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TRIAL EVIDENCE

THE RULES OF EVIDENCE

APPLICABLE ON THE TRIAL

OF

CIVIL ACTIONS

INCLUDING BOTH CAUSES OF ACTION AND DEFENSES

AT COMMON LAW, IN EQUITY

AND

UNDER THE CODES OF PROCEDURE

BY AUSTIN ABBOTT, LL.D.

VOL. II

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CHAPTER XVIII

ACTIONS FOR THE HIRE OF PERSONAL PROPERTY

1. Agreement to pay. 2. Measure of recovery.

1. Agreement to Pay.

In the absence of evidence that the use, by one person, of the chattels of another, was intended to be gratuitous, the law implies a promise to pay fair value of such use. The fact that such use was under the mutual expectation that the user would buy them, does not raise a presumption that the use was gratuitously given.[81] Declarations of either party or his agent, which form part of the *res gestæ* of the delivery or return of the property are competent, if relevant to the question.[82] Evidence that defendant after being informed that plaintiff's charge would be at a specified rate for the time, took the thing into his possession and kept it

[81] Rider *v.* Union Rubber Co., 28 N. Y. 379, affi'g 5 Bosw. 85.

One who leases a scale from another for a certain term, with the option of purchasing it at the end of that term, cannot refuse to pay the rent for said scale, which he used until long after the expiration of the term, on account of a defect which he discovered in the scale at the very beginning of the term, of which he gave the lessor no notice. Moneyweight Scale Co. *v.* Woodward, 29 Pa. Super. Ct. 142.

In an action to recover the agreed reasonable price for the use of property, evidence of a custom of furnishing the use of such property gratuitously is inadmissible. Independent Torpedo Co. *v.* J. E. Clark Oil Co., 48 Ind. App. 124, 95 N. E. Rep. 592.

[82] Knauss *v.* Shiffert, 58 Penn. St. 152.

Where a written agreement for the leasing of a portable sawmill and fixtures is drawn up and a place for the signature arranged for, and before it is signed a paragraph is added below the place for the signatures, parol evidence that the signatures were placed above said paragraph, because the place for the signatures had been arranged, is admissible and will not be deemed in any way to vary the written agreement. Cox *v.* Burdett, 23 Pa. Super. Ct. 346.

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for a certain time is sufficient *prima facie*.[83] But if plaintiff relies on an executory agreement, he may be required to prove readiness and offer to perform.[84]

The general rules, elsewhere stated as applicable to proof of agreements for sale of goods, and for work, labor and services, apply to these contracts.[85]

2. Value.

If there is uncontradicted evidence of an express contract fixing the rate of compensation, evidence of value is irrelevant.[86] If the rate was not fixed, evidence of the value of the article before and after the use, is competent on the value of its use, for it shows the wear and tear.[87] A witness who has bought, sold and used similar articles may testify to his opinion of the value of the use.[88] The opinion of a witness

[83] Reilly *v.* Rand, Mass. Supm. Ct. Mar. 1877.

In an action to recover rental for the use of certain machinery under a lease, plaintiff makes out a *prima facie* case by proving the lease and that defendant went into possession under it. Sharpless *v.* Zelley, 37 Pa. Super. 102.

[84] See Babcock *v.* Stanley, 11 Johns. 178.

[85] See Chapters XVI and XIX of this volume. As to parol evidence to explain a written contract, see also Bradley *v.* Washington, &c. Steam Packet Co., 31 Pet. 89, 99; as to usage, Sipperly *v.* Stewart, 50 Barb. 62, 68.

[86] Sherman *v.* Champlain Trans. Co., 31 Vt. 162, 176.

In an action for the hire of a horse, where the plaintiff claims that the defendant agreed to pay what the use of the horse was reasonably worth, and the defendant claims that he was to have the use of the horse as a compensation for the expense of keeping it, the defendant has the burden of proving that which he sets up. Palmer *v.* Smith, 76 Conn. 210, 56 Atl. Rep. 516.

[87] Wilcox *v.* Palmeter, 2 Hun, 517.

In an action by bailor against bailee, the measure of damages is the difference in value before and after the property was used. Union Stone Co. *v.* Wilmington Transfer Co., 28 Del. 59, 90 Atl. Rep. 407.

It is the period of possession of the property by the bailee, rather than the period of his actual use of the property, which determines the value of the use. Independent Torpedo Co. *v.* J. E. Clark Oil Co., 48 Md. App. 124, 95 N. E. Rep. 592.

[88] Brady *v.* Brady, 8 Allen, 101.

In an action involving compensation for the use of certain corporate stock, a witness having no knowledge of the market value

who has not seen the thing, nor heard the testimony describing it, is not competent, unless there is a market value, or it appears or may be presumed that all apparatus answering such general description is alike valuable for the purposes for which it was employed.[89]

of the stock, other than information obtained from newspaper reports which have not been introduced in evidence, is not competent to testify as to such value. Bunte *v.* Schumann, 46 Misc. 593, 92 N. Y. Supp. 806.

[89] Dixon *v.* La Farge, 1 E. D. Smith, 722.

Where a steam engine was hired for a specified time and there is no standard price for the use of such an engine, evidence of the value of the engine itself will be admissible in connection with other circumstances from which its use may be valued. Carey *v.* Beebe Concrete Co., 88 Kan. 515, 129 Pac. Rep. 191, 44 L. R. A. N. S. 499, Ann. Cas. 1914, B. 806.

CHAPTER XIX

ACTIONS ARISING ON CONTRACTS FOR SERVICES

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I. ACTIONS FOR COMPENSATION BY THE PERSON EMPLOYED

1. Grounds of Action.

A claim for articles made and delivered for a specified sum pursuant to agreement, may be recovered on a complaint for work, labor and materials, as well as on a complaint for goods sold,[90] subject, however, to the rules as to variance, and surprise. Under the general allegation of work and labor, plaintiff may give evidence of a particular kind of service and of materials.[91] Neither demand nor an express promise to pay are necessary to be shown.[92] A recovery of damages

[90] Prince *v.* Down, 2 E. D. Smith, 525. Compare Union India Rubber Co. *v.* Tomlinson, 1 Id. 364, and see chapter XVI, paragraph 1 of this vol. *Contra*, at common law, Rosc. N. P. 555. The distinction between these two classes of causes of action is chiefly illustrated by the cases arising under the statute of frauds which requires a writing in certain sales, but not in contracts for manufacture. See Parsons *v.* Loucks, 48 N. Y. 17, 8 Am. Rep. 517, and cases cited. Similarly it has been held that board and lodging are included within the meaning of an allegation of goods delivered and services performed. Witter *v.* Witter, 10 Mass. 223. See also Berkowsky *v.* Specter, 79 Ill. App. 215. As to recovery in some cases on proof of money paid, see Knowlman *v.* Bluett, L. R. 9 Exch. 307, s. c., 10 Moak's Eng. 466. In an action upon a continuing executory contract, plaintiff must declare specially; but when the contract has been executed, and payment only remains, the plaintiff may, at his election, declare specially or upon the common counts; and so, also, when the work contracted to be done was not performed within the stipulated times, or in the stipulated manner, and yet was beneficial to the defendant and has been accepted and enjoyed by him, the plaintiff cannot recover upon the contract because he has departed from it, but may recover upon the common counts. Crane Elevator Co. *v.* Clark, 53 U. S. App. 257, 80 Fed. Rep. 705.

[91] For example, the services of a farrier, and the medicines administered. Clarke *v.* Mumford, 3 Camp. 37. Or scientific experiments, and materials used in making them. Grafton *v.* Armitage, 2 C. B. 336, 2 Rosc. N. P. 555.

[92] Pumphrey *v.* Bogan, 8 Tucker's App. D. C. 449. In an action to recover for services performed what they were reasonably worth,

for breach of the contract of employment by discharging the plaintiff, ought not to be allowed without amendment.[93]

2. License.

If a license is necessary to render the services legal, it will be presumed that plaintiff had one until the contrary appears.[94] In the case of services rendered in another State, the court will not presume that its statute requires a license because ours does.[95]

3. Implied Contract.

In general, there must be evidence that defendant requested plaintiff to render the services, or assented to receiving their benefit under circumstances negativing any presumption that they were to be gratuitous.[96] The evidence

it is unnecessary to aver in the pleadings a local custom or usage by which the value of the services are fixed, as the plaintiff is entitled to recover what is usual and customary for like services. Hansbrough *v.* Neal, 94 Va. 722, 27 S. E. Rep. 593.

But there is no presumption that the parties did not agree upon a specific compensation. Johnson *v.* Wanamaker, 17 Pa. Super. Ct. 301.

[93] Wiseman *v.* Panama R. R. Co., 1 Hilt. 300. For the distinction between action for wages and for wrongful discharge, see Howard *v.* Daly, 61 N. Y. 362; Clark *v.* Mayor, &c. of N. Y., 4 N. Y. 338, rev'g 3 Barb. 288; Colburn *v.* Woodworth, 31 Barb. 381; Routledge *v.* Hislop, 2 E. & E. 549; and see L. R. 10 C. P. 29, s. c., 11 Moak's Eng. 232.

Where the employee is discharged without cause he may regard the contract as rescinded and sue upon a *quantum meruit*. Hart *v.* Buckley, 164 Cal. 160, 128 Pac. Rep. 29.

[94] In a suit for physician's services a license and due qualification under the law will be presumed. Lacy *v.* Kossuth County, 106 Iowa, 16, 75 N. W. Rep. 689; Cather *v.* Damerell, 5 Nebr. (Unoff.) 490, 99 N. W. Rep. 35. *Contra* Adams *v.* Stewart, 5 Del. 144; Bower *v.* Smith, 8 Ga. 74.

Failure of a physician to register under the city ordinance imposing a penalty for practicing without such registry is immaterial in an action for services. Prietto *v.* Lewis, 11 Mo. App. 601 (memorandum decision). See Chapter XVI, paragraph 3 of this vol.

[95] Downs *v.* Minchew, 30 Ala. 86; County of Jo. Daviess *v.* Staples, 108 Ill. App. 539.

[96] See Irvin *v.* Stroher, 163 Ala. 484, 50 So. Rep. 969, holding the question to be one for the jury.

usually consists, either in, 1, an express request, precedent to the service, or, 2, circumstances justifying the inference that plaintiff in rendering the service expected to be paid, and defendant supposed, or had reason to and ought to have supposed, that he so expected, and still allowed him to go on in the service without doing anything to disabuse him of this expectation; or, 3, proof of benefit received, not on an agreement that it was gratuitous, and followed by an express promise to pay. Evidence that defendant voluntarily accepted and availed himself of valuable services rendered for his benefit by plaintiff, when he had the option whether to accept or reject them, especially when he had reason to know that plaintiff rendered them with the expectation of payment by defendant, will sustain a finding by the jury that defendant promised to pay for them,[97] although there may have been no actual request or promise.[98] Where work is done on property of a married woman under contract with her husband and on his credit, the mere fact that she knew the work was in progress and did not object, is not evidence of agency on his part sufficient to charge her.[99]

Mansfield *v.* Morgan, 140 Ala. 567, 37 So. Rep. 393; Ford *v.* Ward, 26 Ark. 360; Wagner *v.* Edison Electric Illum. Co., 177 Mo. 44, 75 S. W. Rep. 966; Mumford *v.* Brown, 6 Cow. 475, 16 Am. D. 440.

A promise to pay what the services are reasonably worth will be inferred in the absence of an agreed rate of compensation. Johnson *v.* Wanamaker, 17 Pa. Super. Ct. 301. On what evidence one who becomes a joint owner, after the employment of services, may be held liable, compare Belfast, &c. Plank R. Co. *v.* Chamberlain, 32 N. Y. 621; Fuller *v.* Rowe, 57 N. Y. 23, rev'g 59 Barb. 344; Smith *v.* Douglass, 4 Daly, 191.

[97] Day *v.* Caton, 119 Mass. 513, s. c., 20 Am. Rep. 347; Painter *v.* Ritchey, 43 Mo. App. 111; Belfour *v.* Raney, 8 Ark. 479; Thomas *v.* Walnut Land, etc., Co., 43 Mo. App. 653; Ploger *v.* Bright, 119 N. Y. Supp. 628.

It seems that where the plaintiff has proved facts from which an implied agreement arose, the burden is on the defendant to show an express agreement if such be his contention. Gallaher & Speck *v.* Madsen, 178 Ill. App. 421.

[98] Abbott *v.* Inhabitants of Hermon, 7 Greenl. Ev. 118; Morris *v.* Burdett, 1 Campb. 218.

[99] Jones *v.* Walker, 63 N. Y. 612. Compare Fowler *v.* Seaman, 40

If benefit to defendant by the service is clear, slight evidence will justify the finding of a request.[1] The fact that the services were for the sole benefit of a third person, is not material, if an original request and agreement to pay is shown; [2] otherwise, if only a request is shown.[3] An agreement to contribute, with others, for the purpose of a work, does not necessarily imply a request to whomsoever may do the work.[4] The evidence must connect the defendant with the request.

4. Presumption that Service was Gratuitous.

The law will not imply a promise to pay for board or services as among members of the same family, and persons

N. Y. 522; Ainsley *v.* Mead, 3 Lans. 116; Fairbanks *v.* Mothersell, 60 Barb. 406, s. c., 41 How. Pr. 274. The general rule is that where the work is done under a contract with a third person the party receiving the benefit of such work, under and pursuant to such contract, is not responsible. "A person may accept and receive the service of another without incurring any implied liability, or ever expecting to pay for such service, because at the very time of receiving such service he may know that the service is rendered because of an employment by some other person, with which he has nothing to do, and but for such knowledge the services would not have been received." Morrison *v.* Jones, 6 Ill. App. 89.

[1] Sinclair *v.* Tallmadge, 35 Barb. 602.

Voluntary services rendered to preserve another's property from destruction by flood (New Orleans, etc., Co. *v.* Turcan, 46 La. Ann. 155, 15 So. Rep. 187), or fire (Kelley *v.* East Jordan Chemical Co., 162 Mich. 525, 127 N. W. Rep. 671, Bartholomew *v.* Jackson, 20 Johns. 28, 11 Am. D. 237), are presumed to be gratuitous and give no cause of action against the party receiving the benefit. See as to: Services rendered in anticipation of marriage, Newhall *v.* Knowles, 28 R. I. 348, 67 Atl. Rep. 365; Clary *v.* Clary, 93 Me. 220, 44 Atl. Rep. 921; services rendered by one neighbor to another, Davis *v.* Wilson, 14 Ky. L. Rep. 301; services performed for another from friendly motives. Zane *v.* De Onativia, 139 Cal. 328, 73 Pac. Rep. 856. Failure to demand compensation for a long time raises a presumption that the services were gratuitous. In re Deaulich, 14 Pittsb. Leg. J. N. S. Rep. 341.

[2] Quackenbos *v.* Edgar, 34 Super. Ct. (2 J. & S.) 333.

[3] As where one calls a physician to attend another.

[4] Van Rensselaer *v.* Aikin, 44

more or less intimately or remotely related, where they are living together as one household, and nothing else appears.[5] Evidence of the situation of the parties, and of the surrounding circumstances is freely received, for the purpose of determining the question whether there was an understanding that payment should be made. If the person receiving the service is deceased, the executor or administrator is not bound to establish a negative in order to defeat the claim. The relation existing between the parties, as parent and child, step-parent and step-child, brother and sister, and the like, is itself strong negative proof, and raises a presumption that no payment or compensation was to be made beyond that received by the claimant at the time. The evidence to the contrary must sustain the conclusion that the services were rendered, not in the ordinary relation of parent and child, or of brother and sister, nephew and uncle, and the like, but in that of debtor and creditor, or of master and servant.[6]

N. Y. 126, rev'g 44 Barb. 547; Berchorman *v.* Murken, 2 E. D. Smith, 98; Smith *v.* Duchardt, 45 N. Y. 597. Compare Gray *v.* Murray, 3 Johns. Ch. 167; Rourke *v.* Story, 4 E. D. Smith, 54.

[5] Wilcox *v.* Wilcox, 48 Barb. 327, and cases cited; Williams *v.* Hutchinson, 3 N. Y. 312; and see Bartley *v.* Richtmyer, 4 Id. 38; Nicholls *v.* Hodges, 1 Pet. 562.

In an action by a daughter to recover from her brother for her father's board, the alleged agreement by the brother to pay is not proved by evidence of two payments made by the brother without showing that such payments made as money due from him and not as mere gratuities. Manning *v.* Carberry, 172 Mass. 432, 52 N. E. Rep. 521.

Where the relation of mother and son exists, it seems that the burden is on the son to show that the services were not rendered to her gratuitously. Messier *v.* Messier, 34 R. I. 233, 82 Atl. Rep. 996.

[6] Hall *v.* Finch, 29 Wisc. 278, s. c., 9 Am. Rep. 559, Dixon, C. J. But compare Robinson *v.* Raynor, 28 N. Y. 494. The agreement may be valid even against intermediate creditors of the deceased. Brown *v.* Pyle, 4 Weekly Notes (Pa.), 394.

It is not necessary to prove a formal contract. Sammon *v.* Wood, 107 Mich. 506, 65 N. W. Rep. 529.

Evidence of an agreement by a mother to compensate her son by her will is admissible. In such a case the Statute of Limitations

The further removed the parties are from the filial relation, the less need there is of evidence of intention to compensate.[7] If a child rendering service was of full age, the presumption that the service was gratuitous is weaker than if he were a minor.[8] If the child continued in the same filial service, after majority, as before, there must be evidence of a mutual understanding that payment was to be made,[9] so as to constitute the relation of master and servant. Evi-

ordinarily begins to run on the death of the promisor. Where, however, the agreement is repudiated, as by a conveyance of the property, the statute runs from the date of such conveyance. Messier *v.* Messier, 34 R. I. 233, 82 Atl. Rep. 996.

Evidence sufficient to justify a finding of an intent to compensate by will may also justify recovery on *quantum meruit* in the event of death without will. Matter of Wescott, 34 App. Div. 239, 54 N. Y. Supp. 545.

On an issue as to the existence of a contract for services between a father and daughter, the nature of their relationship and their condition in life is pertinent. Cole *v.* Fitzgerald, 132 Mo. App. 17, 111 S. W. Rep. 628.

The relation of husband and wife although meretricious may be considered as illustrating the purpose and expectation with which services were performed by each. Gjurich *v.* Fieg, 164 Cal. 429, 129 Pac. Rep. 464, Ann. Cas. 1916, B. 111.

A mere denial of indebtedness and employment raises an issue on which the status of the parties is material. Gjurich *v.* Fieg (above).

[7] Gordner *v.* Heffley, 49 Pa. St. 163.

[8] Moore *v.* Moore, 3 Abb. Ct. App. Dec. 303, s. c., 21 How. Pr. 211.

The right to compensation should be determined from all the facts and circumstances. Stansbury *v.* Stansbury, 20 W. Va. 23. See also Saunders *v.* Saunders, 90 Me. 284, 38 Atl. Rep. 172.

[9] Green *v.* Roberts, 47 Barb. 521.

There is no implied promise to pay. Byrnes *v.* Clark, 57 Wis. 13, 14 N. W. Rep. 815. Albee *v.* Albee, 3 Ore. 321.

The services of an adult child living apart from his father, performed at the latter's request are usually not presumed to be gratuitous. Butler *v.* Kent, 152 Ala. 594, 44 So. Rep. 863. See also Parker *v.* Parker, 33 Ala. 459.

Where an adult child who has been living by himself or with his own family, returns home at the parent's request and performs services he is usually entitled to compensation. See Robnett *v.* Robnett, 43 Ill. App. 191; Carrell *v.* McDonnell, 139 Mo. App. 450, 122 S. W. Rep. 1129; Wilsey *v.* Franklin, 57 Hun, 382, 10 N. Y. Supp. 833.

dence of mere loose, verbal declarations, made to a third person, by the one who had enjoyed the service, that he intended to compensate it, are not alone sufficient in case of parent and child; but are competent as tending to show a contract relation.[10]

5. Admissions and Promises.

Evidence having been given that work was done by plaintiff for defendant, it is enough to prove that defendant, on presentation of plaintiff's bill therefor, promised to pay it, or admitted its correctness; [11] but mere declarations to a third person, of intent to pay for services, are not equivalent to a promise.[12]

6. Question Who Was Employer.

To determine by which of two persons the plaintiff was employed, it is proper to ask a witness for whom, or on

[10] See Robinson *v.* Raynor, 36 Barb. 128, rev'd in 28 N. Y. 494; Gordner *v.* Heffley, 49 Penn. St. 163; Hertzog *v.* Hertzog, 29 Id. 465. For the presumption that the whole services were gratuitous, if part were, see Ross *v.* Ross, 6 Hun, 182; Marion *v.* Farnan, 68 Hun, 383, 22 N. Y. Supp. 946, (statements as to value of services); Hart *v.* Hess, 41 Mo. 441 (general statement of intention to compensate); Donovan *v.* Driscoll, 116 Ia. 339, 90 N. W. Rep. 60 (desire that child be paid); O'Kelly *v.* Faulkner, 92 Ga. 521, 17 S. E. Rep. 847; Gaston *v.* Gaston, 80 S. C. 157, 61 S. E. Rep. 393; Cole *v.* Fitzgerald, 132 Mo. App. 17, 111 S. W. Rep. 628.

[11] Haymaker *v.* Haymaker, 4 Ohio St. 272; Houston *v.* Crutcher, 31 Miss. 51, 56. But the mere rendition by an attorney of an account and the retention thereof by the client will not constitute a cause of action unless employment is shown. Kellogg *v.* Rowland, 40 App. Div. 416, 57 N. Y. Supp. 1064.

As to when the employee's failure to question monthly statements rendered him by his employer will be regarded as an admission of the correctness of the terms stated therein, see Shade *v.* Sisson Mill, etc., Co., 115 Cal. 357, 47 Pac. Rep. 135. Compare as to imperfect performance of part, Hollis *v.* Wagar, 1 Lans. 4.

[12] Ditch *v.* Wilkinson, 10 Louis, 205.

Evidence of a contract between the employer and a former employee, together with statements by the former to witnesses, com-

whose behalf were the services rendered;[13] though it is not proper to ask the same question with the qualification, "as you supposed." [14] Evidence of the insolvency of either of the alleged employers is not competent for the purpose of raising a presumption that the credit was not given to him.[15] Defendant cannot set up that he acted only as agent, &c., without evidence that he disclosed the fact of the agency at the time of making the contract.[16] General reputation as to the agency is not competent.[17] Where plaintiff may prove defendant's dominion over the property benefited, as one element in the evidence that defendant was the real employer, it is competent to show that other persons had received orders from the defendant to do work on the same property, without showing that the plaintiff knew of these orders at the time he did the work.[18]

Declarations made by plaintiff while at work, and part of the *res gestæ*, and tending to show for which of several he was working, may be competent on that point,[19] though they cannot of course be evidence of employment, unless brought home to defendant.[20]

When defendant, in making the contract, acted as agent, and within the authority conferred, and disclosed his prin-

paring such contract with the arrangement made with plaintiff, was held competent as tending to show the nature of the agreement with plaintiff. Gardner *v.* Crenshaw, 122 Mo. 79, 27 S. W. Rep. 612.

[13] Sweet *v.* Tuttle, 14 N. Y. 465, affi'g 10 How. Pr. 40.

[14] Denman *v.* Campbell, 7 Hun, 88; Murray *v.* Deyo, 10 Id. 3, and cases cited. For other cases, see chapter XII, paragraph 5; chapter XIII, paragraph 19; and chapter XVI, paragraph 15 of this vol. A witness cannot be asked whether plaintiff "*knew*" the work was not done for defendant. The fact from which knowledge is to be inferred must be proved. Major *v.* Spies, 66 Barb. 576.

[15] Trowbridge *v.* Wheeler, 1 Allen, 162.

[16] Cabre *v.* Sturges, 1 Hilt. 160.

[17] Trowbridge *v.* Wheeler, 1 Allen, 162.

[18] Woodward *v.* Buchanan, L. R. 5 Q. B. 285. Compare Fuller *v.* Clark, 3 E. D. Smith, 302.

[19] Printup *v.* Mitchell, 17 Geo. 558, 562; Autauga County *v.* Davis, 32 Ala. 703, 708.

[20] Erben *v.* Lorillard, 19 N. Y. 299, rev'g 23 Barb. 82.

cipal at the time, he is not personally bound, unless upon clear and explicit evidence of an intention to interpose his personal liability.[21] In the case of a public agent, much stronger evidence is required of such an intention.[22] If it is sought to charge him on the ground that he acted as agent without authority, the burden is on plaintiff to show that defendant had not the authority under which he professed to act.[23]

7. Declarations of Employees.

The mere relation of employment does not render evidence of the admissions and declarations of the employee competent against the employer.[24] Where the servants of one party are, under the contract, at work for the other,

[21] Hall *v.* Lauderdale, 46 N. Y. 70; Buck *v.* Amidon, 4 Daly (N. Y.), 126, 41 How. Pr. 370.

So held where the defendants acted as officers of a railroad company. Imhoff *v.* House, 36 Neb. 28, 53 N. W. Rep. 1032. See also Rosenthal *v.* Myers, 25 La. Ann. 463.

On the question of plaintiff's knowledge of defendant's agency, admissions by the former on cross-examination are of greater weight than his disavowal of such knowledge on direct examination. Cohen *v.* Barry, 111 N. Y. Supp. 668.

[22] Hall *v.* Lauderdale, 46 N. Y. 70.

[23] Plumb *v.* Milk, 19 Barb. 74. The cases holding the burden to be on defendant are where the contract purported to be that of the defendant. Id.

Where the action is brought not against the agent but against those receiving the benefit of the services, the question of authority or lack of authority of an agent who contracted for the work on a *quantum meruit* basis, but without assuming personal liability, is immaterial since the law implies a promise on the part of those reaping the benefit to pay for it. Henderson Bridge Co. *v.* McGrath, 134 U. S. 260, 10 S. Ct. 730, 33 L. ed. 934.

[24] Cook *v.* Hunt, 24 Ill. 535; Corbin *v.* Adams, 6 Cush. 93; Maher *v.* Chicago, 38 Ill. 266, 273. A contractor for building a ship is not the agent of the owner within the rule, so as to make his admission that materials were used in the construction, admissible against the owner. Happy *v.* Mosher, 48 N. Y. 313, rev'g 47 Barb. 501. Compare Fleming *v.* Smith, 44 Barb. 554, where the contrary principle seems to have been applied in the case of a contractor for building a house.

this may preclude the latter from using their declarations against the former.[25]

8. Express Contract when Admissible Under General Allegation.

Under a general complaint for a *quantum meruit*, for work, labor and services, plaintiff cannot prove a contract which remains executory on his part,[26] nor one which, though fully performed on his part, is special in respect to the time or manner of payment, so that it cannot be said that nothing remains but the payment of money already due.[27] A variance in this respect, nevertheless, may be cured by amendment. He may, however, under such a complaint, prove that a price was fixed by agreement; [28] or may give in evidence any express or special contract payable presently in money, together with evidence either of full performance on his part,[29] or an excuse exonerating him from full perform-

[25] Dennis *v.* Belt, 30 Cal. 247, 253.

[26] Dermott *v.* Jones, 2 Wall. 9, 2 Greenl. Ev. 82, § 104.

Where a plaintiff has elected to rely on a *quantum meruit*, evidence of an alleged special contract becomes inadmissible. Morris *v.* Sire, 61 N. Y. Supp. 1098.

Where the special contract is fully executed and nothing remains but payment, recovery may be had on the common counts. Sands *v.* Potter, 165 Ill. 397, 46 N. E. Rep. 282, 56 Am. St. Rep. 253, and case cited; Illinois Linen Co. *v.* Hough, 91 Ill. 63; Adlard *v.* Muldoon, 45 Ill. 193.

[27] Champlin *v.* Butler, 18 Johns. 169; Ladue *v.* Seymour, 24 Wend. 59. Although the work may have been in part done, if the stipulations of the contract have not been fully performed—as, for instance, if the work has not been approved by a third person, whose approval was made a condition precedent—the plaintiff cannot recover under a general allegation. Atkinson *v.* Collins, 30 Barb. 430, s. c., 9 Abb. Pr. 353, 18 How. Pr. 235.

[28] Fells *v.* Vestvali, 2 Keyes, 152; Lowe *v.* Pimental, 115 Mass. 44.

[29] Hurst *v.* Litchfield, 39 N. Y. 377; Dermott *v.* Jones, 2 Wall. 9. *Contra*, Adams *v.* Mayor, &c. of N. Y., 4 Duer, 295.

Evidence of a special contract to pay an injured employee his wages during the period of his disability does not sustain a complaint on the common counts. Louisville, etc., R. R. Co. *v.* Barnes, 16 Ind. App. 312, 44 N. E. Rep. 1113.

ance,[30] such as illness; [31] or that he has, in good faith, fulfilled, but not in the manner, or not within the time prescribed by the contract, and that the other has sanctioned or accepted the work; [32] or that he has fully, or partly, performed, and that the contract has been abandoned by mutual consent, or has been rescinded and become extinct by act of the other.[33] In all these cases the contract is no longer executory on his part, nor a hindrance to a money judgment for price or value.

9. Express Contract, if Subsisting, Must be Put in Evidence.

If it appear by plaintiff's evidence that a special agreement exists, even though not pleaded, it must be produced or accounted for, and its contents proved, for the purpose of seeing whether it has been performed by the plaintiff, and whether the stipulated time and mode of payment were such as to warrant a recovery.[34] And if the contract was

[30] Hosley *v.* Black, 28 N. Y. 438, s. c., 26 How. Pr. 97; Farron *v.* Sherwood, 17 N. Y. 227.

[31] Wolfe *v.* Howes, 20 N. Y. 197, affi'g 24 Barb. 174, 666.

See Dempsey *v.* Schawacker, 140 Mo. 680, 38 S. W. Rep. 954, 41 S. W. Rep. 1100, as to the rule where the act upon which plaintiff bases his excuse for nonperformance was occasioned by a breach on his own part.

[32] Dermott *v.* Jones (above); Hutchinson *v.* Cullum, 23 Ala. 622; Dubois *v.* Delaware & Hudson Canal Co., 4 Wend. 285.

See as to substantial compliance Foulger *v.* McGrath, 34 Utah, 86, 95 Pac. Rep. 1004.

Where the court, in an action on the common counts for work done and materials furnished, ruled that the plaintiff could not recover if the work was done and the materials were furnished under a special contract, it was not error to reject as immaterial evidence of a breach of such special contract. Lowe *v.* Pimental, 115 Mass. 44.

[33] 2 Greenl. Ev. 82, § 104; Burlingame *v.* Burlingame, 7 Cow. 92.

As to prevention of performance see Adams *v.* Burbank, 103 Cal. 646, 37 Pac. Rep. 640.

[34] Ladue *v.* Seymour, 24 Wend. 59; Alger *v.* Raymond, 7 Bosw. 418.

In an action on a *quantum meruit* a special contract, if existing, should be proved as a part of the plaintiff's case rather than in rebuttal. Boyle *v.* McKinley, 6 Phila. 172.

not in writing, plaintiff must nevertheless prove its substance before he can recover.[35] The contract so proved will be applied as far as its application can be traced; but if, by the defendant's fault the cost of the work or materials has been increased, in so far the jury will be warranted in departing from the contract prices.[36]

If, after parol evidence has been taken of an agreement, a written agreement is produced embodying the contract, the parol evidence may be struck out on motion.[37]

10. What are Contracts Within the Rule.

If the contract refers to another document for details of the work to be done, the plaintiff in order to prove performance must produce it,[38] or account for its non-production, and prove its terms; but it is enough to identify it without proving its execution.[39] A document specifying the work or other conditions, and communicated by one party, and accepted by the other, as the terms of employment, although not signed by either, is a written contract within the rule

Where the plaintiff sues on a written contract and *quantum meruit*, the defendant may introduce the written contract in evidence, where he has specifically pleaded it as well as a general denial. Neblett *v.* McGraw, 41 Tex. Civ. A. 239, 91 S. W. Rep. 309.

[35] Smith *v.* Smith, 1 Sandf. 206.

[36] Dermott *v.* Jones, 2 Wall. 9. It seems that where the express terms of the contract have been departed from by express consent or by implication through conduct in making changes in materials, workmanship, etc., the contractor may sue on a *quantum meruit* and leave it to the defendant to insist upon the contract for the purpose of limiting the amount of recovery. Foulger *v.* McGrath, (above).

[37] Newkirk *v.* New York & Harlem R. R. Co., 38 N. Y. 158.

[38] Bryant *v.* Stilwell, 24 Pa. St. 314, 317. Compare, to the contrary, Coles *v.* Holmes, 2 Spears (S. C.), 360.

In an action by a subcontractor against his contractor, a contract between the latter and the party for whom the work was being done, not referred to in the contract in suit, is inadmissible. Kingston *v.* Berry, 27 Misc. 803, 53 N. Y. Supp. 331.

As to the admissibility of a contract referred to as a supplemental agreement, see Vale *v.* Suiter, 58 W. Va. 353, 52 S. E. Rep. 313.

[39] See chapter XVI, paragraph 5 of this vol.

requiring production,[40] but it does not necessarily exclude oral evidence of other terms. If, however, assent is proven, ignorance of the contents is not material.[41] An unexecuted draft contract, drawn up by a third person at the request of the parties, is not necessarily competent.[42]

11. Extra Work.

An independent oral order for separate work may be proved in an action for compensation for such work, although given during the performance of a written contract which is not produced.[43] But if it is not clear that the work was entirely separate from that called for by the written contract, the latter must be produced,[44] or accounted for; and even a distinct promise to pay for the work does not

[40] Whitford *v.* Tutin, 10 Bing. 395, Rice *v.* Dwight Mfg. Co., 2 Cush. 80, 87, chapter XVI, paragraph 5 of this vol. Otherwise, of terms read to one party by theother from a writing not shown.

A proposal by one party and an acceptance by the other varying the terms of the proposal do not, of course, constitute a contract. Swing *v.* Walker, 27 Pa. Super. Ct. 366.

[41] Rice *v.* Dwight Mfg. Co. (above).

[42] Flood *v.* Mitchell, 68 N. Y. 507, confirming 4 Hun, 813, but rev'g it on other points. If an offer by one to the other has been proven, a letter signed by the former and produced by the latter, although not addressed, agreeing on the sum specified in the offer, is admissible. Bagliolo *v.* Scott, 5 Mo. 341, 343.

[43] Reid *v.* Batte, Moody & M. 413.

There is no implied promise to pay extra compensation for work voluntarily done outside of the usual hours by one who is regularly employed and paid by the week or month. Levi *v.* Reid, 91 Ill. App. 430.

There may, however, be circumstances giving rise to an implied promise to pay for extra hours of service, as where the employee is hired at a specified compensation for a certain number of hours per day or week and the extra service is rendered at the employer's express request. Id.

[44] Parton *v.* Cole, 6 Jur. 370.

As to waiver of a claim for additional compensation by acceptance of stipulated weekly wages, see Forster *v.* Green, 111 Mich. 264, 69 N. W. Rep. 647; Helphenstine *v.* Hartig, 5 Ind. App. 172, 31 N. E. Rep. 845; Levi *v.* Reid, 91 Ill. App. 430.

dispense with this necessity.[45] If the existence of an express contract appears, the employer's request for extra work is deemed, in the absence of further evidence, to be merely a notice of his claim that the contract calls for such work.[46] The contract is the proper evidence to show what are extras.[47]

12. Variances.

In pleading a contract by its legal effect, the omission to state conditions which altered the liability or obligation may be a variance,[48] but the omission to state a contingent condition, which never took effect, is not.[49] Under an allegation of a special contract for work and materials, a contract for work only may be proved.[50]

13. Requisite Memorandum under Statute of Frauds.

The general principles applicable have been already stated.[51] It is essential that the writing should be final, as

[45] Vincent *v.* Cole, Moody & M. 257.

[46] Collyer *v.* Collins, 17 Abb. Pr. 467.

The burden is on the plaintiff to show that items claimed as extras are without the terms of the original contract. Molzahn *v.* Christensen, 152 Wis. 520, 139 N. W. Rep. 429.

[47] Jones *v.* Howell, 4 Dowl. 176; Buxton *v.* Cornish, 12 M. & W. 426, Rosc. N. P. 552. A promise to pay for extra material may be implied from the employer's own act, which rendered the extra material necessary to conform the work to the conditions of the contract. Messenger *v.* City of Buffalo, 21 N. Y. 196.

Where the contract is silent as to extra pay for services on Sunday it will be held that they were performed under the contract. Guthrie *v.* Merrill, 4 Kan. 187; Robinson *v.* Webb, 73 Ill. App. 569.

Recovery cannot be had for salary during vacation period in the absence of a specific stipulation therefor. Schurr *v.* Savigny, 85 Mich. 144, 48 N. W. Rep. 547.

In an action for work done under a contract, evidence of extra work performed is inadmissible. Hinkle *v.* San Francisco, &c. R. R. Co., 55 Cal. 627.

[48] See, for instance, Sheafe *v.* Locke, 1 Allen (Mass.), 369. Compare Bruce *v.* Greenbanks, 33 Vt. 226.

[49] Cobb *v.* West, 4 Duer, 38; Short *v.* McRea, 4 Minn. 119, 124.

[50] Cobb *v.* West, 4 Duer, 38.

[51] Chapter XVI, paragraph 7 of this vol.

distinguished from a statement of some terms, leaving others to be subsequently agreed on.[52] But the memorandum is not vitiated by omitting to designate the kind of service, even though on familiar principles the obligation of the employee will consequently depend on oral evidence of surrounding circumstances and of usage.[53] The party who is sought to be charged, having subscribed the memorandum, the assent of the other may be proved by parol.[54] If the terms of the contract do not negative the feasibility or right of performance within the year, evidence that it was not completely performed, or as the event proved, could not have been so performed, is not enough. If the terms require more than a year, evidence that it actually was performed within the year does not avail. If a contract for a year's service does not express the time for commencement of the term of service it commences in contemplation of law immediately, and is valid without writing.[55] If for a year commencing at a

The statute of frauds is satisfied if every element necessary to constitute a binding contract is put in writing. Flash *v.* Rossiter, 116 App. Div. 880, 102 N. Y. Supp. 449.

The statute of frauds creates a rule of evidence. Price *v.* Press Publishing Co., 117 App. Div. 854, 103 N. Y. Supp. 296.

A contract to devise real estate in consideration of services to be rendered is within the statute of frauds as a sale of real property and therefore unenforcible. Plaintiff may, however, sue for the services rendered upon *quantum meruit*. Hamilton *v.* Thirston, 93 Md. 213, 48 Atl. Rep. 709.

[52] Appleby *v.* Johnson, L. R. 9 C. P. 158.

Letters and writings between the parties may be introduced to show a complete contract under the statute. They must, however, contain the essential terms of the contract. Rahm *v.* Klerner, 99 Va. 10, 37 S. E. Rep. 292.

[53] Hagan *v.* Domestic Sewing Mach. Co., 9 Hun, 73. And see paragraph 15.

Letters and correspondence relied upon to prove a sales agency contract should show the territory to be covered, as this is an essential term of the contract. Rahm *v.* Klerner, 99 Va. 10, 37 S. E. Rep. 292.

[54] Reuss *v.* Pickley, L. R. 1 Ex. 342, 4 H. & C. 588.

A parol acceptance of a written offer is sufficient. Black *v.* Crowther, 74 Mo. App. 480. *Contra*, Spence *v.* Apley, 4 Nebr. (Unof.) 358, 94 N. W. Rep. 109.

[55] Russell *v.* Slade, 12 Conn. 455.

future day, it is void if not in writing, and evidence of performance by plaintiff until discharge is not evidence of a new contract for the same term, but only entitles him to recover for actual service.[56]

A contract which is possible of performance within one year is not within the statute. A. B. Smith Co. *v.* Jones, 75 Miss. 325, 22 So. Rep. 802; Lennard *v.* Texarkana Lumber Co., 46 Tex. Civ. A. 402, 94 S. W. Rep. 383; Mobile, etc., R. R. Co. *v.* Hayden, 116 Tenn. 672, 94 S. W. Rep. 940; Woodall *v.* Davis-Cresewell Mfg. Co., 9 Colo. App. 198, 48 Pac. Rep. 670; Degnan *v.* Nowlin, 5 Ind. Terr. 312, 82 S. W. Rep. 758. Contracts which contain no stipulation as to time, but depend for performance upon a contingency which may occur within a year are not within the statute, Degnan *v.* Nowlin, (above), such as a contract for services while learning a trade. Myers *v.* Korb, 21 Ky. Law Rep. 163, 50 S. W. Rep. 1108. If performance depends upon a contingency which may or may not happen within one year, the mere fact that the contingency was not likely to happen or was not expected to happen within that time will not bring the case within the statute. Lennard *v.* Texarkana Lumber Co., (above). Where the pleadings are oral the defendant may rely on the statute though not pleaded (Jonap *v.* Preger, 59 Misc. 187, 110 N. Y. Supp. 483); and the fact that the agreement was within the statute may be elicited from plaintiff's own witness under cross-examination. Booker *v.* Heffner, 95 App. Div. 84, 88 N. Y. Supp. 499. A denial of the making of the contract is sufficient to allow the defense of the statute although not specifically pleaded. Hamilton *v.* Thirston, 93 Md. 213, 48 Atl. Rep. 709. See Duffy v. O'Donovan, 46 N. Y. 223. But where it appears from the complaint that the contract may fall within the statute, the defense of the statute should be pleaded. Fangar *v.* Caspary, 87 App. Div. 417, 84 N. Y. Supp. 410. Where it appears from the complaint that the contract is within the statute a demurrer will be sustained. Milan *v.* Rio Grande, etc., R. R. Co., 37 S. W. Rep. (Tex. Civ. App.) 165. Similarly as to a counterclaim setting up the breach of a contract within the statute. Mendelsohn *v.* Banov, 57 S. C. 147, 35 S. E. Rep. 499.

[56] Oddy *v.* James, 48 N. Y. 685.

An oral contract for services to begin at a future date and extend one year is within the statute. Mendelsohn *v.* Banov, 57 S. C. 147, 35 S. E. Rep. 499; Hillhouse *v.* Jennings, 60 S. C. 373, 38 S. E. Rep. 599.

The statutory period commences or takes effect from the date of the agreement. Chase *v.* Hinkley, 126 Wis. 75, 105 N. W. Rep. 230, 2 L. R. A. N. S. 738, 110 Am. St. Rep. 896, 5 Ann. Cas. 328.

A contract not to be performed

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If services are rendered under a contract, which is wholly void by the statute of frauds, no action can be maintained to recover their value, except upon evidence of the default of the other party, or his refusal to go on with the contract.[57]

Evidence that the employee refused to go on, on the credit

within one year from its date is within the statute, although performance could be completed within one year from the date when such performance begins. Embrey *v.* Hargadine-McKittrick Dry Goods Co., 115 Mo. App. 130, 91 S. W. Rep. 170.

The statute applies to a contract for attorney's services. Miller *v.* Wisener, 45 W. Va. 59, 30 S. E. Rep. 237.

Part performance will not relax the rule. Hillhouse *v.* Jennings, 60 S. C. 373, 38 S. E. Rep. 599; Hamilton *v.* Thirston, 93 Md. 213, 48 Atl. Rep. 709; Chase *v.* Hinkley, 126 Wis. 75, 105 N. W. Rep. 230, 2 L. R. A. N. S. 738, 110 Am. St. Rep. 896, 5 Ann. Cas. 328; Waters *v.* Cline, 121 Ky. 611, 85 S. W. Rep. 209, 750, 27 Ky. L. 479, 586, 123 Am. St. Rep. 215.

Where the agreement is set out in *haec verba*, the question whether it is within the statute must be determined from the contract itself. Lennard *v.* Texarkana Lumber Company, 46 Tex. Civ. A. 402, 94 S. W. Rep. 383.

[57] Galvin *v.* Prentice, 45 N. Y. 162, per RAPALLO, J. And see William Butcher Steel Works *v.* Atkinson, 68 Ill. 421.

It has been held, however, that recovery may be had on *quantum meruit* where the defendant has received the benefit of the services although the contract was within the statute. Riley *v.* Williams, 123 Mass. 506; Booker *v.* Heffner, 95 App. Div. 84, 88 N. Y. Supp. 499; Draheim *v.* Evison, 112 Wis. 27, 87 N. W. Rep. 795; Murphy *v.* DeHaan, 116 Iowa, 61, 89 N. W. Rep. 100. Contract with infant. Myers *v.* Korb, 21 Ky. Law Rep. 163, 50 S. W. Rep. 1108; Chase *v.* Hinkley, 126 Wis. 75, 105 N. W. Rep. 230, 110 Am. St. Rep. 896, 2 L. R. A. N. S. 738, 5 Ann. Cas. 328; Bristol *v.* Sutton, 115 Mich. 365, 73 N. W. Rep. 424; Waters *v.* Cline, 121 Ky. 611, 85 S. W. Rep. 209, 750, 27 Ky. L. 479, 586, 123 Am. St. Rep. 215. So held upon repudiation of an agreement for compensation by will. Snyder *v.* Neal, 129 Mich. 692, 89 N. W. Rep. 588; Gates *v.* Davis, 28 Ky. Law Rep. 490, 89 S. W. Rep. 490; Cozad *v.* Elam, 115 Mo. App. 136, 91 S. W. Rep. 434. In such case the contract price will limit the amount of recovery. Cozad *v.* Elam, 115 Mo. App. 136, 91 S. W. Rep. 434. In Lally *v.* Crookston Lumber Co., 85 Minn. 257, 88 N. W. Rep. 846, it was held that a contract which was unenforcible under the statute could nevertheless be used to determine the rights of the parties with respect to services performed thereunder in partial performance or even in full performance thereof.

of the original employer, and thereupon at the request of defendant, and on his oral promise to pay, went on with the work, is sufficient to go to the jury to sustain an inference of a new and original undertaking [58] by defendant, on which he is liable for work thereafter done.[59]

14. Oral Evidence to Vary Writing.

In application of the general principles already stated as to oral evidence in connection with written,[60] it is to be observed that evidence of the surrounding circumstances, the previous negotiations and the usage of the business or vocation, are freely admitted to explain ambiguous terms; but not to contradict unambiguous terms, except within the limits already stated, of evidence to show usages of language.[61] A stipulation on a point which the writing either expressly

[58] Lakeman *v.* Mountstephen, L. R. 7 H. of L. 17, s. c., 9 Moak's Eng. 5.

A legal term of service cannot be created by implication to continue from the termination of a contract unenforcible under the statute of frauds. Lally *v.* Crookston Lumber Co., 85 Minn. 257, 88 N. W. Rep. 846.

A parol extension of a contract for services for another year, made before the expiration of the contract so extended, is void under the statute. Booker *v.* Heffner, 95 App. Div. 84, 88 N. Y. Supp. 499.

[59] Rand *v.* Mather, 11 Cush. 1.

[60] Chapter XVI, paragraph 8 of this vol.

[61] Compare Partridge *v.* Ins. Co., 15 Wall. 573, 1 Dill. 139; Stoops *v.* Smith, 100 Mass. 63, s. c., 1 Am. Rep. 85; Sweet *v.* Lee, 3 Mann. & G. 452, 460; Myers *v.* Sarl, 3 E. & E. 306; Zerrahn *v.* Ditson, 117 Mass. 553; and chapter XVI, paragraphs 8 and 9, and chapter V, paragraph 86 of this vol. Whether contradictory clauses, which may be reconciled by construing one as an exception from the other, can be otherwise explained by parol evidence, see Porter *v.* Spence, 38 N. Y. 119. A provision in a building contract that the contractor will "do" a certain amount of "brick work" may mean simply the work of laying the brick, or it may include furnishing as well as laying them, and parol evidence is competent in such case to show the sense in which the parties used the words. Streppone *v.* Lennon, 143 N. Y. 626, 37 N. E. Rep. 638.

Evidence as to the situation of the parties at the time when the contract was made is admissible as an aid to the interpretation thereof. Alvord *v.* Cook, 174 Mass. 120, 54 N. E. Rep. 499.

or impliedly controls cannot be added by parol.[62] But usage may be proved to show what amounts to complete performance of the express contract under the presumed understanding of the parties.[63] If the time for performance is not specified, subsequent conversations of the parties are competent evidence to show what they regarded as a reasonable time.[64]

[62] Thorp *v.* Ross, 4 Abb. Ct. App. Dec. 416. Whether a verbal limit of cost, on a written order, is competent,—see Hooper *v.* Taylor, 4 E. D. Smith, 486; Carll *v.* Spofford, 45 N. Y. 61.

In the absence of uncertainty, the law conclusively presumes that the whole engagement is reduced to writing. Kenefick *v.* Missouri Brass Type Foundry Co., 72 Mo. App. 381.

A new obligation cannot be added by a contemporaneous parol agreement. Kramer *v.* Wolf Cigar Stores Co., 99 Tex. 597, 91 S. W. Rep. 775, reversing 89 S. W. Rep. 995.

Missing essential elements of a contract cannot be supplied by parol. Flash *v.* Rossiter, 116 App. Div. 880, 102 N. Y. Supp. 449.

But the existence of a separate oral agreement, if not inconsistent with the terms of the written agreement, may be proved by parol if the parties did not intend the written contract to be a complete statement of the transaction. See Seitz *v.* Brewers' Refrigerating Mach. Co., 141 U. S. 510, 12 S. Ct. 46, 35 L. ed. 837.

Under a contract not to engage in the insurance business for a stated period, evidence is inadmissible to show that the defendant had a right to solicit any insurance not held by the plaintiff at the time the defendant left his employ. Borley *v.* McDonald, 69 Vt. 309, 38 Atl. Rep. 60.

Where, in an action for commissions for negotiating a loan on certain premises, the written contract expressly stated that there was only one mortgage on the property, whereas in fact there were two, it is error to admit evidence tending to show that prior to the making of the written contract the defendant disclosed the existence of the second mortgage to the plaintiff. Finck *v.* Schaubacher, 34 Misc. Rep. 547, 69 N. Y. Supp. 977.

[63] Cooper *v.* Kane, 19 Wend. 386, NELSON, Ch. J. In the absence of any express agreement as to the time for the payment of work contracted to be done, parol evidence is admissible to show certain usage of the business, and of the locality, known to the parties, or so general and well-settled as to raise the presumption that the parties dealt with reference to the usage, and with a common understanding that their rights and responsibilities should be determined thereby. Hansbrough *v.* Neal, 94 Va. 722, 27 S. E. Rep. 593.

[64] Davis *v.* Talcott, 14 Barb. 611, rev'd on other points, in 12 N. Y.

Such papers as a circular of instructions accepted by an agent on entering employment,[65] further instructions in writing received by him during his employment, and acted on by him continuously thereafter, are contracts within the rule.[66] So is a stipulation in a receipt for a payment in advance, stating how it is to be applied or forfeited.[67]

15. Kind of Service.

Where the writing is silent as to the kind of service agreed for, it may be shown by oral evidence of the surrounding circumstances,[68] and for this purpose the nature of the employer's business, and the kind of occupation to which the employee was known to be accustomed, are competent,[69] and the general usage in such business.[70] If the writing

184. Thus under a contract to build such a drawbridge as specified in the contract, it is competent to prove that it is the common understanding that it should be so constructed as to be easily turned in two or three minutes, by one man. R. R. Co. *v.* Smith, 21 Wall. 262.

Where a written contract is silent as to where the services under it are to be performed, the presumption is that they are to be performed at the place of the making of the contract. It seems that parol evidence should be admitted to show an intent to perform elsewhere. Cook *v.* Todd, 24 Ky. Law Rep. 1909, 72 S. W. Rep. 779.

[65] Stagg *v.* Ins. Co., 10 Wall. 589.

[66] Id. Letter written by employer in answer to his remonstrances asking what his status was; or the employer's letter to his employee, written in answer as to the latter's inquiry as to the terms on which he was to be understood as serving, and put in evidence by him as proving his employment, are contracts within the rule that the writing cannot be contradicted by oral evidence. Partridge *v.* Insurance Co., 15 Wall. 579.

[67] Townsend *v.* Fisher, 2 Hilt. 47.

[68] Price *v.* Mouat, 11 C. B. N. S. 508; Mumford *v.* Gething, 7 C. B. N. S. 305, L. J. 29 C. P. 105.

Where the written contract does not specify in detail what work is to be done and the character and amount of materials to be furnished, parol evidence is admissible to establish these details. Whately *v.* Reese, 128 Ala. 500, 29 So. Rep. 606.

[69] Hagan *v.* Domestic Sewing Machine Co., 9 Hun, 73.

As to evidence of custom with regard to manner of laying brick, see Laycock *v.* Parker, 103 Wis. 191, 79 N. W. Rep. 327.

[70] Eldredge *v.* Smith, 13 Allen, 140, 143.

designates the service in the language of trade, oral evidence to show what business was properly included in the phrase used, is competent.[71]

16. Measurement.

In application of the principle as to usage already stated, evidence of usage in the locality, or in the trade, is competent to show in what manner measurements provided for by the contract are to be taken;[72] and the usage need not be pleaded.[73]

Proof of custom or usage is admissible on the ground that it serves to explain and ascertain the intent of the parties upon some point as to which their contract is silent, but with respect to which there exists a usage so long continued and well known as to raise a presumption that it was within the view of the contracting parties. Connolly *v.* Bruner, 48 W. Va. 71, 35 S. E. Rep. 927.

When evidence of a local or class usage is admitted it is for the reason that it tends to show the ordinary meaning of the language used, and evidence to show the sense in which words were used by a particular individual is inadmissible. Violette *v.* Rice, 173 Mass. 82, 53 N. E. Rep. 144.

A usage, no matter how general, may not be permitted to contradict the expressed terms of a contract. Brunold *v.* Glasser, 25 Misc. 285, 53 N. Y. Supp. 1021.

[71] Stroud *v.* Frith, 11 Barb. 300.

The function of a custom or usage is to aid the interpretation of the contract and not to relieve a party from his express agreement. Anderson *v.* Daly Min. Co., 16 Utah, 28, 50 Pac. Rep. 815.

[72] As, for instance, under a contract calling for bricks and laying them in a wall at so much "per thousand," that the number is ascertainable by measurement and estimate. Lowe *v.* Lehman, 15 Ohio St. 179. Evidence of a custom that in measuring brick "in the wall," no deductions should be made for openings, such as windows and doors, is admissible. Walker *v.* Syms, 118 Mich. 183, 76 N. W. Rep. 320. Or how a wall with angles is to be measured when it is to be paid for "by the foot." Ford *v.* Tirrell, 9 Gray, 401. Whether an agreement to pay for plastering "per square yard," includes or excludes measurement of spaces of base-boards, doors, etc. Walls *v.* Bailey, 49 N. Y. 467; and how wall more than nine inches thick is to be measured under a clause for payment "per superficial yard of work nine inches thick." Symonds *v.* Floyd, 6 C. B. N. S. 691.

[73] Lowe *v.* Lehman (above). As to proving the meaning of such terms as "hard pan," see Dubois *v.* Delaware, &c. Co., 12 Wend. 334, 15 Id. 87; Dickinson *v.* Water Com'rs of Poughkeepsie, 2 Hun,

17. Term of Service; Holidays, "Day's Work," &c.

If the allegation is of service between specified dates, prior or later services are not strictly provable,[74] except on the principles on which variance may be disregarded; but if the allegation is of indebtedness on a day named, or service before a day named, a term of service or various services before that day may be proved.[75]

If there is a written contract specifying the term of service,[76] or which, by specifying no term and stipulating for wages by the week, month, or other period, implies that the term is for that period,[77] oral evidence is not competent to contradict the language; but it is competent to show what length of actual service is by usage designated by such language. Thus in a contract for the services of an actor for three years, a party may show that "year" means annual season,[78] but not that four years or seasons were agreed

615; Currier *v.* Boston, &c. R. R. Co., 34 N. H. 498, 508.

[74] Manch. & Law. R. R. *v.* Fisk, 33 N. H. 297, 305.

[75] Beekman *v.* Platner, 15 Barb. 550.

[76] Sweet *v.* Lee, 3 Mann. & G. 452, 466.

[77] Evans *v.* Roe, L. R. 7 Com. Pl. 138, s. c., 2 Moak's Eng. R. 116.

Under a contract for employment at a weekly salary, parol evidence is inadmissible to show a term of one year. Eichenauer *v.* Rentz Candy Co., 43 Misc. Rep. 151, 88 N. Y. Supp. 260. The employment of an attorney "at a salary of $1000.00 per year, payable quarterly," constitutes a contract for at least one year. Horn *v.* Western Land Assoc., 22 Minn. 233. See as to the rule that menial or domestic servants, although hired for a specified period, as for a year, may nevertheless be discharged by general custom on one month's notice, Larkin *v.* Hecksher, 51 N. J. L. 133, 16 A. Rep. 703, 3 L. R. A. 137.

[78] Grant *v.* Maddox, 15 Mees. & W. 737.

Under a contract for services "for a period of one year for the season commencing December 1st, 1897," since the words "for the season" appear to qualify the expression "for a period of one year," testimony of a custom or usage is admissible to explain what the words mean, i. e., what constitutes a season. Johnston-Woodbury Hat Co. *v.* Lightbody, 18 Colo. App. 239, 70 Pac. Rep. 957. See as to the meaning of the term "run" as applied to theatrical contracts, Hart *v.* Thompson, 19 App. Div. 183, 41 N. Y. Supp. 909.

for.[79] "Month" means calendar month, unless otherwise expressed.[80] Parol evidence of a usage in the trade or business to allow holidays is competent;[81] and so is a usage not to pay the stipulated weekly salary during vacation.[82]

A general usage of the trade[83] is competent to show that an agreement for a day's work is satisfied by a certain number of hours, so as to entitle the employee to work for himself the rest of the time. So a usage to pay proportionably more than the day's wages for more hours than the usual day's work, is competent.[84] Where a statute fixes the number of hours in a day's work, unless otherwise expressly agreed, if the parties render and accept less or more, without any express agreement, an agreement may be inferred that the work actually done in a day shall be reckoned a day's work.[85] If such a statute does not require an express agreement to manifest a different intention, the rendering of more hours' service in a day than it calls for does not prove an intent that more than a day's wages shall be paid.[86]

18. Rate of Compensation.

Usually if, after the expiration of an hiring for an agreed compensation, the employee continues in the same service,

[79] Sweet *v.* Lee (above). It has been held that evidence of a usage of the trade to allow termination on certain notice, before the end of the periodical hiring, is competent. Parker *v.* Ibbetson, 4 C. B. (N. S.) 348, s. c., L. J. 27 C. P. 236.

[80] 1 N. Y. R. S. 606, § 4. *Contra*, at common law, Simpson *v.* Margitson, 11 Q. B. 23, 32.

As to the recovery of extra pay for Sunday services under a monthly hiring, see Guthrie *v.* Merrill, 4 Kan. 187; Robinson *v.* Webb, 73 Ill. App. 569 (farm laborer).

[81] Reg. *v.* Stoke upon Trent, 5 Q. B. (Ad. & El. N. S.) 303. And see Hosley *v.* Black, 28 N. Y. 438, s. c., 26 How. Pr. 97.

[82] Grant *v.* Maddox, 15 Mees. & W. 737.

[83] Perhaps also a general usage of other kindred vocations in the same place. Barnes *v.* Ingalls, 39 Ala. 393. See Schurr *v.* Savigny, 85 Mich. 144, 48 N. W. Rep. 547 (photographic trade).

[84] Hinton *v.* Locke, 5 Hill, 437.

[85] Brooks *v.* Cotton, 48 N. H. 50, s. c.. 1 Am. Rep. 172.

[86] Luske *v.* Hotchkiss, 37 Conn. 219, s. c., 9 Am. Rep. 314.

the law implies, in the absence of other evidence, a promise to continue to pay at the same rate; [87] but such a promise is not implied after the expiration of service under an agreement to pay at a specified rate for a limited period, without evidence of actual engagement for that period.[88] Nor is an agreement to accept the same rate implied, if the employee commenced in ignorance of the business, and during a part of the period of the original contract was a learner.[89]

A hiring at so much per week or month usually implies a promise to pay at the end of the periods thus specified.[90]

If complete performance of a special contract is prevented by sickness or death,[91] or by act of law,[92] or other legal excuse exonerating the employee, the contract is competent evidence on the question of the rate of compensation for serv-

[87] Smith *v.* Velie, 60 N. Y. 106; Vail *v.* Jersey Little Falls Manuf. Co., 32 Barb. 564. Compare Miller *v.* Hooper, 7 Hun, 200; Nutt *v.* Minor, 14 How. U. S. 464.

Where a person performing labor at an agreed price and for a stated time continues in the same employment after the expiration of the term, without a new agreement, it is presumed by the law in the absence of anything to the contrary, that the terms of the original contract are continued. Hermann *v.* Littlefield, 109 Cal. 430, 42 Pac. Rep. 443.

The original contract is admissible in evidence in an action of assumpsit, as showing the terms under which the services were rendered. Id.

But this implication is not so strong as to render parol evidence of other terms inadmissible as varying a written contract. Hale *v.* Sheehan, 41 Neb. 102, 59 N. W. Rep. 554.

An agreement for services for one year is renewed from year to year by continuance in the service. Mason *v.* New York Produce Exch., 127 App. Div. 282, 111 N. Y. Supp. 163.

A contract to pay $2,500 for the first year and $3,000 for the second year and thereafter if the services rendered during the first year were satisfactory, constitutes a hiring from year to year. Id.

[88] Smith *v.* Velie (above).

[89] Galvin *v.* Prentice, 45 N. Y. 162.

[90] Heim *v.* Wolf, 1 E. D. Smith, 70.

An action for a "balance of wages" due an employee is not maintainable before the period of service has expired. Dixon *v.* Bunnell, 52 Misc. Rep. 560, 102 N. Y. Supp. 775.

[91] Clark *v.* Gilbert, 26 N. Y. 279, rev'g 32 Barb. 576.

[92] Jones *v.* Judd, 4 N. Y. 441.

ices actually performed; and contract rates cannot be reduced by proving that the portion unfinished would be more expensive in its nature than the portion completed.[93] So where the contract is absolutely void by the statute of frauds, it may still be put in evidence to fix the rate of compensation,[94] if any be recoverable.[95] If the void contract calls for compensation not by a pecuniary standard,[96] but in a specific thing the value of which is not fixed, such as a tract of land, the value of the services must be shown, and evidence of the value of the land is incompetent.[97]

19. Fixed Price, or Quantum Meruit.

Under an allegation of a contract to pay a specified rate of compensation, plaintiff may prove a promise to pay what the services were reasonably worth,[98] or an implied promise

[93] Id. Where a contract of yearly service is determined by consent in the middle of a quarter, there is no necessarily implied contract to pay *pro rata;* but a jury may infer such an agreement from circumstances. Rosc. N. P. 492, citing Lamburn *v.* Cruden, 2 M. & Gr. 253; Thomas *v.* Williams, 1 Ad. & E. 685.

As to recovery for substantial performance, see Manning *v.* Ft. Atkinson School Dist. No. 6, 124 Wis. 84, 102 N. W. Rep. 356.

[94] Nones *v.* Homer, 2 Hilt. 116; Monarch *v.* Board of Commissioners, 49 La. Ann. 991, 22 So. Rep. 259.

Similarly, where the employer cancels the contract with the acquiescence of the employee, the contract no longer governs, but may be resorted to to determine how long the employee was in default. General Supply, etc., Co. *v.* Goelet, 149 App. Div. 80, 133 N. Y. Supp. 978.

[95] Galvin *v.* Prentice, 45 N. Y. 162.

[96] Lisk *v.* Sherman, 25 Barb. 433.

[97] Erben *v.* Lorillard, 19 N. Y. 299, rev'g 23 Barb. 82.

[98] Palmer *v.* Miller, 19 Ind. App. 624, 49 N. E. Rep. 975; Scott *v.* Lilienthal, 9 Bosw. 224; Harrington *v.* Baker, 15 Gray, 538. But probably to weight of authority is otherwise. Hayes *v.* Bunch, 91 Mo. App. 467; Hunt *v.* Tuttle, 125 Iowa, 676, 101 N. W. Rep. 509; International, etc., R. R. Co. *v.* Masterson, 51 S. W. Rep. 644; Wade *v.* Nelson, 119 Mo. App. 278, 95 S. W. Rep. 956; Ecker *v.* Isaacs, 98 Minn. 146, 107 N. W. Rep. 1053; Seale *v.* Emerson, 25 Cal. 293. See also Manning *v.* Ft. Atkinson School District No. 6, 124 Wis. 84, 102 N. W. Rep. 356; Dennison *v.*

to pay usual compensation.[99] The variance is immaterial, if the defendant is not misled; [1] especially where there are sufficient averments to enable him to recover without reference to the allegation of an agreed compensation.[2] But if he rests his case on a contract fixing the price to be re-

Musgrove, 29 Misc. 627, 61 N. Y. Supp. 188. In an action on a special contract providing for a specific compensation, evidence of value is incompetent, Van Orden *v.* Fox, 32 App. Div. 173, 52 N. Y. Supp. 863. See Dorrington *v.* Powell, 52 Neb. 440, 72 N. W. Rep. 587. The plaintiff may rely upon a special contract or upon the implied promise to pay which arises upon the performance.

No recovery can be had on *quantum meruit* on the absence of any evidence as to value. Johnson *v.* Peterson, 166 Ill. App. 404; Schillinger Bros. Co. *v.* Thompson-Starrett Co., 171 Ill. App. 319.

A contract for services at a price to be agreed upon will permit a recovery of the reasonable value of such services. International, etc., R. R. Co. *v.* Masterson, 51 S. W. Rep. (Tex. Civ. App.) 644.

Failure to object to the submission of the case on the theory of *quantum meruit* prevents the party from challenging the judgment on that ground. Hayes *v.* Bunch, 19 Mo. App. 467.

Under a contract with a surgeon for the performance of an operation at a charge of from two hundred to four hundred dollars, he may recover the reasonable value of his services (not less than two hundred dollars) to the amount of four hundred dollars. Doyle *v.* Edwards, 15 S. D. 648, 91 N. W. Rep. 322.

[99] Morgan *v.* Mason, 4 E. D. Smith, 636; Burgess *v.* Helm, 24 Nev. 242, 51 Pac. Rep. 1025.

After proof of an express contract of employment, it is competent, on failure to sustain an allegation of agreed compensation, to show the reasonable value of the services rendered. Dennison *v.* Musgrave, 29 Misc. 627, 61 N. Y. Supp. 188.

A contract may be express although the amount of compensation rests on *quantum meruit.* Nyhart *v.* Pennington, 20 Mont. 158, 50 Pac. Rep. 413.

[1] Scott *v.* Lilienthal (above). See Foulger *v.* McGrath, 34 Utah, 86, 95 Pac. Rep. 1004 (citing the text).

Where a pleading is ambiguous as to whether based upon an express or implied contract, and it is important to be informed on this point, the remedy is by demurrer on the ground of ambiguity, uncertainty, etc. Burgess *v.* Helm, 24 Nev. 242, 51 Pac. Rep. 1025.

[2] Sussdorf *v.* Schmidt, 55 N. Y. 319.

The complaint may be so framed as to permit a recovery on an express contract or on the common counts. Paschall *v.* Gilliss, 113 Va. 643, 75 S. E. Rep. 220, Ann. Cas. 1913, E. 778.

covered, it is not competent for him to give evidence of value as a basis of recovery beyond the contract; [3] nor for the defendant, without denying the making of the contract, to give evidence that the value of the services was less.[4] Even where the complaint is on a *quantum meruit*, a contract at a specified sum, if proved, controls.[5] But if evidence of

Where the plaintiff was employed as a cook at $3.50 for the first week, and for "more when business picked up," she was entitled to recover on *quantum meruit*. Sexton *v.* Snyder, 119 Mo. App. 668, 94 S. W. Rep. 562.

[3] Trimble *v.* Stilwell, 4 E. D. Smith, 512; Burgess *v.* Helm, 24 Nev. 242, 51 Pac. Rep. 1025.

"It is quite true that a party entering into a contract of this character [building] may not abandon the contract and recover more than the contract price upon a *quantum meruit;* but there may be cases where the stipulations of the contract have been departed from either by the express consent of the parties or by implication through their conduct in making changes in materials, workmanship, or structure by reason of which it may become a matter of doubt whether the contract, as a whole, has been abandoned or not. In such cases the contractor may, in the first instance, sue as upon a *quantum meruit*, and leave it to the defendant to set up and insist upon the contract for the purpose of limiting the recovery to the price stipulated therein. The defendant may, in such a case, likewise insist that the stipulations of the contract remain in full force and have not been performed, and may demand damages for a noncompliance with the terms of the contract. The contractor may, however, in such cases, also base his action upon both the contract and upon a *quantum meruit* by setting up the former in one count and the latter in another in his complaint. In all such cases a recovery by either party will be allowed in accordance with the facts developed at the trial and the law applicable thereto. Again, a contractor, in case the contract is fully performed, and nothing remains except to obtain payment, may sue to recover the amount unpaid without specially declaring upon the contract." Foulger *v.* McGrath, 34 Utah, 86, 95 Pac. Rep. 1004.

[4] Marsh *v.* Holbrook, 3 Abb. Ct. App. Dec. 176. But see Doyle *v.* Edwards, 15 S. D. 648, 91 N. W. Rep. 322.

[5] Ludlow *v.* Dole, 62 N. Y. 617, affi'g 1 Hun, 715, s. c., 4 Supm. Ct. (T. & C.) 655.

Where, under a complaint on *quantum meruit* a specific contract is proved, the stipulated price becomes the *quantum meruit* in the case, but recovery cannot be had beyond the amount demanded in the complaint. Burgess *v.* Helm, 24 Nev. 242, 51 Pac. Rep. 1025.

value is received from either side without objection, the other may be allowed to give evidence of the same kind.[6] And in a conflict of evidence as to whether a specified rate was agreed on or not, evidence of its reasonableness or unreasonableness, and particularly of the usual price, is competent, as bearing on the probable truth of the allegation of rate agreed.[7] But evidence of the profitableness or unprofitableness to the employer of an engagement at such a rate is not competent.[8] Where the claim is for commissions, a variance as to the amount on which they are computable, may be disregarded.[9]

Where the plaintiff who was prevented from performing his contract, elected to stand on a count upon *quantum meruit*, it was held that the express contract was admissible in evidence in proof of value but was not conclusive. Adams *v.* Burbank, 103 Cal. 646, 37 Pac. Rep. 640.

[6] Morgan *v.* Mason, 4 E. D. Smith, 636.

[7] Harrington *v.* Baker, 15 Gray, 538, 540; Darling *v.* Westmoreland, 52 N. H. 401, s. c., 13 Am. Rep. 55, s. p., Moore *v.* Davis, 49 N. H. 45, s. c., 6 Am. Rep. 460; Spurck *v.* Dean, 49 Neb. 66, 68 N. W. 375; Locke *v.* Kraut, 85 Conn. 486, 83 Atl. Rep. 626. Where one party to an action seeks to recover for services and sets up a special agreement as to the sum to be paid therefor, which is controverted by the other, who also alleges a special agreement, and the testimony is conflicting upon this issue, it is proper for either party to prove the value of the services, both as bearing upon the issue raised and the probability that one or the other agreement was made, and because, in order to settle the controversy, the jury or trial court may find that the minds of the parties did not meet upon any special agreement. Barney *v.* Fuller, 133 N. Y. 605, 30 N. E. Rep. 1007; Whitney Co. *v.* Stevenson, 17 App. Div. 224, 45 N. Y. Supp. 552; Van Orden *v.* Fox, 32 App. Div. 173, 52 N. Y. Supp. 863; Rubino *v.* Scott, 118 N. Y. 662, 22 N. E. Rep. 1103. On the issue as to the cost of rebuilding a defective wall, evidence as to what bidders were willing to do the work for is inadmissible. Hulst *v.* Benevolent Hall Assoc., 9 S. D. 144, 68 N. W. Rep. 200. Under a *quantum meruit* for services rendered under a contract, the contract is admissible to prove the value of the services. The stated rates of compensation, if any, are competent evidence tending to show reasonable value. Hibbard *v.* Wilson, 51 Neb. 436, 71 N. W. Rep. 65.

[8] Harrington *v.* Baker (above).

[9] Morgan *v.* Mason, 4 E. D. Smith, 636; Durkee *v.* Vermont, &c.

20. Value of Service.

On the question of the value of services of a workman, evidence of his skill is competent in his favor, in connection with evidence of the usual wages; [10] and evidence of his unskillfulness or his intemperate habits is competent against him.[11] Evidence of the recommendations of third persons on which he was engaged is not competent.[12]

To prove value of work and materials it is not competent to show the cost of constructing a different structure, for it leads to a collateral issue involving comparison between the structures; [13] and on the same principle to show the value of a service—for instance, negotiating the sale of a lease—it is not competent to prove the relative labor involved in negotiating that and the sale of the fee.[14] An agreed price being proved, evidence by comparison of plaintiff's services with those of his fellows, is not competent.[15]

21. Bill Rendered Not a Limit.

The presentment by a party to his debtor of a bill in which he charges a gross sum for services, for which he is

R. R. Co., 29 Vt. 127. It must be objected to, if at all, at the trial, so as to allow amendment. Divoll *v.* Henken, 48 N. Y. 672.

Where the right to recovery of commissions on sales of property is based solely on a special contract, inquiry as to the usual commissions is irrelevant. Dorrington *v.* Powell, 52 Neb. 440, 72 N. W. Rep. 587.

[10] Cummings *v.* Nichols, 13 N. H. 420; Barnes *v.* Ingalls, 39 Ala. 193; Major *v.* Spies, 66 Barb. 576.

[11] Cummings *v.* Nichols (above); and see Harmer *v.* Cornelius, 5 C. B. N. S. 236.

Evidence as to instances of the arrest of an employee during the period of service is pertinent as to the amount, quality and value of his services. Ralph *v.* Taylor, 33 R. I. 503, 82 Atl. Rep. 279.

[12] Wolstenholme *v.* Wolstenholme Tile Manuf. Co., 3 Lans. 457. Evidence of what the employee had received from other employers has been held inadmissible. Stevens *v.* Benton, 2 Lans. 156, s. c., 39 How. Pr. 13; and see Collins *v.* Fowler, 4 Ala. 647. But compare Kingsbury *v.* Moses, 45 N. H. 222.

[13] Gouge *v.* Roberts, 53 N. Y. 619; s. p., 59 Id. 300, 37 Super. Ct. (J. & S.) 433. And see chapter on SALES, paragraphs 20, 21.

[14] Siegel *v.* Lewis, 54 N. Y. 651, s. p., Gouge *v.* Roberts, 53 Id. 619.

[15] Green *v.* Washburn, 7 Allen, 390.

entitled to claim *quantum meruit*, where the subject of the demand is one which would naturally consist of many items, there being no payment nor settlement of the account, does not preclude the creditor from showing what the services were reasonably worth, and recovering more than he had so charged.[16]

22. Opinions of Witnesses.

In applying the general rule admitting opinions of witnesses as to value,[17] it is held that the witness must be shown to have some special conversance with the subject.[18] The

[16] Williams *v.* Glenny, 16 N. Y. 389; and see Romeyn *v.* Campan, 17 Mich. 327, 3 Am. Law Rev. 381.

Where, under a monthly employment, it appeared that the employer had for some time past delivered to the employee each month a statement of account, the failure to make an objection thereto was regarded as an admission that the rate of compensation stated therein was correct. Shade *v.* Sisson Mill, etc., Co., 115 Cal. 357, 47 Pac. Rep. 135.

[17] See chapter XVI, paragraphs 23 and 82 of this vol. But compare Pullman *v.* Corning, 9 N. Y. 93, affi'g 14 Barb. 174, where it was held that a witness who has examined buildings may, though neither a mason nor an expert, testify that, in his opinion, one was built more compactly than the other; or that a wall was not worth covering; that the materials were worth more than the wall.

[18] Lamoure *v.* Caryl, 4 Den. 370; Elfelt *v.* Smith, 4 Minn. 125. Thus one who has owned and managed mills for years, and employed millwrights, is competent to testify whether a millwright he has often employed is a good workman. Doster *v.* Brown, 25 Geo. 24. But the mere fact of being a miller does not qualify to express an opinion of the skillfulness of such work. Walker *v.* Fields, 28 Geo. 237. So one who is somewhat familiar with bookkeeping and accounting, and shows a somewhat intimate familiarity with a bookkeeper's services, is competent to testify to their value. Scott *v.* Lilienthal, 9 Bosw. 224. But one who is a farmer and does not know the usual compensation of clerks, is not. Lamoure *v.* Caryl, 4 Den. (N. Y.) 370, 373. So testimony of master builders as to value of a house, and of the work and materials, is competent. Tebbetts *v.* Haskins, 16 Me. 283, 289. But members of a committee are not rendered competent to express an opinion of the value or cost of fitting up a stage, by the fact that, after consultation with stage carpenters and artists, they had once

question of competency to express an opinion is for the court; and if facts appear showing a reasonable degree of conversance, it is not material that the witness says he does not profess to be an expert.[19] It is not a matter of right to cross-examine an expert as to his own professional income, by way of testing his qualifications.[20] It is not essential that the witness should have been employed in the vocation concerned; [21] and if he has been so employed, it is not a disqualfication that he has abandoned it and engaged in other business.[22] If otherwise competent, it is no objection that the witness is the party examined in his own behalf.[23]

fitted up a theatre. Forbes *v.* Howard, 4 R. I. 364. Non-experts who are shown to be familiar with the extent and character of the particular service may properly give their opinion of the value of that service. Jenney Electric Co. *v.* Branham, 145 Ind. 314, 317-318, 41 N. E. Rep. 448.

A brick and tile maker of some years' experience is qualified to give an opinion on the proper mode of burning tiles, and what would be the effect of burning in one way or another. Wiggins *v.* Wallace, 19 Barb. 338. A carpenter of experience in the place is competent to testify to the value of carpenter work done, at the time and place of performance. Major *v.* Spies, 66 Barb. 576. So witnesses who were not ship-carpenters, but who had been in and about ships as masters and workmen, are competent to show the difference between the value of a vessel as repaired, and its value had it been repaired according to contract. Sikes *v.* Paine, 10 Ired. (N. C.) 280. So a physician is competent as to value of a nurse's services. Woodward *v.* Bugsbee, 2 Hun, 128. A mason may be asked how long, in his opinion, it would take to dry the walls of a house so as to render it fit and safe for human habitation. Sedgw. on Damages, 591; Smith *v.* Gugerty, 4 Barb. 515.

[19] Mercer *v.* Vose, 40 Super. Ct. (J. & S.) 218.

[20] Harland *v.* Lilienthal, 53 N. Y. 438.

[21] Pullman *v.* Corning, 14 Barb. 174, 9 N. Y. 93; Carroll *v.* Welch, 26 Tex. 147; Barnes *v.* Ingalls, 39 Ala. 193.

[22] Bearss *v.* Copley, 10 N. Y. 93; Robertson *v.* Knapp, 35 Id. 91, s. c., 33 How. Pr. 309.

[23] Nourry *v.* Lord, 3 Abb. Ct. App. Dec. 392. A woman employed to do the general housework about a farmhouse is competent to testify, in an action to recover therefor, as to the nature and value of the services rendered. Fowler *v.* Fowler, 111 Mich. 676, 70 N. W. Rep. 336.

The testimony of a qualified witness, who has heard the services described by the other witnesses, or read their testimony, may be asked as to what would be the value of such services, if rendered as stated.[24] The value may be called for by a general question, leaving the details to cross-examination.[25] The witness may be asked to describe the peculiarities, the excellencies, or the defects, which enter into his estimate of value; [26] and it is not error to allow him to be asked, on cross-examination, what he would have undertaken the work for.[27]

23. Modification of Contract.

Oral evidence is admissible to prove a new and distinct agreement made upon a good and valid consideration, although the previous written agreement had been partly performed, and rescission is not shown by writing; [28] and

[24] McCollum *v.* Seward, 62 N. Y. 316; Beekman *v.* Platner, 15 Barb. 550; Reynolds *v.* Robinson, 64 N. Y. 589. As to the proper form of the question, see chapter XVI, paragraphs 23 and 27 of this vol. And compare Lewis *v.* Trickey, 20 Barb. 387, with Stevens *v.* Benton, 2 Lans. 156, 164, s. c., 39 How. Pr. 13, 34; Scott *v.* Lilienthal, 9 Bosw. 224, 228.

[25] Parker *v.* Parker, 33 Ala. 459, 462; Garfield *v.* Kirk, 65 Barb. 464.

And where a witness has testified to value of services, on the theory that the case was a difficult one, the defendant has a right to ask him, on cross-examination, whether assuming the nature of the case were such as defendant claims it was, he would not estimate the value lower. Garfield *v.* Kirk (above). But see Siegel *v.* Lewis, 54 N. Y. 651.

In the absence of market value of a structure, cost is relevant, in connection with opinions as to value. Patterson *v.* Kingsland, 8 Blatchf. 278.

A competent expert who has seen the engine and heard the testimony as to the repairs upon it, the value of which are used for, may be asked if it be possible that such an engine could be so damaged as testified to, that a reasonable charge for its repair could amount to the sum claimed. Tyng *v.* Fields, 3 Hun, 75.

[26] Jackson *v.* N. Y. Central, &c. R. R. Co., 2 Supm. Ct. (T. & C.) 653. But it is not error to exclude a question as to how he arrived at his opinion, as too general. Booker *v.* Adkins, 48 Ala. N. S. 529.

[27] Gilman *v.* Gard, 29 Ind. 291, 293.

[28] Piatt's Adm'r *v.* U. S., 22 Wall. 506, and cases cited. There it was held competent to prove by parol

the rule is the same though the previous agreement was sealed.[29]

Where the statute of frauds requires a writing, an oral modification does not satisfy the statute.[30]

that a contractor with the government refused to continue performance of his written contract, because he was unpaid, and thereupon orally agreed to continue at higher prices and wait for payment. S. P., Stewart *v.* Keteltas, 36 N. Y. 388, affi'g 9 Bosw. 261; Youngberg *v.* Lamberton, 91 Minn. 100, 97 N. W. Rep. 571; Hartford *v.* Attalla, 119 Ala. 59, 24 So. Rep. 845; Solomon *v.* Vallette, 152 N. Y. 147, 46 N. E. Rep. 324.

As to admissibility of evidence of an executory agreement to vary the terms of a written contract, see Mettel *v.* Gales, 12 S. D. 632, 82 N. W. Rep. 181; Barnard, etc., Mfg. Co. *v.* Galloway, 5 S. D. 205, 58 N. W. Rep. 565.

Parol evidence to sustain a new agreement must be clearly proved especially after a considerable lapse of time. Kent *v.* Kent, 34 S. E. Rep. 32 (action to complete accounting).

The consideration for the new agreement may be found in the release by the parties of their rights under the previous one. Taylor *v.* Citizens' Ice Co., 46 App. Div. 491, 61 N. Y. Supp. 213.

The action should be brought upon the contract as modified, which is usually done by spelling out the contract and the modification of it. Harrington *v.* F. W. Brockman Commission Co., 107 Mo. App. 418, 81 S. W. Rep. 629.

[29] Munroe *v.* Perkins, 9 Pick. 298, and cases cited. Compare Tinker *v.* Geraghty, 1 E. D. Smith, 687, and 2 Abb. N. Y. Dig. new ed. tit. Contracts, *modif.* Oral evidence is competent to show that the time of performance of the work was extended or waived; and this need not be established by positive testimony; it may be inferred from circumstances. Meehan *v.* Williams, 2 Daly, 367, s. c., 36 How. Pr. 73. The request of the employer to make a change in the mode of construction, of a nature which both parties know to require more time, implies consent to a reasonable extension of time. Manuf. Co. *v.* U. S., 17 Wall. 595. Where the defense to a builder's suit for the money due on the contract is a claim for damages stipulated for his delay in completing a small part of the work, and it is shown that the contract was changed by introducing extra work, the burden of proof is on the party claiming the damages, to show either that the delay was but slightly produced by the change in the contract, or that it was caused by the builder's negligence or fault. Bridges *v.* Hyatt, 2 Abb. Pr. 449.

But see Morehouse *v.* Terrill, 111 Ill. App. 460, where it is held that a contract under seal cannot be varied except by a similar instrument.

[30] Swain *v.* Seamens, 9 Wall.

24. Performance.

On a special contract, substantial performance, notwithstanding slight defects caused by inadvertence or unintentional omissions, may be proved, unless full performance be an express condition; then it must be strictly proved,[31] or

254; Augusta So. R. R. Co. *v.* Smith, 106 Ga. 864, 33 S. E. Rep. 28; Badders *v.* Davis, 88 Ala. 367, 6 So. Rep. 834; Prestwood *v.* Eldridge, 119 Ala. 72, 24 So. Rep. 729.

[31] Phillip *v.* Gallant, 62 N. Y. 264, and cases cited.

In building contracts especially, substantial performance is equivalent to performance, and in such cases deductions may be made from the contract price for small omissions or defects occurring in good faith. Van Orden *v.* MacRae, 121 App. Div. 143, 105 N. Y. Supp. 600. Whether there is substantial performance is a question for the jury. Ramstedt *v.* Brooker, 113 App. Div. 45, 98 N. Y. Supp. 1044; Williamson *v.* Bennett, 27 Ohio Cir. Ct. 681; Drew *v.* Goodhue, 74 Vt. 436, 52 Atl. Rep. 971; Thomas *v.* Kanawha Valley Traction Co., 73 W. Va. 374, 80 S. E. Rep. 476; Bergfors *v.* Caron, 190 Mass. 168, 76 N. E. Rep. 655.

Evidence held insufficient to establish substantial performance. Uldrickson *v.* Samdahl, 92 Minn. 297, 100 N. W. Rep. 5.

Where substantial performance may be found, the court should instruct the jury that it may charge against the contract price the value of work left undone or improperly done. Finkelstein *v.* Miller, 54 Misc. Rep. 555, 104 N. Y. Supp. 880.

Defects which involve deviations from the general plan of construction which cannot be remedied without practically reconstructing the building, do not fall within the rule of substantial performance. Spence *v.* Ham, 163 N. Y. 220, 57 N. E. Rep. 412, 51 L. R. A. 238, aff'g 27 App. Div. 379, 50 N. Y. Supp. 960.

As to substantial performance, where work is done with machinery furnished by the employer, see Miller *v.* Isaac H. Blanchard Co., 84 N. Y. Supp. 585.

Where a building contract is not substantially performed, evidence that the building is a good one and suitable for the purposes for which it was constructed is inadmissible. Braseth *v.* State Bank, 12 N. D. 486, 98 N. W. Rep. 79.

One who claims compensation for substantial performance must show the cost of supplying omissions. Spence *v.* Ham, 163 N. Y. 220, 57 N. E. Rep. 412, 51 L. R. A, 238, aff'g 27 App. Div. 379, 50 N. Y. Supp. 960.

The owner may counterclaim for the damages sustained by reason of the contractor's failure to perform literally or he may bring a separate action therefor. Desmond-Dunne Co. *v.* Friedman Doscher Co., 162 N. Y. 486, 56 N. E. Rep. 995, aff'g 16

defendant's assent to deviation,[32] or his prevention of performance, be shown by the act of the other party; [33] or other excuse exonerating him.[34] If the employer refuses to per-

App. Div. 141, 45 N. Y. Supp. 111.

It is not necessary to counterclaim in order to obtain an allowance for deductions. Manning *v.* Ft. Atkinson School District No. 6, 124 Wis. 84, 102 N. W. Rep. 356.

Appropriate allegations should be made to permit a recovery on *quantum meruit* where the contract has not been strictly performed. Boyce *v.* Timpe (Iowa), 89 N. Y. Rep. 83.

[32] Rosc. N. P. 558; Hayden *v.* Hayward, 1 Camp. 180. Part performance followed by his voluntary and unexcused cessation of performance is not enough. Jennings *v.* Camp, 13 Johns. 94; Lantry *v.* Parks, 8 Cow. 63. In an action on an agreement to pay a certain portion of the profits of a joint adventure, upon condition that information furnished by the plaintiff should be true, the burden is on plaintiff to show that the information was true. Strong *v.* Place, 4 Robt. 385, s. c., 33 How. Pr. 114. Although if there was no such expressed condition the burden would be upon defendant to prove falsity, if he relied upon that. Id.; but compare Townsend *v.* Neale, 2 Camp. 191.

[33] Henderden *v.* Cook, 66 Barb. 23; Hudson River, etc., R. R. Co. *v.* Hanfield, 36 App. Div. 605, 55 N. Y. Supp. 877.

The rule applies although such prevention was for cause. Where an employee is discharged for cause, he may recover for his services to the time of the discharge subject to recoupment for damages. Hildebrand *v.* Amer. Fine Art. Co., 109 Wis. 171, 85 N. W. Rep. 268, 53 L. R. A. 826.

Where performance is prevented, the contractor may at once bring his action for damages. Vaughn *v.* Digman, 19 Ky. Law Rep. 1340, 43 S. W. Rep. 251.

A party who prevents performance cannot avail himself of the default he has occasioned, and thus avoid his agreement. Lehmann *v.* Warren, 209 Ill. 264, 70 N. E. Rep. 600.

[34] Wolfe *v.* Howes, 20 N. Y. 197, affi'g 24 Barb. 174, 666. Plaintiff should not be allowed to show facts excusing performance without appropriate allegations thereof in his complaint. Dwyer *v.* New York, 77 App. Div. 224, 79 N. Y. Supp. 17. See also, Scheurer *v.* Monash, 37 Misc. 803, 76 N. Y. Supp. 917, former appeal 35 Misc. 276, 71 N. Y. Supp. 818.

The plaintiff should plead either performance, or a waiver thereof. Young *v.* Stickney, 46 Ore. 101, 79 Pac. Rep. 345.

Under a municipal contract plaintiff agreed to perform labor and furnish certain materials, pursuant to a plan and specifications furnished by the city. Plaintiff guaranteed that his work would

accomplish a certain result which subsequently turned out impossible of accomplishment owing to the insufficiency of the plan, from which plaintiff, under a contract, could not depart. The work was done strictly as called for by the plan. The court, following the rule of reasonable construction held that plaintiff's guaranty applied only to the quality of the work and materials and that under the circumstances plaintiff was entitled to recover. MacKnight Flintic Stone Co. *v.* New York, 160 N. Y. 72, 54 N. E. Rep. 661, rev'g 31 App. Div. 332, 52 N. Y. Supp. 747.

The burning of a building in which plaintiff was doing work at a salary per week for a given period, does not deprive him of the right to recover for the full period in the absence of an agreement that the work was to be done in the burned building. Magida *v.* Wiesen, 114 App. Div. 866, 100 N. Y. Supp. 268.

A contractor is not excused from completing the contract by destruction of the work by accident or act of God. It is otherwise when he contracts to do a particular part of the work in the construction of a building. Atlantic, etc., R. R. Co., 98 Va. 503, 37 S. E. Rep. 13.

In an action for wrongful discharge where it was claimed that the contract provided that the employee might be discharged whenever his services proved to be unsatisfactory, it was held that the burden was on the employer to prove that the services were unsatisfactory. Mobile, etc., R. R. Co. *v.* Hayden, 116 Tenn. 672, 94 S. W. Rep. 940.

See National Contracting Co. *v.* Hudson River Water Power Co., 192 N. Y. 209, 84 N. E. Rep. 965, rev'g 118 App. Div. 665, 103 N. Y. Supp. 641.

Where performance by one party presupposes the doing of an act by the other, a covenant on the part of the latter is implied, for the breach of which there may be rescission or an action for damages. Petrolia Mfg. Co. *v.* Jenkins, 29 App. Div. 403, 408, 51 N. Y. Supp. 1028.

If the obligation to perform is dependent upon an act by the other party, his failure to do that act dispenses with performance. Howard *v.* Amer. Mfg. Co., 162 N. Y. 347, 56 N. E. Rep. 986, aff'g 15 Misc. 4, 36 N. Y. Supp. 430.

Where completion at the time specified is prevented by the owner, it is not necessary for the contractor to give notice that he will complete in order to recover for the additional expense occasioned by the delay. Barnum *v.* Williams, 115 App. Div. 694, 102 N. Y. Supp. 874.

Upon notice to proceed no further, the contractor may at once sue for damages. Chapman *v.* Kansas City, etc., R. R. Co., 146 Mo. 481, 48 S. W. Rep. 646. See also French *v.* City of Syracuse, 18 Misc. 278, 41 N. Y. Supp. 1036.

Where delay is occasioned by the owner, the contractor's time to complete is extended for a

form on his part, and actually prevents performance by the contractor, it is unnecessary for the latter to prove readiness and ability to perform.[35]

In a contract to perform work as soon as possible, or within a reasonable time, evidence of the surrounding circumstances is competent to show what was understood as a reasonable time.[36]

When the thing to be performed is expressed in terms of art, or technical terms, it is competent to ask a qualified witness as to whether the stipulation calls for a particular thing,[37] and as to the manner of performance.[38]

reasonable time. Barnum *v.* Williams, 115 App. Div. 694, 102 N. Y. Supp. 874.

As to the agency of the owner in completing unfinished work for the contractor, see Kennedy *v.* McKone, 10 App. Div. 88, 41 N. Y. Supp. 782. The objection that the contract was entire, so that full performance must be shown, if not taken at the trial, is not available to defendant on appeal. Jenkins *v.* Wheeler, 2 Abb. Ct. App. Dec. 442.

[35] Howell *v.* Gould, 2 Abb. Ct. App. Dec. 418.

Where one of the parties, by his own act, puts it beyond his power to carry out his part of the contract, the other party need not place himself in readiness to perform. It is sufficient for the latter to allege that he was ready and willing to perform. Morehouse *v.* Terrill, 111 Ill. App. 460.

[36] See Hydraulic Engineering Co. *v.* McHaffie, 27 Weekly R. 222.

On a question as to whether the performance was within a reasonable time, evidence of a prior completed contract between the parties was said to be admissible. Bellows *v.* Crane Lumber Co., 119 Mich. 424, 78 N. W. Rep. 536.

[37] Colwell *v.* Lawrence, 38 N. Y. 71, s. c., 36 How. Pr. 306, affi'g 38 Barb. 643, 24 How. Pr. 324.

In an action on a contract to make certain books of "Whiting Standard Ledger 22 pounds . . . sewed with extra heavy thread on two extra heavy bands, paper and binding to be fully equal to sample shown in every particular," it was held that, on proof that "Whiting Standard Ledger 22 pounds" was no longer made under that designation, evidence that the paper actually used was of an equal grade to that specified was admissible. Gallagher *v.* City of Philadelphia, 9 Pa. Super. Ct. 498, 43 Wkly. N. Cas. 499.

[38] Reed *v.* Hobbs, 3 Ill. (2 Scam.) 297; Conrad *v.* Trustees of Ithaca, 16 N. Y. 158. The testimony of the architect should be regarded as controlling, in a conflict of evidence, as to whether a building is erected in conformity with the con-

The mere fact that defendant took possession of his property, whether real[39] or personal,[40] does not necessarily amount to an admission that a contract to do work thereupon had been so performed as to impose any liability on him. The fact that defendant clandestinely removed the thing,[41] or refused to allow its inspection,[42] so as to preclude plaintiff having testimony to its quality, is relevant.

25. Certificates of Performance.

Certificates of performance, given by a third person, although he superintended the work, are not competent,[43] unless made so by agreement, or unless coupled with evidence that the person was the authorized agent of defendant to give such certificate.[44] If the promise to pay is conditioned on the work being done to the satisfaction of a third person, evidence of performance is not enough, without showing the satisfaction of that person.[45] But a stipulation

tract. Tucker *v.* Williams, 2 Hilt. 562. As to production of plans on the trial, see Stuart *v.* Binsse, 10 Bosw. 436.

[39] Reed *v.* Board of Education of Brooklyn, 4 Abb. Ct. App. Dec. 24.

[40] The Isaac Newton, 1 Abb. Adm. 11, 19.

Where, however, the property belongs to the party who has done the work, as, for instance, the reproduction of a picture, defendant cannot retain that property or a part thereof or of the work done and still rescind the contract. Central Bureau of Engraving *v.* J. W. Pratt Co., 60 Misc. 120, 111 N. Y. Supp. 561.

[41] Kidd *v.* Belden, 19 Barb. 266.

[42] Bryant *v.* Stillwell, 24 Pa. St. 314, 317.

One who is bound to pay the contract price on completion of the work and has practically the same means of knowledge of completion as the contractor, is not entitled to notice thereof in the absence of an express stipulation therefor. Drew *v.* Goodhue, 74 Vt. 436, 52 Atl. Rep. 971.

[43] Reed *v.* Scituate, 7 Allen, 141, 144.

Written reports by an expert who was employed by one of the parties in whose behalf such reports are offered in evidence, are inadmissible on the question as to whether a building conforms to the contract specifications. Manning *v.* Ft. Atkinson School District No. 6, 124 Wis. 84, 102 N. W. Rep. 356.

[44] Smith *v.* Kahill, 17 Ill. 67; Sutherland *v.* Kittredge, 19 Me. 424.

[45] Galef *v.* Standard Fish Co., 107 N. Y. Supp. 43; Butler *v.*

to pay according to estimates of a third person,[46] or that any matter of difference shall be determined by a third person,[47] without making his act a condition or conclusive, does not exclude other evidence of performance, or nonperformance.[48] If the contract contemplates a conclusive certificate, plaintiff must prove one,[49] substantially complying with the stipulation.[50] A general certificate, to a conclusion implying all the particulars, is enough,[51] but an evasive one is

Tucker, 24 Wend. 447, and cases cited; Barton *v.* Hermann, 11 Abb. Pr. N. S. 378. Compare Hart *v.* Lauman, 29 Barb. 410; Sharpe *v.* San Paulo Ry. Co., L. R. 8 Ch. App. 597, s. c., 6 Moak's Eng. 516.

As to the effect of acceptance of work as dispensing with necessity of producing architect's certificates, see Windham *v.* Independent Telephone Co., 35 Wash. 166, 76 Pac. Rep. 936.

The provision for a certificate is not to be deemed part of a subcontractor's undertaking. Modern Steel Structural Co. *v.* English Const. Co., 129 Wis. 31, 108 N. W. Rep. 70.

[46] Sherman *v.* Mayor, &c. of N. Y., 1 N. Y. 316.

[47] Hurst *v.* Litchfield, 39 N. Y. 377, and cases cited. Compare Morris Canal & B. Co. *v.* Nathan, 2 Hall, 239.

[48] Bigler *v.* Mayor, &c., of New York, 9 Hun, 253.

A certificate is conclusive as to visible defects but not as to latent defects. Spink *v.* Mueller, 77 Mo. App. 85.

[49] Smith *v.* Brady, 17 N. Y. 173, s. p., 1859, McMahon *v.* N. Y. & Erie R. R. Co., 20 N. Y. 463.

A provision for such a certificate is not objectionable as preventing a party from enforcing his rights by legal proceedings. Seim *v.* Krause, 13 S. D. 530, 83 N. W. Rep. 583.

A certificate given prior to the completion of the contract will not preclude the other party from showing failure to perform. Gallagher *v.* Minturn, 27 App. Div. 274, 50 N. Y. Supp. 491.

As to the certificate as a condition precedent, see Meyers *v.* Shapiro, 127 App. Div. 186, 111 N. Y. Supp. 503.

[50] Adams *v.* Mayor, &c. of N. Y., 4 Duer, 295; Morgan *v.* Birnie, 9 Bing. 672. The certificate need not be given in writing unless expressly required by the contract. Roberts *v.* Watkins, 14 C. B. N. S. 592, s. c., L. J., 32 C. P. 291.

Under a stipulation that all payments shall be made upon written certificate of the architect to the effect that such payments have become due, it is error to allow proof of a contract for extra work irrespective of such certificate. Bjorkegren *v.* Kirk, 56 Misc. Rep. 485, 107 N. Y. Supp. 34.

[51] Stewart *v.* Keteltas, 36 N. Y.

not.[52] On a question arising whether the certificate is sufficient within this rule, evidence that defendant made payments to plaintiff under the same contract, on similar certificates, without objection to their form, at the time of presentation, is relevant and conclusive.[53] Under these rules a certificate is conclusive in plaintiff's favor, unless defendant can show that it was procured by fraud.[54] Plaintiff may dispense with the requirement of a certificate by showing that the third person had unreasonably, and in bad faith, refused the

388, affi'g 9 Bosw. 261; Wyckoff *v.* Meyers, 44 N. Y. 143.

A certificate stating in effect that the work has been performed as required by the contract and in a satisfactory manner is sufficient. Graves Elevator Co. *v.* John H. Parker Co., 92 App. Div. 456, 87 N. Y. Supp. 156.

Where the party for whom the work is done, in assigning his reason for refusing payments, makes no reference to the sufficiency of the certificate furnished, he thereby waives any defects therein. Tilden *v.* Buffalo Office Bldg. Co., 27 App. Div. 510, 50 N. Y. Supp. 511.

The certificate need not follow the language of the contract. Eastham *v.* Western Const. Co., 36 Wash. 7, 77 Pac. Rep. 1051.

A certificate should not be excluded for a defect in verbal form. Bailey *v.* Presbyterian Bd., 200 Pa. St. 406, 50 Atl. Rep. 160.

[52] Smith *v.* Briggs, 3 Den. 73.

[53] Bloodgood *v.* Ingoldsby, 1 Hilt. 388; Bailey *v.* Presbyterian Board, 200 Pa. St. 406, 50 Atl. Rep. 160.

[54] Wyckoff *v.* Meyers, 44 N. Y. 143. Unless the contract requires proof of performance *and* certificate. Glacious *v.* Black, 50 N. Y. 151; Chandler *v.* Wheeler, 49 S. W. Rep. (Tenn. Ct. App.) 278 (certificate procured by collusion).

Schultze *v.* Goodstein, 180 N. Y. 248, 73 N. E. Rep. 21, rev'g 82 App. Div. 316, 81 N. Y. Supp. 946.

See also Robertson *v.* Grand Rapids, 96 Minn. 69, 104 N. W. Rep. 715.

So held with regard to decision of disputes by engineer. U. S. *v.* Gleason, 175 U. S. 588, 20 Sup. Ct. 228, 44 L. Ed. 284.

It is not sufficient to show an error of judgment. Brin *v.* McGregor, 45 S. W. Rep. (Tex. Civ. App.) 923.

Alteration of price to be paid as fraud. See Mills *v.* Norfolk, etc., R. R. Co., 90 Va. 523, 19 S. E. Rep. 171.

The question of bad faith is for the jury. Rawle *v.* Gilmore, 76 Ill. App. 372.

In a contract for mason work, evidence that measurements certified by the architect were not in accordance with rules provided for in the contract was held admissible. Koch *v.* Kuhns, 6 Pa. Super. Ct. 186, 41 Wkly. N. Cas. 429.

certificate,[55] and thereupon proving performance of the work; or by showing that defendant had waived the matters to which the certificate was required.[56]

[55] Thomas *v.* Fleury, 26 N. Y. 26; Bowery Nat. Bank *v.* Mayor, &c. of N. Y., 63 N. Y. 336, rev'g 3 Hun, 639; Neagle *v.* Herbert, 73 Ill. App. 17; MacKnight Flintic Stone Co. *v.* New York, 160 N. Y. 72, 54 N. E. Rep. 661; Langley *v.* Rouss, 85 App. Div. 27, 82 N. Y. Supp. 1082; North Amer. R. R. Const. Co. *v.* R. E. McMath Surveying Co., 54 C. C. A. 27, 116 Fed. Rep. 169; Foster *v.* McKeown, 192 Ill. 339, 61 N. E. Rep. 514; Dyer *v.* Middle Kittitas Irr. Dist., 25 Wash. 80, 64 Pac. Rep. 1009 (approval by Board of Directors). The wrongful withholding of the certificate need not be specifically alleged. Wyman *v.* Hooker, 2 Cal. App. 36, 83 Pac. Rep. 79; but see Weeks *v.* O'Brien, 141 N. Y. 199, 36 N. E. Rep. 185; Bird *v.* St. John's Episcopal Church, 154 Ind. 138, 56 N. E. Rep. 129. The refusal of an arbiter to act does not preclude the plaintiff from recovering. Potter *v.* Holmes, 72 Minn. 153, 75 N. W. Rep. 591. But the mere fact that the certificate should have been granted will not avail the plaintiff where the refusal was in good faith. Henbert *v.* Dewey, 191 Mass. 403, 77 N. E. Rep. 822. Generally the court will not overrule the decision of an architect in the absence of very strong evidence, Dugue *v.* Levy, 114 La. Ann. 21, 37 So. Rep. 995; but palpable errors, sufficient to leave no doubt of the injustice of the refusal have been held sufficient to dispense with production of the certificate. Fruin-Bambrick Const. Co. *v.* Ft. Smith, etc., W. R. Co., 140 Fed. Rep. 465. Arbitrary refusal is equivalent to fraud. Crane Elevator Co. *v.* Clark, 26 C. C. A. 110, 80 Fed. Rep. 705. To establish unreasonable withholding of a certificate the plaintiff must show compliance with the terms of the contract, Fox *v.* Clark, 44 App. Div. 626, 60 N. Y. Supp. 237; or substantial compliance. Bush *v.* Jones, 75 C. C. A. 582, 144 Fed. Rep. 942, 6 L. R. A. N. S. 774. Where the architect who was to furnish the certificate is one of the owners and contracting parties, a refusal to pay is equivalent to a refusal of the certificate. Abramson-Engesser Co. *v.* McCafferty, 86 N. Y. Supp. 185.

[56] Smith *v.* Gugerty, 4 Barb. 614; compare Barton *v.* Hermann, 11 Abb. Pr. N. S. 378. See further as to the subject of certificates, 1 Moak's Eng. 532, n.; 6 Id. 528, 871; 1 Redf. on Rw. 435; Schencke *v.* Rowell, 3 Abb. N. C. 42; Vanderhoof *v.* Shell, 42 Oreg. 578, 72 Pac. Rep. 126. See also Traitel *v.* Oussani, 51 Misc. 667, 101 N. Y. Supp. 105.

Where work is to be done to the satisfaction of the supervising architect, a failure seasonably to reject material or work operates as a waiver of defects in connection therewith. Ashland Lime,

If the stipulation makes the third person an arbitrator, notice of his examination is material.[57]

26. Excuse.

Evidence of an excuse for partial nonperformance is objectionable under an allegation of performance, but should be admitted by amendment if defendant is not misled.[58]

27. Shop-books and Other Accounts of a Party Offered in His Own Favor.

The rules already stated on this point [59] admit the account

etc., Co. *v.* Shores, 105 Wis. 122, 81 N. W. Rep. 136.

Where the contract provides for payments to be made during the progress of the work upon presentation of architect's certificates, evidence that about three-fourths of the contract amount was paid without insisting upon such certificates, is sufficient to justify a finding of a waiver. Boden *v.* Maher, 105 Wis. 539, 81 N. W. Rep. 661.

Where the owner notified the contractor that he would complete the work, the contractor, in an action on the contract, need not produce the engineer's certificate. Smith *v.* Wetmore, 167 N. Y. 234, 60 N. E. Rep. 419.

Defendant's failure to employ an architect constitutes a waiver of the provision that work be done to the satisfaction of the architect. Diehl *v.* Schmalacker, 30 Misc. 786, 62 N. Y. Supp. 1080.

[57] McMahon *v.* N. Y. & Erie R. R. Co., 20 N. Y. 463; Collins *v.* Vanderbilt, 8 Bosw. 313.

As to the admissibility of a certificate determining damages, based upon the *ex parte* statements of the owner without notice to the contractor, and not determined entirely in reference to matters within the contract, see Young *v.* Wells Glass Co., 187 Ill. 626, 58 N. E. Rep. 605, aff'g 87 Ill. App. 537.

A waiver of all rights of action with respect to any disputes that might arise is unlawful as an abrogation of the authority which has been conferred upon the courts. Mitchell *v.* Dougherty, 33 C. C. A. 205, 90 Fed. Rep. 639.

[58] Hosley *v.* Black, 28 N. Y. 438, s. c., 26 How. Pr. 97.

Under a complaint based on performance or substantial performance there is a variance if an excuse for non-performance is proved. Fox *v.* Davidson, 36 App. Div. 159, 55 N. Y. Supp. 524. See Olson *v.* Snake River Valley R. R. Co., 22 Wash. 139, 60 Pac. Rep. 156.

A waiver cannot be proved under an allegation of performance. Schillinger Bros. Co. *v.* Thompson-Starrett Co., 171 Ill. App. 319.

[59] Chapter XVI, paragraph 39 of this vol.

of mechanics and tradesmen;[60] and, upon the same principle, those of physicians.[61]

Charges made as each part of an entire work was completed are not incompetent;[62] but charges for anything done under a supposed special contract, but which, by reason of a rescission of the contract, afterwards became matter of account by operation of law, cannot be proved by the party's book. There must be a right to make an efficacious charge when the service is done.[63] Pay-rolls or check-rolls between a contractor and his laborers, though such as would be admissible as accounts between him and them are not admissible in evidence against the contractor's employer, to enable

[60] Linnell *v.* Sutherland, 11 Wend. 568; The Potomac, 2 Black, 581. Where an account has been kept in the ordinary course of business of laborers employed in the prosecution of a work, based upon daily reports of foremen having charge of the men, who, in accordance with their duty, reported the time to another subordinate of a higher grade of the same common master, and who, also, in time, in accordance with his duty, entered the time as reported, and where the foremen testify that they made true reports and the person who made the entries, that he correctly entered them, the entries so made are admissible as evidence to show the amount of work done. Mayor *v.* Second Ave. R. Co., 102 N. Y. 572, 7 N. E. Rep. 905. Books of account showing entries for time of workmen are admissible in evidence against a party who, by special contract, was to pay the expense of such work, though such entries were made the day after the work was done, from time-slips made by the workmen and marked "approved" by the foremen, who testify to their correctness, while the men who made the entries on the books testify that the slips were correctly copied. Chisholm *v.* Beaman Mach. Co., 160 Ill. 101, 43 N. E. Rep. 796.

A witness is not allowed to refresh his recollection from a statement written out by the bookkeeper of the defendant, it not being shown that the witness had knowledge of the correctness of the statement. Wagar Lumber Co. *v.* Sullivan Logging Co., 120 Ala. 558, 24 So. Rep. 949.

[61] Foster *v.* Coleman, 1 E. D. Smith, 85; Knight *v.* Cunnington, 6 Hun, 100. *Contra*, as to necessity of preliminary services, proof that physician kept correct books, &c. Clarke *v.* Smith, 46 Barb. 30.

[62] Kaughley *v.* Brewer, 12 Sergt. & R. 133.

[63] COWEN, J., Merrill *v.* Ithaca & Oswego R. R. Co., 16 Wend. 585, and cases cited.

the contractor to establish a *quantum meruit*, on the rescission of the contract, unless upon the ground that they were original entries.[64]

28. Defenses—What Admissible under Denial.

Under a general denial, defendant may prove any circumstances tending to show that he was never indebted at all, or that he never owed so much as was claimed; for example, that he never incurred the debt; or that the services, either in whole or in part, were rendered as a gratuity; or that plaintiff had himself fixed a less price for them than he claimed to recover; or that they were rendered upon the credit of some other person than the defendant.[65] If the complaint is a mere allegation of indebtedness the rule is still more liberal.[66] But a general denial does not admit evidence that plaintiff has converted the thing, in respect of which the services were alleged to have been rendered.[67] If the complaint is on a *quantum meruit*, not for an agreed price, a general denial admits evidence in reduction of the value, such as, that the work was unskillfuly done, or that defendant had discharged plaintiff, or given him notice to stop.[68] If the answer admits the employment and service alleged, and only denies the value, the quantity of work is

[64] Merrill *v.* Ithaca & Oswego R. R. Co., 16 Wend. 586. For the rule as to original entries see chapter XVI, paragraphs 37–39 of this vol.

[65] Schermerhorn *v.* Van Allen, 18 Barb. 29.

Under a general denial, the defendant is not confined to negative proof in denial of the facts alleged in the complaint, but may introduce proof of facts independent of those alleged by the plaintiff, as to show for instance, that the plaintiff did not do the work according to the contract. Gwinnup *v.* Shies, 161 Ind. 500, 69 N. E. Rep. 158; or that the services were rendered by some one other than the plaintiff. Outcalt *v.* Johnston, 9 Colo. App. 519, 49 Pac. Rep. 1058.

[66] Brown *v.* Colie, 1 E. D. Smith, 265.

[67] Wood *v.* Belden, 54 N. Y. 658, rev'g 59 Barb. 549. This is a counterclaim. Wadley *v.* Davis, 63 Barb. 500.

[68] Raymond *v.* Richardson, 4 E. D. Smith, 171; s. p., Bridges *v.* Paige, 13 Cal. 640.

not in issue, but only the value; [69] otherwise if it only admits employment and some service, not indicating the amount, and denies all other allegations.[70]

If the complaint is for an agreed price, a general denial does not admit evidence of unworkmanlike manner,[71] nor of negligence or affirmative misconduct; [72] unless the contract as pleaded requires plaintiff to show performance of its stipulations, in which case a general denial allows evidence to disprove performance.[73] If the answer alleges generally that plaintiff had failed to fulfill the contract, and also sets forth particular defaults, he is not confined to proving the particular defaults stated, but may prove any defaults under his general allegation.[74] If there is no general allegation, defendant may be confined to proof of the default alleged.[75] If the contract is special, a general denial admits evidence that it was different from that alleged, for instance, a qualifying contract of the same date,[76] or a usage which in contem-

[69] Van Dyke *v.* Maguire, 57 N. Y. 429.

[70] Albro *v.* Figuera, 60 Id. 630.

[71] Kendall *v.* Vallejo, 1 Cal. 371.

[72] Stoddard *v.* Treadwell, 26 Cal. 294, 305.

[73] Sisson *v.* Willard, 25 Ward, 572; Child *v.* Detroit Manufacturing Co., 72 Mich. 623, 40 N. W. Rep. 916; Turner *v.* Snyder, 132 Mo. App. 320, 111 S. W. Rep. 858.

[74] Trimble *v.* Stilwell, 4 E. D. Smith, 512.

[75] Brown *v.* Colie, 1 E. D. Smith, 265.

[76] See Marsh *v.* Dodge, 66 N. Y. 533, rev'g 4 Hun, 278; Stewart *v.* Thayer, 170 Mass. 560, 49 N. E. Rep. 1020.

In an action by an architect for compensation for preparing plans, the defendant may show under a general denial that the contract required plans for a house to cost not more than a certain sum, and breach of this requirement. Hellmuth *v.* Benoist (1910) (Mo. App.), 129 S. W. Rep. 257.

Under a general denial defendant may show that the services were rendered in consideration of the defendant's aid in procuring the plaintiff a position and that no charge was to be made for such services. Ziegler *v.* Smith (1909), 115 N. Y. Supp. 99.

Under a general denial, evidence of an additional term of the oral contract that it could be terminated on two weeks' notice is admissible, as, by showing what the contract was, it was shown that it was not as alleged in the complaint. Haines *v.* Thompson, 2 Misc. 385, 21 N. Y. Supp. 991. See also Bien *v.* Abbey, 13 N. Y. Supp. 286.

plation of law formed an integral part of the agreement;[77] but a denial of the contract only, does not admit evidence of a mutual abandonment of it.[78]

If there is a special contract, which the result of the work corresponds to, evidence that the thing will not answer its purpose is irrelevant.[79] On the other hand, if defendant shows that the contract was not faithfully performed, plaintiff cannot prove that the work would have been worth more than the contract price had it been performed.[80] An excess in the performance, if not shown to be detrimental, is not relevant.[81] But a departure may be, though not shown to be detrimental.[82]

If the complaint is general, defendant must aver a special contract, if he relies on it to show that by its terms nothing is due.[83] But under a general denial he may prove an agreement fixing a less price than that sued for.[84]

If the complaint is general for indebtedness, and does not allege a contract, the statute of frauds is available under a general denial.[85] Where the complaint sets forth a contract and the answer admits it, the statute is not available unless the facts to invoke the statute of frauds are pleaded.[86]

Evidence of a modification of a written contract of employment, reducing the amount to be paid to the employee, is admissible under a general denial. Romaine *v.* Beacon Lithographic Co., 13 Misc. 122, 34 N. Y. Supp. 124.

[77] Miller *v.* Ins. Co. of North America, 1 Abb. New Cas. 470.

[78] Laraway *v.* Perkins, 10 N. Y. 371.

[79] Kendall *v.* Vallejo, 1 Cal. 371, 373.

[80] Williams *v.* Keech, 4 Hill, 168.

[81] Turner *v.* Haight, 16 N. Y. 465.

[82] See Swain *v.* Seamens, 9 Wall. 254.

[83] Reed *v.* Scituate, 7 Allen, 141; Hagan *v.* Burch, 8 Iowa, 309, 312. Where a plaintiff closes his case without its appearing that there is any written contract relating to the subject matter of the action, the defendant, if he means to set up that there is such a contract, must produce it. Magnay *v.* Knight, 1 M. & Gr. 944, 950.

[84] Budreaux *v.* Tucker, 10 La. Ann. 80.

[85] Crane *v.* Powell, 139 N. Y. 379.

[86] Id.

So, also, where the answer denies the contract, the statute of frauds must be pleaded, otherwise it cannot be availed of to exclude evi-

29. Disproof of Employment.

In a conflict of evidence as to who was the real employer, it is competent for defendant to show that he employed another person to do the whole work,[87] and paid him.[88] Evidence that plaintiff received payments from a third person is competent, as tending to show that it was to him that plaintiff looked as employer.[89] The declarations of defendant, a part of the *res gestæ* of the circumstances under which the request was made, are competent in his own behalf.[90] Where the defense is that by agreement the business was carried on for joint account evidence of the acts, doings and declarations of the parties, the mode of transacting business and keeping the accounts, the dealings with others, and a memorandum in the handwriting of one and held by the other, though unsigned, tending to show such an agreement, are competent.[91] In disproof of the allegation of employment, evidence of plaintiff's conduct during the period, inconsistent with the relation, is relevant,[92] and where there is a conflict in the evidence, evidence that the plaintiff never rendered a bill is relevant to the issue.[93]

dence in proof of the contract. Thelberg *v.* National Starch Manufacturing Co., 2 App. Div. 173, 37 N. Y. Supp. 735.

[87] Pomeroy *v.* Pierce, 5 Hun, 119; S. P., Pelanne *v.* Coudreau, 16 La. Ann. 127. See Brower *v.* N. Y. Mailing & Advertising Co., 92 N. Y. Supp. 61.

Plaintiff's belief as to the identity of his employer is not admissible in his behalf in the absence of proof of some conduct on the part of the defendant justifying such belief. Petterson *v.* Stockton, etc., R. Co., 134 Cal. 244, 66 Pac. Rep. 304.

[88] Gerish *v.* Chartier, 1 C. B. 13, Steph. Ev. 18.

[89] Gilmore *v.* Atlantic & Pacific R. R. Co., 35 Barb. 279.

[90] Smith *v.* Smith, 1 Sand. S. C. 206; Beck *v.* Bonwit & Co., 153 N. Y. Supp. 888.

[91] Dickinson *v.* Robbins, 12 Pick. 74.

[92] See Daylon *v.* Hall, 8 Blackf. Ind. 556; Weber *v.* Kingsland, 8 Bosw. 415.

In like manner, evidence of defendant's conduct toward the plaintiff is admissible to show whether or not the plaintiff was treated as a servant by the defendant. Grotjan *v.* Rice, 124 Wis. 253, 102 N. W. Rep. 551.

[93] Dexter *v.* Collins, 21 Colo. 455, 458, 42 Pac. Rep. 664.

30. Payment.

In the case of weekly wages, systematically paid to a number of workmen or servants, evidence that plaintiff had been seen waiting with the others to receive his wages is competent to go to the jury, in connection with lapse of time before suit, from which to infer payment.[94] But the mere fact that fellow laborers were paid does not raise a presumption that plaintiff was.[95] Nor does mere lapse of time raise such a presumption, in the case of an ordinary domestic servant.[96]

31. Former Adjudication.

A former recovery for a part of a running account for continuous service, such as that of a physician, bars a new action for another part, even though the items be separate and distinct.[97] Otherwise, if the former recovery was on a distinct and separate contract.[98]

32. Limitations.

In applying the statute of limitations to a claim for services rendered continuously during a long series of years, it may be presumed that the contract contemplated yearly or monthly payments,[99] and if the employer is deceased, the

[94] Lucas *v.* Novosilieski, 1 Esp. 296; and see Seller *v.* Norman, 4 C. & P. 80.

[95] Filer *v.* Peebles, 8 N. H. 226, 231.

[96] Snediker *v.* Everingham, 27 N. J. L. (3 Dutch.) 143; and see Holmes *v.* The Lodemia, Crabbe, 434.

[97] Oliver *v.* Holt, 11 Ala. 574; compare O'Beirne *v.* Lloyd, 43 N. Y. 248.

[98] Phillips *v.* Berick, 16 Johns. 139. As to judgments for wages or price and judgments for discharge or breach, compare L. R. 10 C. P. 29, s. c., 11 Moak's Eng. 232; Routledge *v.* Hislop, 2 E. & E. 549; De Wolf *v.* Crandall, 34 Super. Ct. (J. & S.) 14; Davenport *v.* Hubbard, 46 Vt. 200, s. c., 14 Am. Rep. 620; and cases cited in last note to paragraph 1, chapter XIX of this vol.

A judgment rendered in an action on a specific contract of employment which had been only partially performed, is a complete bar to a subsequent action on *quantum meruit*. Holman *v.* Updike, 208 Mass. 466, 94 N. E. Rep. 689.

[99] Davis *v.* Gorton, 16 N. Y. 255.

statute is deemed to run from the completion of such periods of service unless there is sufficient evidence of the decedent's agreement to make provision for compensation by a disposition of his property at death.[1]

II. RULES PECULIARLY APPLICABLE TO PARTICULAR KINDS OF SERVICE

33. Advertising.

Evidence of sending in an advertisement, not in itself implying a limitation—such as is implied by an advertisement of a sale on a day named, and other transitory announcements—and without any direction as to number of insertions, implies a direction to continue till stopped.[2] Where a limitation is expressed or implied, evidence that the advertiser took the paper, and that the advertisement was brought to his knowledge, is not enough to sustain a finding that he authorized the continuation of it.[3] For advertising after valid notice to discontinue, the price is not recoverable; the claim, if any, must be for damages.[4]

[1] Nicholl *v.* Larkin, 2 Redf. Surr. R. 236.

The oral declarations of a deceased employer, made to third persons, to the effect that she intended to provide for plaintiff after his death are not sufficient to prove a promise to pay a debt or to constitute such an acknowledgment of a subsisting debt as to remove the bar of the statute of limitations. Gill *v.* Staylor, 97 Md. 665, 55 A. Rep. 398.

[2] Ahern *v.* Standard Life Ins. Co., 2 Sweeny, 441.

[3] Dake *v.* Patterson, 5 Hun, 558. One who publishes an advertisement by direction of a sheriff, marshal or other officer, cannot recover against the party without showing that the latter authorized the publication. Raney *v.* Weed, 3 Sandf. 577, s. c., 8 N. Y. Leg. Obs. 182.

If a contract for future advertising is assignable without notice to the defendant, his rights thereunder cannot be altered by the plaintiff's purchase of the publishing business. Accordingly if the defendant serves notice on the former owner that the contract is terminated, the fact that the plaintiff (assignee) thereafter publishes the advertisement does not raise an implied promise to pay. Ingalls *v.* Burlingame, 71 N. H. 19, 51 Atl. Rep. 175.

[4] Stephens *v.* Howe, 34 Super. Ct. (2 J. & S.) 133.

A contract whereby one party permits another to use a side of

It is better to be prepared to produce the file as the best evidence of actual publication;[5] but an advertising agent suing on a contract to insert in papers of a certain description, must at least prove the papers to have been such, and continuance for the time stipulated.[6] The rule as to shop-books[7] applies to the books of a newspaper printer to show his authority and prices, in connection with such evidence of performance.[8] A witness who wrote out a notice to be advertised, and gave it to another person to be inserted, but has no personal knowledge of the publication, cannot be examined, in the absence of all other proof, as to the contents published.[9]

Where the advertising was agreed to be done in some special form,—such as a chart,—not particularly described in the written contract, oral evidence is admissible to show that, at the time the contract was made, the plaintiff agreed to make the chart of a certain material, and to publish it in a certain manner.[10]

On the question of value, a qualified witness may be asked what is a fair price for advertising such a card in the manner published by the plaintiff.[11]

his house for advertising purposes for one year, does not create the relation of landlord and tenant, so as to authorize a finding of a "hold over" if the advertisement is not removed at the end of the stipulated period. Goldman *v.* N. Y. Advertising Co., 29 Misc. 133, 60 N. Y. Supp. 275.

[5] This was held necessary in Richards *v.* Howard, 2 Nott & M'C. 474. *Contra*, Enloe *v.* Hall, 1 Humph. (Tenn.) 303, 310. Compare next paragraph.

[6] Holloway *v.* Stephens, 2 Supm. Ct. (T. & C.) 562.

To recover against a county for official printing, the printer must show both the designation to do the printing and the performance of the services. Smith *v.* Van Buren County, 125 Iowa, 454, 101 N. W. Rep. 186.

[7] Chapter XVI, paragraph 39, and chapter XIX, paragraph 27 of this vol.

[8] Richards *v.* Howard (above); Thomas *v.* Dyott, 1 Nott & M'C. 186.

[9] City Bank of Brooklyn *v.* Dearborn, 20 N. Y. 244.

[10] Stoops *v.* Smith, 100 Mass. 63, s. c., 1 Am. Rep. 85.

[11] Palmer *v.* White, 10 Cush. 321, 323.

Where a newspaper, pursuant to the designation of a judge, publishes an advertisement in fore-

34. Artists; Architects; Authors.

In an *artist's* action for price of a portrait, evidence that defendant admitted that the portrait was good and accepted a delivery, is enough to go to the jury, though there be conflicting evidence on the question whether it was really a good likeness.[12] It is not necessary that a witness be an artist, in order to be competent to express an opinion on the question of likeness.[13] If it appear that the plans were left with the employer, the nature of the action is sufficient notice to produce them.[14] In the absence of express agreement, it is a question for the jury whether the commission charged is, under the circumstances, reasonable or unreasonable.[15]

In an action by an *author* or writer, for compensation, it is not necessary to produce the work written.[16] The

closure proceedings, it can only recover the amount of compensation therefor that is prescribed by law. Eberle *v.* Krebs, 50 App. Div. 450, 64 N. Y. Supp. 246.

In the absence of a statute regulating the price to be paid for publishing election tickets, the reasonable value of the work done at the time and place may be recovered. Pitkin County *v.* Price, 10 Colo. App. 519, 51 Pac. Rep. 1011.

[12] Francois *v.* Ocks, 2 E. D. Smith, 417. See Thomas *v.* Gage, 156 N. Y. 612, 51 N. E. Rep. 307.

In an action on a contract to paint a portrait, the artist cannot recover where it appears that the refusal to accept was not unreasonable, capricious or arbitrary. Barry *v.* Rainey, 27 Misc. 772, 57 N. Y. Supp. 766.

Where an artist contracts to paint portraits, and no place of delivery is fixed, that place is the artist's studio and no offer of delivery need be proved. Scott *v.* Miller, 114 App. Div. 6, 99 N. Y. Supp. 609.

[13] Barnes *v.* Ingalls, 39 Ala. 193.

Where the contract involves a question of personal taste or feeling, an agreement that the work (a portrait) shall be satisfactory to the buyer makes him the sole judge whether it complies with that condition. Pennington *v.* Howland, 21 R. I. 65, 41 Atl. Rep. 891, 79 Am. St. Rep. 774.

[14] Hooker *v.* Eagle Bank of Rochester, 30 N. Y. 83.

[15] Rosc. N. P. 558, citing Chapman *v.* De Tastet, 2 Stark. 294; Upsdell *v.* Stewart, Peake, 193. The schedule of the American Institute of Architects in New York is held not a proper rule of value of services elsewhere. Mason *v.* United States, 4 Ct. of Cl. 495. As to defects in the work, see Peterson *v.* Rawson, 34 N. Y. 370, 2 Bosw. 234.

[16] Houghton *v.* Paine, 29 Vt. 57.

authorship being in question, it is not competent to ask the opinion of a witness (founded merely on his having read the articles, and professing a knowledge of the plaintiff's style of writing), as to whether they were written by plaintiff.[17] On the question of value, the opinion of the writer, formed with reference to the time and labor employed in its preparation, is competent,[18] and, if uncontradicted, is sufficient.[19]

On the question whether an *architect's* employment was conditioned on the adoption of his plans, the fact that he took the plans away does not raise a legal presumption against him.[20]

35. Attorney and Counsel.

An attorney must prove an employment, either original, or by recognition during the progress of the suit;[21] or a prom-

[17] Lee *v.* Bennett, How. App. Cas. 187, 202.

[18] Babcock *v.* Raymond, 2 Hilt. 61.

[19] Id., s. p., Dickenson *v.* Fitchburgh, 13 Gray, 546, 555.

[20] Nourry *v.* Lord, 3 Abb. Ct. App. Dec. 397.

A provision that the plaintiff shall furnish plans satisfactory to the defendant does not mean plans that a jury might say should have been satisfactory. Barnett *v.* Beggs, 208 Fed. Rep. 255, 125 C. C. A. 455.

An architect cannot recover against a deceased builder's estate for preparing plans, where it appears that the uniform course of dealings between the parties during the deceased's lifetime was that the architect was not paid for plans unless they were actually used by the builder. In re McCaul, 206 Pa. 506, 56 Atl. Rep. 26.

Where the plans call for work far in excess of the amount stipulated or otherwise depart from the builder's instructions, the architect cannot recover. Emerson *v.* Kneezell, 62 S. W. Rep. (Tex. Civ. App.) 551; Feltham *v.* Sharp, 99 Ga. 260, 25 S. E. Rep. 619; Cann *v.* Church of Redeemer, 111 Mo. App. 164, 85 S. W. Rep. 994. But the rule is otherwise if the plans were accepted. Hight *v.* Klingensmith, 75 Ark. 218, 87 S. W. Rep. 138. Thus, where the plans are accepted and used for determining the cost of a building the architect may recover on *quantum meruit*. Horgan *v.* New York, 144 App. Div. 555, 100 N. Y. Supp. 68. See Douglas *v.* Rogers, 10 Ga. App. 486, 73 S. E. Rep. 700.

[21] Hotchkiss *v.* Le Roy, 9 Johns. 142; Burghart *v.* Gardner, 3 Barb. 64. (For other earlier cases see 2 Greenl. Ev. 120, § 139, &c.)

Where services are performed

ise to pay, made with knowledge of service rendered. Evidence of services rendered merely is not enough.[22] If retainer is proved, the fact that the service was for a third person does not defeat the recovery.[23] A paper in the cause,

with the knowledge and consent of the client, who avails himself thereof, the jury may find an implied contract. Davis *v.* Walker, 131 Ala. 204, 31 So. Rep. 554.

The fact that a foreclosure proceeding went through its natural stages, is evidence of ratification of an attorney's employment. Saxton *v.* Harrington, 52 Neb. 300, 72 N. W. Rep. 272.

Attorneys must show that the contract for services is reasonable if made after establishment of the relationship of attorney and client. Boyd *v.* Daily, 85 App. Div. 581, 83 N. Y. Supp. 539, aff'd in 176 N. Y. 556, 68 N. E. Rep. 1114; French *v.* Cunningham, 149 Ind. 632, 49 N. E. Rep. 797.

[22] Id. Attorneys transacting business as brokers, and entitled to compensation as such, must prove express contract, to recover a counsel fee for conversations with their employers about the business. Walker *v.* Am. Nat. Bank, 49 N. Y. 659.

Although the authority of an attorney to employ counsel at his client's expense should be expressly conferred, an implied contract to that effect may be shown. White *v.* Esch, 78 Minn. 264, 80 N. W. Rep. 976.

As to the presumption that counsel is to be paid by the client rather than by the attorney of record, see Allen *v.* Parish, 65 Kan. 496, 70 Pac. Rep. 351, Ennis *v.* Hultz, 46 Iowa, 76.

An attorney should not employ counsel in proceedings on behalf of an estate without the assent of the legal representatives. Kingsbury *v.* Joseph, 94 Mo. App. 298, 68 S. W. Rep. 93.

[23] Wilson *v.* Burr, 25 Wend. 386. As to proving ratification of employment of counsel, see Harnett *v.* Garvey, 36 Super. Ct. (4 J. & S.) 326. Retainer by one partner, Merchant *v.* Belding, 49 How. Pr. 344. As to combined employment, see Smith *v.* Duchardt, 45 N. Y. 597; Van Renssaelaer *v.* Aikin, 44 N. Y. 126, rev'g 44 Barb. 547. For rules applicable to contingent agreements, see Ogden *v.* Des Arts, 4 Duer, 275; Ely *v.* Spofford, 22 Barb. 231; Wood *v.* Young, 5 Wend. 620; Wadsworth *v.* Green, 1 Sandf. 78; Satterlee *v.* Jones, 3 Duer, 102; Marsh *v.* Holbrook, 3 Abb. Ct. App. Dec. 176; Coughlin *v.* N. Y. Cent. R. R., 71 N. Y. 443, rev'g 8 Hun, 136; Whitehead *v.* Kennedy, 69 N. Y. 462, 467, rev'g 7 Hun, 230.

A contract with an attorney providing that the client should not be entitled to settle or discontinue his action without the consent of the attorney is unenforcible as tending to foster and encourage litigation and therefore contrary to public policy. So is an agreement for a contingency

signed by the client, is better than oral evidence; [24] but there must be proof of the signature.[25] For services, under the Code of Procedure,[26] an attorney or counseller must prove, in the absence of an express agreement as to amount, the value of the services actually rendered.[27] Taxable costs are

fee in a divorce action void as against public policy. McCurdy *v.* Dillon, 135 Mich. 678, 98 N. W. Rep. 746; Davis *v.* Chase, 159 Ind. 242, 64 N. E. Rep. 88, 853, 95 Am. St. Rep. 294. But some courts allow attorneys who enter into such contracts to recover on *quantum meruit*, looking to the void contract merely to ascertain what the parties thought the services were worth. Davis *v.* Weber, 66 Ark. 190, 49 S. W. Rep. 822, 45 L. R. A. 196, 74 Am. St. Rep. 81; Gammons *v.* Johnson, 69 Minn. 488, 72 N. W. Rep. 563.

[24] Harper *v.* Williamson, 1 McCord (S. C.), 156; and see Hughes *v.* Christy, 26 Tex. 230, 232.

A deceased attorney's ledger showing a charge of $750, is not evidence of an agreement between him and the client as to the amount of his fee. Davis *v.* Fischer, 90 N. Y. Supp. 301.

The client should not be allowed to give his understanding of a contract of employment contained in correspondence where such correspondence is not produced. Fulton *v.* Western Stove Mfg. Co., 45 S. W. Rep. (Tex. Civ. App.) 1035.

Where the attorney relied upon a written agreement to pay him the sum of $300 in cash as a retainer and a percentage in addition thereto, and the defendant testified that $300 was to be paid only if the proceeding was successful, the action of the jury in disregarding the written agreement was so clearly against the evidence as to indicate prejudice. Klein *v.* Utz, 143 N. Y. Supp. 1099.

[25] Burghart *v.* Gardner, 3 Barb. 64. The presumption that the officer who allowed the document to be filed would not do so if it were not genuine, is not enough. Id.

[26] N. Y. Code, § 303; Code Civ. Pro., § 66.

[27] Garr *v.* Mairet, 1 Hilt. 498; S. P., Moore *v.* Westervelt, 3 Sandf. 762.

In the absence of a special agreement for compensation, an attorney is entitled to the reasonable value of his services. Rowell *v.* Ross, 87 Conn. 157, 87 Atl. Rep. 355; Bingham *v.* Spruill, 97 Ill. App. 374.

Where an attorney is prevented from fulfilling his contract by the client, he may recover on *quantum meruit* for the services which he has already rendered; and if the remuneration agreed upon was contingent upon the successful termination of the suit, the attorney can recover the reasonable value of the services but not the contingent fee. French *v.* Cunningham, 149 Ind. 632, 49 N. E. Rep. 797.

not the measure; and production of the judgment roll showing the costs taxed is not alone enough; [28] but the amount of taxable costs is competent as bearing on the value of the services.[29] Where the amount of compensation to be paid was not fixed, evidence of what is ordinarily charged by attorneys or counsel in cases of the same character, is admissible.[30] The importance and incidental effects of the controversy,[31] and the value of the property involved in litigation,[32] are competent for the same purpose, and as bearing on the care and labor involved. Evidence of how often the plaintiff appeared as attorney or counsel in the court where the services were rendered, is competent as showing skill and experience.[33] Retainer and service in a cause being proved, at an agreed rate, the question whether there were merits is irrelevant.[34]

Where the attorney dies before completion of the services, his representative can recover the reasonable value of the work actually performed not exceeding the sum fixed by contract. Sargent *v.* McLeod, 209 N. Y. 360, 103 N. E. Rep. 164, 52 L. R. A. N. S. 380.

The presumption is that attorney's fees allowed in a case are fair and reasonable, but this presumption is rebuttable. Ramage *v.* Littlejohn, 17 Wash. 386, 49 Pac. Rep. 486.

[28] Id.

[29] Foster *v.* Newbrough, 66 Barb. 645.

[30] Stanton *v.* Embrey, 93 U. S. (3 Otto) 548. An appellate court will not take judicial notice of value by looking at the reported briefs, &c. Pearson *v.* Darrington, 32 Ala. 227, 262. See Clark *v.* Ellsworth, 104 Iowa, 442, 73 N. W. Rep. 1033.

Where the defendant fails to produce evidence as to customary charges, he cannot complain that the jury was guided by the evidence introduced by the other party. Hart *v.* Wilson, 177 Ill. App. 510.

[31] Harland *v.* Lilienthal, 53 N. Y. 438; Clark *v.* Ellsworth, 104 Iowa, 442, 73 N. W. Rep. 1023.

[32] Garfield *v.* Kirk, 65 Barb. 468; Ottawa University *v.* Parkinson, 14 Kan. 159; Gorman *v.* Banigan, 22 R. I. 22, 29, 46 Atl. Rep. 38.

[33] Harland *v.* Lilienthal (above).

Professional standing and the extent of the attorney's professional business are properly considered in determining the value of services. Davis *v.* Webber, 66 Ark. 190, 49 S. W. Rep. 822, 45 L. R. A. 196, 74 Am. St. Rep. 81; Schlesinger *v.* Dunne, 36 Misc. 529, 73 N. Y. Supp. 1014, 10 N. Y. Ann. Cas. 350.

[34] Case *v.* Hotchkiss, 1 Abb. Ct. App. Dec. 324, s. c., 3 Abb. Pr.

Upon principles already stated,[35] the opinion of an attorney or counsellor as to the value of the services[36] (but not as to legal effect or right),[37] is competent; but that of a non-professional witness is not.[38]

Uselessness of the service, through error in advice, is not a defense, unless negligence or want of skill be shown to have contributed thereto.[39] The burden of proof of negligence

N. S. 381; 3 Keyes, 334, 37 How. Pr. 283.

Where a claim is received by an attorney from another, evidence of custom as to division of fees is admissible. Parker *v.* Gartside, 178 Ill. App. 634.

[35] Chapter XIX, paragraph 20 of this vol.

[36] Beekman *v.* Platner, 15 Barb. 550; Hart *v.* Vidal, 6 Cal. 56; Clark *v.* Ellsworth, 104 Iowa, 442, 73 N. W. Rep. 1023.

The court or jury may exercise an independent judgment in determining how far they will follow the opinion expressed. Schlesinger *v.* Dunne, 36 Misc. 529, 73 N. Y. Supp. 1014, 10 N. Y. Ann. Cas. 350.

Testimony as to value should not be based upon what the witness thinks is just and proper. McMannomy *v.* Chicago, etc., R. R. Co., 167 Ill. 497, 47 N. E. Rep. 712.

[37] Clussman *v.* Merkel, 3 Bosw. 402. Other than foreign law.

On the question of the value of a deceased attorney's services, an office associate may testify that the client complained of the deceased's handling of the matter. Boyd *v.* Daily, 85 App. Div. 581, 83 N. Y. Supp. 539, aff'd in 176 N. Y. 556, 68 N. E. Rep. 1114.

The statement of an attorney who is also an heir of an estate, that his services for the estate would be gratis, made under the impression that the other heirs were also to give their services gratis, did not prevent him from recovering the reasonable value of his services. Pickett *v.* Gore, 58 S. W. Rep. (Tex. Ct. App.) 402.

[38] Smith *v.* Kobbe, 59 Barb. 289; Howell *v.* Smith, 108 Mich. 350, 66 N. W. Rep. 218. But see Hand *v.* Church, 39 Hun (N. Y.), 303.

An attorney may not testify as to the compensation which he received for a similar case, where it does not appear that his experience, talent and amount of labor involved was the same in both cases. Ottawa University *v.* Parkinson, 14 Kan. 159.

A statement of the trial judge as to what the trial attorneys should have for services is incompetent. Walbridge *v.* Barrett, 118 Mich. 433, 76 N. W. Rep. 973.

[39] Bowman *v.* Tallman, 3 Abb. Ct. App. Dec. 182, note. The right to compensation for services in one matter is not forfeited by his misconduct in another; Currie *v.* Cowles, 6 Bosw. 452; nor by act-

is on the client.[40] Failure of success is not *prima facie* evidence of negligence or want of proper skill.[41]

36. Board and Lodging.

An implied promise by a father to pay for board and lodging of a child may be inferred from knowledge and omission to dissent.[42] Declarations of the child, if part of the *res gestæ* of removal, may be competent on the question of *loco parentis*, or gratuitous support.[43] The implied promise of a guardian to continue to pay may be implied from previous payments.[44] Such agreements are not within the statute of frauds, unless expressly to continue beyond a year from the time when made.[45] But if for a year or more to commence at a future day they are.[46] An agreement for board, though with lodging, in a specified apartment, is not a tenancy of real estate within the statute requiring writing.[47]

ing adversely; Porter *v.* Ruckman, 38 N. Y. 210. See Leo *v.* Leyser, 36 Misc. 549, 73 N. Y. Supp. 941.

[40] Seymour *v.* Cagger, 13 Hun, 29.

[41] Id.

But failure of success is an element to be considered in determining an allowance to an attorney. Germania Safety, etc., Co. *v.* Hargis, 23 Ky. Law Rep. 874, 64 S. W. Rep. 516.

What the services were worth to the client is not a criterion in determining the amount of compensation. Kingbury *v.* Joseph, 94 Mo. App. 298, 68 S. W. Rep. 93.

[42] Nichole *v.* Allen, 3 C. & P. 36. To recover for board and maintenance of defendant's illegitimate child, an express promise must be shown, or it must be shown that he admitted himself the father and adopted the child, in which case plaintiff may recover on the implied promise for maintenance during the adoption, but not for that after the adoption has been revoked. Nelson, Ch. J. Moncrief *v.* Ely, 19 Wend. 406, and cases cited.

[43] Edy *v.* McCoy, 20 Ala. 403; and see chapter VI, paragraph 24 of this vol.

[44] Pegge *v.* Guardians of Lampeter Union, L. R. 7 C. P. 366, s. c., 2 Moak's Eng. 668.

[45] Knowlman *v.* Bluett, L. R. 9 Ex. 1, s. c., 7 Moak's Eng. 287.

[46] Wilson *v.* Martin, 1 Den. 602.

[47] Wilson *v.* Martin (above); Inman *v.* Stamp, 1 Stark. 12; Edge *v.* Strafford, 1 C. & J. 391. Nor is an agreement for lodgings only. White *v.* Maynard, 111 Mass. 250, s. c., 15 Am. Rep. 28. *Contra*, Wright *v.* Stavert, 2 E. & E. 721, L. J. 29 Q. B. 161.

One who has had long experience in the care of a person, *non compos*, is competent to express an opinion as to the value of his board and care.[48]

37. Brokers.

In a conflict of evidence as to employment, evidence of acts and declarations by the plaintiff, made in the interest of the other party to the bargain, and in hostility to defendant within the period covered by the alleged employment, is competent.[49] A clause stating terms of employment, inserted in a contract with a third person to which plaintiff was not a party, does not exclude oral evidence.[50] The testimony of a broker, that in a hypothetical case stated, brokers would be entitled to commission, is inadmissible. This is a question of law.[51]

A real estate broker, acting as such (and not as middleman, with the knowledge of both parties that he acts for both),[52] cannot recover from either, if employed by and entitled to compensation from the other,[53] unless this double employment was disclosed to[54] and assented to, by

[48] Kendall *v.* May, 10 Allen (Mass.), 59, 67. And see Reynolds *v.* Robinson, 64 N. Y. 589.

[49] Miller *v.* Irish, 63 N. Y. 652, affi'g 3 Hun, 352, s. c., 5 Supm. Ct. (T. & C.) 707; Morris *v.* Poundt, 51 Misc. 6, 99 N. Y. Supp. 1002; Callaway *v.* Equitable Trust Co., 67 N. J. L. 44, 50 A. Rep. 900; Gordon *v.* First Univ. Soc., 217 Mass. 30, 104 N. E. Rep. 448.

[50] Weber *v.* Kingsland, 8 Bosw. 415.

[51] Main *v.* Eagle, 1 E. D. Smith, 619; Weber *v.* Kingsland, 8 Bosw. 415. Compare Allan *v.* Sundius, 1 H. & C. 123.

[52] Siegel *v.* Gould, 7 Lans. 177; Rupp *v.* Sampson, 16 Gray, 398.

Where the broker acts merely as a middleman for the purpose of bringing the parties together and takes no part in the negotiations, he is entitled to recover. American Security, etc., Co. *v.* Penney, 129 Minn. 369, 152 N. W. Rep. 771; King *v.* Reed, 24 Cal. App. 229, 141 Pac. Rep. 41.

[53] Cohn *v.* Cohen, 157 N. Y. Supp. 125; Levy *v.* Gross, 46 Okl. 626, 149 Pac. Rep. 237; Walker *v.* Osgood, 98 Mass. 348, 93 Am. D. 168. Whether the broker is acting in a dual capacity is a question for the jury. Wheeler *v.* Lowler, 222 Mass. 210, 110 N. E. Rep. 273.

[54] Redfield *v.* Tegg, 38 N. Y. 212;

both,[55] and evidence in his behalf to show a custom among brokers to charge a commission to both parties in such cases is inadmissible.[56]

It is competent to ask the purchaser, as a witness, if he would have purchased had he not gone to the plaintiff and obtained information from him.[57] If the employment requires the broker to conclude a contract, he cannot prove a sale by a written instrument which on its face does not bind the purchaser, aided by parol evidence of mistake or other circumstances which would make it binding, for the seller (unless his acceptance of a purchaser is shown) is entitled to a valid contract under the statute.[58]

If there was a contract for compensation, plaintiff need not prove any usage of brokerage for like services; [59] and if

and see Coleman *v.* Garrigues, 18 Barb. 60; Glentworth *v.* Luthen, 21 Id. 145; Morrison *v.* New York & New Haven R. R. Co., 32 Id. 568; Levy *v.* Gross (above). See also Madden *v.* Davis, 192 Ill. App. 575.

[55] Rice *v.* Wood, 113 Mass. 133, s. c., 18 Am. Rep. 459.

The burden of proving such knowledge and assent is upon the broker. Cohn *v.* Cohen, 157 N. Y. Supp. 123; Leno *v.* Stewart, 89 Vt. 286, ,95 Atl. Rep. 539, Ann. Cas. 1917, A. Rep. 509.

[56] Farnsworth *v.* Hemmer, 1 Allen, 494; Raisin *v.* Clark, 41 Md. 158, s. c., 20 Am. Rep. 66; and see Lynch *v.* Fallon, 11 R. I. 311, s. c., 23 Am. Rep. 458; and chapter XVI, paragraph 10 of this vol.

[57] Mansell *v.* Clements, L. R. 9 Com. Pl. 139, s. c., 8 Moak's Eng. R. 449.

A purchaser, who has testified that the sale to him was not negotiated through plaintiff, may state the circumstances of his going to the defendant to buy the goods. Wheeler *v.* Buck, 23 Wash. 679, 63 Pac. Rep. 566.

[58] Stitt *v.* Huidekopers, 17 Wall. 397. As to whether consummated purchase must be shown, compare Love *v.* Miller, 53 Ind. 294, s. c., 21 Am. Rep. 192; and Richards *v.* Jackson, 31 Md. 250, s. c., 1 Am. Rep. 49. See Bird *v.* Rowell, 180 Mo. App. 421, 167 S. W. Rep. 1172; Matthews *v.* Globe-Star Realty Co., 167 S. W. Rep. (Tex. Civ. App.) 764.

[59] Paulsen *v.* Dallett, 2 Daly, 40.

Evidence of reasonable value is not admissible where the amount of compensation is specified by the contract. Canton-Hughes Pump Co. *v.* Llera, 215 Fed. Rep. 79, 131 C. C. A. 387; Kitchen *v.* Kaveney, 33 S. D. 312, 145 N. W. Rep. 543. See Bryant *v.* Ayers, 190 Ill. App. 499; McKinnon *v.* Gates, 102 Mich. 618, 61 N. W. Rep. 74. But it

it specified the conditions, evidence that, by the usage of brokers, commissions are allowable, although the conditions are not complied with, is not competent.[60] If plaintiff was not a broker by vocation, evidence of the usual commissions of a broker is not competent.[61] He must prove that he was a broker, to make evidence of their usual charge available as the measure of recovery.[62] General value of time, travel and expense may be proved by opinion.[63] Opinion is not competent on the value of brokage services for procuring a loan, for that is fixed by statute; nor the value of a loan of credit, for credit has no market value.[64] Evidence that defendant had previously paid plaintiff brokage on similar transactions is competent, as tending to show usage and knowledge of it.[65]

38. Officers and Promoters of Corporations.

The law does not imply a promise on the part of corporations to pay their directors, as such; and it must appear that an express by-law or resolution of the board[66] was adopted to compensate them, before a director can recover for services as director. Otherwise, as to duties not imposed upon him as director by the charter or by-laws of the company, where he acted not as director but as agent, for instance, in soliciting subscriptions and procuring right of way.[67] If a director is ap-

has been held that where brokerage has been earned under an express contract, the plaintiff may recover on the common counts and may put the contract in evidence in proof of the particulars of the general right sued on. Risley *v.* Beaumont, 71 N. J. Law, 372, 59 Atl. Rep. 145.

[60] Main *v.* Eagle, 1 E. D. Smith, 619; Clark *v.* Hovey, 217 Mass. 485, 105 N. E. Rep. 222.

If the contract contains conditions precedent to payment they should be pleaded and proved on the trial. Turner *v.* Lane, 47 Misc. 387, 93 N. Y. Supp. 1083.

[61] Lyon *v.* Valentine, 33 Barb. 271. Compare Erben *v.* Lorillard, 19 N. Y. 299, 2 Keyes, 567. *Contra*, Elting *v.* Sturtevant, 41 Conn. 176.

[62] Main *v.* Eagle (above).

[63] Perrine *v.* Hotchkiss, 58 Barb. 77.

[64] Perrine *v.* Hotchkiss, 58 Barb. 77.

[65] Weber *v.* Kingsland, 8 Bosw. 415.

[66] Alston Mfg. Co. *v.* Squair, 105 Ill. App. 238. Or the corporators.

[67] Cheney *v.* Lafayette, Bloomington & Mississippi R. R. Co., 68 Ill. 570, s. c., 18 Am. Rep. 585; Shackleford *v.* Orleans R. R. Co.,

pointed by the board agent of the corporation in such other matters, clearly beyond the range of his duty, there is an implied promise on the part of the corporation to compensate him for such services rendered;[68] but not for services in effecting the organization, unless they were unquestionably beyond the range of his official duties.[69] Where the charter provides that the president shall receive no pay for official services unless voted him by the board, any service performed by him will be presumed to have been rendered as president, unless from its nature it appears that it was outside the duties of his office.[70] The rule requiring an express con-

37 Miss. 202; Hall *v.* Vt. & Mass. R. R. Co., 28 Vt. 401.

Under a vote of a club appointing its president "to let the building and collect the rents" he may recover for his services in so doing. Flynn *v.* Columbus Club, 21 R. I. 534, 45 Atl. Rep. 551.

[68] Shackleford *v.* New Orleans R. R. Co., 37 Miss. 202. *Contra*, New York & New Haven R. R. Co. *v.* Ketchum, 27 Conn. 170, 181; and compare Stacy *v.* State Bank of Illinois, 4 Scam. 91; McGowan *v.* Finola Mfg. Co., 120 Md. 335, 87 Atl. Rep. 694; Chicago Macaroni Mfg. Co. *v.* Boggiano, 202 Ill. 312, 67 N. E. Rep. 17; Barrenstecher *v.* The Hof Brau, 67 Or. 194, 135 Pac. Rep. 518; Bassett *v.* Fairchild, 132 Cal. 637, 64 Pac. Rep. 1082, 52 L. R. A. 611.

An attorney may recover the value of his services as such, although he be a director, if they are not within the scope of his duties as director. Taussig *v.* St. Louis, etc., R. R. Co., 166 Mo. 28, 65 S. W Rep. 969, 89 Am. St. Rep. 674.

A resolution of the board of directors is not essential. Bagley *v.* Carthage, etc., R. R. Co., 165 N. Y. 179, 58 N. E. Rep. 895.

[69] New York & New Haven R. R. Co. *v.* Ketchum, 27 Conn. 170. But compare as to services in organization, Hall *v.* Vermont, &c. R. R. Co., 28 Vt. (2 Ams.) 401; Low *v.* Connecticut, &c. R. R. Co., 45 N. H. 370.

[70] Olney *v.* Chadsey, 7 R. I. 224. See Adlets *v.* Progressive Shoe Co., 84 Mo. App. 288. Where an officer's regular duties are merely nominal, he may recover for other services. Baines *v.* Coos Bay Co., 41 Ore. 135, 68 Pac. Rep. 397. A director elected to serve without compensation cannot recover against the company for services rendered in that capacity, or for such as were incidental to his office as director. Loan Association *v.* Stonemetz, 29 Pa. St. 534. Even a resolution passed by the corporation after the services were rendered, that they be paid for, is without consideration and cannot be enforced by action. Ib.

tract to pay directors, made before service rendered, is applicable to the offices of president, treasurer, and the like, who hold as trustees.[71] If the evidence of promise is oral, the admissions of the officer that he was not to have compensation are competent against him.[72]

To enable a *promoter* to recover against the subsequently organized corporation, it is not enough that the corporation has accepted the result of his labors and enjoyed its benefits,

See Ravenswood, etc., Nav. R. R. Co. *v.* Woodyard, 46 W. Va. 558, 33 S. E. Rep. 285. And to similar effect is Dunstan *v.* Imperial Gas Co., 3 Barn. & Ad. 125. See also on the general subject of officers' implied contract for compensation (besides the cases cited in following notes): Jackson *v.* N. Y. Cent. R. R. Co., 2 Supreme Ct. (T. & C.) 653; Henry *v.* Rutland & Burlington R. Co., 27 Vt. 435; Rockford, Rock Island, &c. R. R. Co. *v.* Sage, 65 Ill. 328; Baistow *v.* City R. Co., 42 Cal. 465; Godbold *v.* Bank of Mobile, 11 Ala. 191; Belfast & County Downs R. R. Co. *v.* Belfast, Holywood, &c. R. R. Co., Ir. Rep. 3 Eq. 581. A vote of the directors during the incumbency of one president fixing the salary of the president, does not amount to a written agreement to pay the same to a president subsequently elected, and any presumption arising from it may be rebutted by evidence of the situation or cessation of business, etc. Commonwealth Ins. Co. *v.* Crane, 6 Metc. 64.

[71] Holder *v.* Lafayette, &c. R. R. Co., 71 Ill. 106, s. c., 22 Am. Rep. 29; Kilpatrick *v.* Penrose Ferry Co., 49 Penn. St. 118; and see Cheney *v.* Lafayette, &c. R. R. Co., 68 Ill. 570, s. c., 18 Am. Rep. 584. See as to application of rule to secretary, N. & M. R. R. Co. *v.* Hay, 7 Ky. Law Rep. (abs.) 665.

The president of a corporation who conducts a litigation for it, resulting in the recovery of a considerable sum of money, is not entitled to compensation for his services in connection with the litigation. Winfield Mtge., etc., Co., *v.* Robinson, 89 Kan. 842, 132 Pac. Rep. 979, Ann. Cas. 1915, A. 451.

Where a member and officer of an incorporated museum society had been curator for fifteen years, and knew that it had never paid any of its officers for their services, it was held that there was nothing to go to the jury on the question of an implied contract to pay for his services. Whittemore *v.* Kent Scientific Inst., 128 Mich. 518, 87 N. W. Rep. 623.

[72] Commonwealth Ins. Co. *v.* Crane, 6 Metc. 64.

No quorum is present when action is taken on a matter as to which one of the directors necessary to make the quorum is interested. Bassett *v.* Fairchild, 132 Cal. 637, 64 Pac. Rep. 1082, 52 L. R. A. 611.

unless it appear that the projectors, by whom the services were employed, on an understanding they should be paid for, were a majority of the promoters, or that the charter had already been obtained, so that there was an inchoate corporation.[73] If no corporation was formed, evidence that defendant took part in the preliminary proceedings is competent as tending to show his authority to incur the necessay expenses.[74]

39. Parent and Child.

To sustain the father's action for the child's services, general evidence that plaintiff is the father, is *prima facie* enough. He is not to be required to prove legitimacy in the first instance.[75] If a parent sends the child to engage himself, he may recover on the terms the child made, without proof that they were known to the father.[76]

To entitle the child to sue, evidence that the child contracted on his own account, with the knowledge and tacit assent of the father;[77] or that the father has been contin-

[73] Bell's Gap R. R. Co. *v.* Christy, 79 Penn. St. 54, s. c., 21 Am. Rep. 39. But compare Rockford, Rock Island, &c. R. R. Co. *v.* Sage, 65 Ill. 328, s. c., 16 Am. Rep. 587, and cases cited.

The secretary to the promoters of a corporation is held not to have shown any agreement to pay for his services. West Point Til., etc., Co. *v.* Rose, 76 Miss. 61, 23 So. Rep. 629.

Directors of a manufacturing corporation have no implied authority to employ agents to organize corporations in other states and agree on their compensation. Eakins *v.* Am. White Bronze Co., 75 Mich. 568, 42 N. W. Rep. 982.

[74] Lake *v.* Duke of Argyll, 6 Q. B. 479; and see Ebbinghousen *v.* Worth, 4 Abb. New Cas. note.

[75] Haight *v.* Wright, 20 How. Pr. 91. *Contra*, Armstrong *v.* McDonald, 10 Barb. 300, clearly unsound.

[76] Herderhen *v.* Cook, 66 Barb. 21. As to whether the declarations of the son in such case are competent in evidence to prove the terms of the contract, compare Corbin *v.* Adams, 6 Cush. 93, and chapter VI, paragraph 19 of this vol.

The fact that the father has allowed the son to collect his wages does not prevent the father from bringing an action for an uncollected portion. Kooser *v.* Housh, 78 Ill. App. 98.

[77] Armstrong *v.* McDonald, 10 Barb. 300.

uously absent, without providing for the child,[78] or that the father made the contract, stipulating that the wages should be paid to the child,[79] is enough. So is evidence of express emancipation. Payment to the child may be a defense, unless the parent gave notice.[80]

40. Physicians, &c.

A diploma from a medical college is sufficiently proved by a witness who identifies the corporate seal, and testifies to the genuineness of the signatures of the officers, though his knowledge of their writing was not acquired by seeing them write, but by familiarity with diplomas under their signatures, including one granted to himself.[81] Recovery for a beneficial operation is not prevented by showing that it was

Where the father has permitted his son to contract for his services, collect the wages and appropriate them to his own use, the son is entitled to recover them until the license is revoked. Vance *v.* Calhoun, 77 Ark. 35, 90 S. W. Rep. 619, 113 Am. St. Rep. 111.

[78] Canovar *v.* Cooper, 3 Barb. 115.

Where a child was illegitimate and its father left the state when it was an infant, it was held that he had no claim to the compensation for the child's services. McMorrow *v.* Dowell, 116 Mo. App. 289, 90 S. W. Rep. 728.

[79] Snedeker *v.* Everingham, 27 N. J. L. (3 Dutch.) 143, 148. Compare Brown *v.* Town of Canton, 49 N. Y. 632, rev'g 4 Lans. 409; Atwood *v.* Holcomb, 39 Conn. 270, s. c., 12 Am. Rep. 386. As to service under void indentures, compare Letts *v.* Brooks, Hill & D. Supp. 36, and Lewis *v.* Trickey, 20 Barb. 387.

[80] By statute in some states, the parent or guardian of the child cannot claim the child's wages unless such parent or guardian serves a notice upon the employer within a specified time after the commencement of the employment that the wages will be claimed by him. Watson *v.* Kemp, 42 App. Div. 372, 59 N. Y. Supp. 142; Herrick *v.* Fritcher, 47 Barb. 589, N. Y. L. 1850, c. 266; Clinton *v.* Rowland, 24 Barb. 624.

[81] Finch *v.* Gridley, 25 Wend. 469. For other rules, as to corporate acts, see p. 57, &c., of this vol. and compare Hunter *v.* Blount, 27 Ga. 76. As to evidence of employment, see Crane *v.* Baudoine, 55 N. Y. 256, rev'g 65 Barb. 260; Cooper *v.* N. Y. Central & Hudson River R. R. Co., 6 Hun, 276; Mundorf *v.* Wickersham, 63 Penn. St. 87, s. c., 3 Am. Rep. 531; M'Bride's Ex'x *v.* Watts, 1 M'Cord, 384.

not performed with the highest skill.[82] Even if the patient is deceased, the burden of proof is on his executor or administrator, to show that services proved to have been rendered, were gratuitous, if that be relied on.[83]

41. Rewards.

The printed advertisement is competent upon adducing evidence tending to show that it was published by authority of defendant, or his agent.[84] Oral evidence is admissible to show that an ambiguous offer of reward relating to a class of crimes, was not retrospective.[85] Plaintiff must show that performance, on his part, was in consideration of the offer.[86]

[82] Alder *v.* Buckley, 1 Swan (Tenn.), 69; and see 3 Abb. New Cas. 229. General professional character not in issue. Jeffries *v.* Harris, 3 Hawks (N. C.), 105. As to declining to answer respecting secret processes, compare Naumon *v.* Zoerklaut, 21 Wisc. 466; Richards *v.* Judd, 15 Abb. Pr. N. S. 184.

Evidence that a physician was not of good repute is incompetent in an action for services. Prietto *v.* Lewis, 11 Mo. App. 601 (memorandum decision.)

In an action for surgeon's services testimony that the place in which the operation was performed was unfit for that purpose, is pertinent as to the reasonableness of the plaintiff's services. Sayles *v.* Fitzgerald, 72 Conn. 391, 44 Atl. Rep. 733.

A contract by a surgeon to charge from two hundred to four hundred dollars is not too vague and indefinite to form the basis of a cause of action. Doyle *v.* Edwards, 15 S. D. 648, 91 N. W. Rep. 322.

[83] Scott's Case, 1 Redf. Surr. R. 234, 237. A physician's books are not admissible as evidence of his services rendered to the decedent, In re Fulton's Estate, 178 Pa. St. 78, 35 Atl. Rep. 880.

In an action by a physician against the administrator of a deceased patient, his testimony as to his services, the value thereof, and that no part has been paid, is admissible. Corbus *v.* Leonhardt, 114 Fed. Rep. 10, 51 Cir. Ct. Ap. 636.

[84] Lee *v.* Trustees of Flemingsburg, 7 Dana (Ky.), 28; see also p. 123 of this vol.

[85] Salvadore *v.* Crescent Mut. Ins. Co., 22 La. Ann. 338.

[86] Lee *v.* Trustees of Flemingsburg (above), and see Marvin *v.* Treat, 37 Conn. 96, s. c., 9 Am. Rep. 307.

No recovery can be had where the services were substantially all rendered before the reward was offered. Williams *v.* West Chicago St. R. R. Co., 191 Ill. 610, 61 N. E. Rep. 456, 85 Am. St. Rep. 278.

He cannot recover if he acted in ignorance of it.[87] But notice to defendant that he was acting on the offer, is not necessary.[88] If the reward was offered for two results, such as apprehension and conviction,[89] or apprehension and recovery of stolen property,[90] both, must be shown. On a reward for a detection or conviction, etc., the record of a conviction of an offender is competent,[91] but not conclusive,[92] evidence of his guilt, as against the offerer. If conviction was prevented by dismissal of the charge procured by the offerer, plaintiff may still recover, as if he proved conviction; and if the dismissal was procured by the attorney of the offerer, for the

It is a defense to an action on an offer of reward for an arrest and conviction that the person claiming the same was employed by the defendant to report as to the matter in question. Van Horn *v.* Ricks Water Co., 115 Cal. 448, 47 Pac. Rep. 361.

[87] Howland *v.* Lounds, 51 N. Y. 604. And if the offer is for apprehension and conviction of the offender, one who procured apprehension before he knew of the offer, cannot recover on proof of a subsequent conviction, even though after he became aware of the offer he aided the conviction; for both apprehension and conviction must be aided, *in consequence of such a reward*, to entitle the party to claim it. Fitch *v.* Snedaker, 38 N. Y. 248. Compare Gregg *v.* Pierce, 53 Barb. 387. As to apportionment of reward, see Janvrin *v.* Town of Exeter, 48 N. H. 83, s. c., 2 Am. Rep. 185; City Bank *v.* Bangs, 2 Edw. 95; Fargo *v.* Arthur, 43 How. Pr. 193; Prentiss *v.* Farnham, 22 Barb. 519.

[88] Baker *v.* Hoag, 7 Barb. 113; Hayden *v.* Songer, Ind. May, 1877.

[89] Fitch *v.* Snedaker (above).

The reward cannot be apportioned. Williams *v.* West Chicago St. R. R. Co., 191 Ill. 610, 61 N. E. Rep. 456, 85 Am. St. Rep. 278.

[90] Jones *v.* Phœnix Bank, 8 N. Y. 228.

[91] Borough of York *v.* Forscht, 23 Penn. St. 391; Arkansas Southwestern R. Co. *v.* Dickinson, 78 Ark. 483, 95 S. W. Rep. 802, 115 Am. St. Rep. 54.

[92] Mead *v.* City of Boston, 3 Cush. 404. It has been held that on an offer for detection of a thief, evidence that defendant, on plaintiff's information, caused a person to be arrested on the charge, may be *prima facie* sufficient. Brennan *v.* Haff, 1 Hilt. 511.

Where it appears that the record of conviction was introduced in evidence, it must be considered upon appeal that the same was read to the jury. Arkansas Southwestern R. R. Co. *v.* Dickinson, 78 Ark. 483, 95 S. W. Rep. 802, 115 Am. St. Rep. 54.

purpose of using the testimony of the accused, it may be inferred, in the absence of evidence, that the attorney acted within his authority.[93]

Evidence that the offer was publicly withdrawn before plaintiff acted on it, is competent, and is a defense, although plaintiff acted in ignorance of the withdrawal.[94]

III. ACTIONS FOR WRONGFUL DISMISSAL, OR REFUSAL TO RECEIVE

42. Dismissal or Refusal.

Where he was discharged while engaged in the performance of the contract, and before his term of service had expired, the burden is cast upon the employer of alleging and proving facts in justification of the dismissal.[95] On the question whether an employee was discharged, the declarations of a party, made in continuation of the transaction, may be competent as part of the *res gestæ;*[96] but evidence of subsequent instructions never communicated to the employee, is not.[97] Under a contract for future employment, evidence that on the arrival of the time for commencing service the employee was ready and willing (and offered, if necessary), to perform, and that the employer absolutely repudiated the contract, is sufficient without proof that the plaintiff

[93] Louisville & Nashville R. R. Co. *v.* Goodnight, 10 Bush, 552, s. c., 19 Am. Rep. 80.

[94] Shuey *v.* United States, 92 U. S. (2 Otto) 73.

An offer for reward remains conditional until accepted by performance. Williams *v.* West Chicago St. R. R. Co., 191 Ill. 610, 61 N. E. Rep. 456, 85 Am. St. Rep. 278.

[95] Linton *v.* Unexcelled Fireworks Co., 124 N. Y. 533, 27 N. E. Rep. 406; Maratta *v.* Chas. H. Heer Dry Goods Co., 190 Mo. App. 420, 177 S. W. Rep. 718; Schommer *v.* Flour City Ornamental Iron Works, 129 Minn. 244, 152 N. W. Rep. 535; Glover *v.* Henderson, 120 Mo. 367, 25 S. W. Rep. 175, 41 Am. St. Rep. 695.

[96] Thus, where the owner went on board the ship and took away the ship's papers, evidence that, on immediately depositing them with a third person, he indicated dismissal to be the reason, brings the words within the rule of the *res gestæ*. Russell *v.* Frisbie, 19 Conn. 205.

[97] Carrig *v.* Oaks, 110 Mass. 145.

thereafter tendered service, or kept himself in readiness to perform;[98] and the damages are *prima facie* the wages for the entire term.[99] The burden of showing, in mitigation of

[98] Howard *v.* Daly, 61 N. Y. 362; and see Dugan *v.* Anderson, 36 Md. 567, s. c., 11 Am. Rep. 509. Compare Colburn *v.* Woodworth, 31 Barb. 381. It is the better opinion that a repudiation of the contract before the time for commencing will be a breach, if the employer also put it out of his power to perform; or if the avowal was intended to and did influence the conduct of the employee to his damage; see also Gray *v.* Green, 9 Hun, 334.

Where there has been no performance on the part of the employee, his only remedy is for breach of contract. Weymouth *v.* Beatham, 93 Me. 454, 45 Atl. Rep. 511; Bushnell *v.* Coggshall, 10 N. Mex. 601, 62 Pac. Rep. 1101. But where the employer's wrongful act occurs after partial performance, the employee is not confined to an action on the contract, but may elect to consider the employer's conduct a repudiation of their agreement and sue upon *quantum meruit* for the value of his services. Brown *v.* Woodbury, 183 Mass. 279, 67 N. E. Rep. 327; Glover *v.* Henderson, 120 Mo. 367, 25 S. W. Rep. 175, 41 Am. St. Rep. 695; O'Dwyer *v.* Smith, 38 Misc. 136, 77 N. Y. Supp. 88; Davis *v.* Brown County Coal Co., 21 S. D. 173, 110 N. W. Rep. 113; Davis *v.* Streeter, 75 Vt. 214, 54 Atl. Rep. 1084. See also White *v.* Livingston, 69 App. Div. 361, 75 N. Y. Supp. 466; aff'd 174 N. Y. 538, 66 N. E. Rep. 1118. Some jurisdictions, however, have held otherwise, Chicago Training School *v.* Davies, 64 Ill. App. 503; and in others the right to a recovery upon *quantum meruit* depends upon whether or not the wrongdoer would be enriched at the expense of the other party as a result of his wrongful act, Wellston Coal Co. *v.* Franklin Paper Co., 57 Ohio St. 182, 48 N. E. Rep. 88. Where an action on *quantum meruit* is maintainable, a prior demand for performance need not be made. Davis *v.* Streeter, 75 Vt. 214, 54 A. Rep. 185. Nor is it necessary to tender back any payment which defendant may have made under the contract, provided the complaint credits them to his account. Posner *v.* Seder, 184 Mass. 331, 68 N. E. Rep. 335; O'Dwyer *v.* Smith, 38 Misc. 136, 77 N. Y. Supp. 88.

[99] Howard *v.* Daly (above). Baldwin *v.* Kohler, 92 Misc. 174, 155 N. Y. Supp. 196; Gardner *v.* Am. Educational Alliance, 153 N. Y. Supp. 4. Where plaintiff's wages were to consist of commissions, loss of the same due to his wrongful discharge may be established by evidence of sales made by himself under similar conditions in other years, or of the actual sales made by other salesmen selling the same goods for the defendant after his discharge. Caluwaert *v.* Schapiro, 93 Misc. 19, 156 N. Y. Supp. 359. Where

the damages for the wrongful discharge what the employee earned or might have earned elsewhere, after such discharge, is upon the employer.[1] In showing the probable compensation for a voyage, where the amount was contingent, testimony of experts to the average results of similar voyages, is competent; and the accounts of such voyages need not be produced.[2]

43. Defenses.

Misconduct known at the time of discharge may be proven, though committed some time before the discharge, and though no cause was assigned for the discharge.[3] Evidence

plaintiff secures other employment before the expiration of the term of the broken contract, his recovery should be for the difference between the total amount which he would have earned under the old contract and the net amount of his earnings under the new for the same period. Baker *v.* Mode Millinery Co., 193 Ill. App. 507; Beck *v.* Max Bonwitt & Co., 153 N. Y. Supp. 888; Robertson *v.* Vanderventer (Okl.), 152 Pac. Rep. 107; Millikan *v.* Holters Shoe Co., 95 Kan. 327, 148 Pac. Rep. 660. Whether plaintiff must prove that he sought employment elsewhere, compare Id. and Polk *v.* Daly, 14 Abb. Pr. N. S. 156; Moody *v.* Leverich, Id. 145; Farrell *v.* French, Blatchf. & H. 275, Id. 366.

[1] Babcock *v.* Appleton Mfg. Co., 93 Wis. 124, 67 N. W. Rep. 33; Halpern *v.* Horwitz, 156 N. Y. Supp. 380; Schommer *v.* Flour City Ornamental Works, 129 Minn. 244, 152 N. W. Rep. 535; Hudson *v.* Yeoman of America, 176 Ill. App. 445.

It is also incumbent upon the defendant to establish the good faith of an alleged offer to reemploy the plaintiff. Gray *v.* Pacific Suction Cleaner Co., 171 Cal. 234, 155 Pac. Rep. 469.

[2] Eldredge *v.* Smith, 13 Allen, 140.

[3] Harrington *v.* First Nat. Bank of Chittenango, 1 Supm. Ct. (T. & C.) 361. Compare Spotswood *v.* Barron, 5 Exch. 110. If the contract reserved absolute right to dismiss, assigning a false reason is not material. Smith *v.* Douglass, 4 Daly, 191; Carpenter Steel Co. *v.* Norcross, 204 Fed. Rep. 537, 123 C. C. A. 63, Ann. Cas. 1916 A. 1035; Maratta *v.* Chas. H. Heer Dry Goods Co., 190 Mo. App. 420, 177 S. W. Rep. 718.

The failure of plaintiff, a professional cartoonist, to report for work at a certain time each morning, is a defense. Macauley *v.* Press Publishing Co., 170 N. Y. App. Div. 640, 155 N. Y. Supp. 1044. An employee who maliciously destroyed the property (the-

of total incapacity for service (if pleaded), is competent in defense of an action for discharging plaintiff without the length of notice to terminate the contract provided for by its terms.[4]

atrical costumes) of a co-employee, may be discharged by the master. Barclay *v.* Savage, Inc., 150 N. Y. Supp. 688. But the return of a gift by an employee to the employer, accompanied by a curt note declining acceptance of the gift, does not constitute misconduct and hence is no defense to an action for wrongful discharge. Frachtman *v.* Fox, 156 N. Y. Supp. 313.

Where by the terms of the contract, the employer has the right to determine the propriety of plaintiff's conduct, the judgment of the master as to the sufficiency of a breach by plaintiff to justify discharge will not be interfered with. Independent Life Ins. Co. *v.* Williamson, 152 Ky. 818, 154 S. W. Rep. 409.

[4] Lyon *v.* Pollard, 20 Wall. 403. Inability resulting from sickness, while it may not render the employee liable, may prevent him from sustaining an action for dismissal. Poussard *v.* Spiers, 1 Queen's Bench Div. 410, s. c., 17 Moak's Eng. 93. See Wells *v.* Haff, 165 N. Y. App. Div. 705, 151 N. Y. Supp. 497.

CHAPTER XX

ACTIONS ON VARIOUS EXPRESS PROMISES TO PAY MONEY

1. General principles.
2. Promise to pay purchase money.
3. — incumbrance.
4. Promise to third person to pay plaintiff.
5. Promise to plaintiff to pay third person.

1. General Principles.

The rules applicable to oral contracts generally are illustrated in chapters XIII to XX; those applicable to unsealed writings in chapters XVI to XXVI; and those applicable to sealed and witnessed instruments in chapter XXVII.

2. Promise to Pay Purchase-Money.

The original contract, and delivery and acceptance of deed having been proved, evidence of express promise to pay balance is not necessary.[5] Conversely if an express and unconditional obligation to pay is proved,—as, for instance, notes given for purchase-money,—plaintiff need not prove the conveyance.[6] Parol evidence is admissible to show the amount agreed to be paid,[7] and the time,[8] and its nonpay-

[5] Vernol *v.* Vernol, 63 N. Y. 45. Compare Huffman *v.* Ackley, 34 Mo. 277.

[6] Lyman *v.* United States Bank, 12 How. (U. S.) 225.

Where there is a covenant in a deed by which the grantee assumes a mortgage, the law will not imply a covenant to keep the grantor harmless from any suits which may be brought against him on account of his having given the original notes and mortgage. Sheppard *v.* Berkshire Life Ins. Co., 161 Ill. App. 467.

[7] Bowen *v.* Bell, 20 Johns. 338; McCrea *v.* Purmort, 16 Wend. 460, affi'g 5 Paige, 620, and see 16 N. Y. 538.

Parol evidence is competent to establish that the grantee agreed to assume and pay off a mortgage as a part of the consideration for the deed. Felker *v.* Rice, 110 Ark. 70, 161 S. W. Rep. 162.

[8] Shepard *v.* Little, 14 Johns. 210.

ment,[9] notwithstanding an acknowledgment in the deed of the payment of a different or less [10] consideration in full.

A covenant purporting to bind the grantee will sustain an action against him, although he did not sign, if there be evidence of his acceptance of the deed.[11]

Declarations of the grantor that a specified sum was due, are competent against him to show that no more was due; [12] but are not competent in his own favor, even though made at execution, unless brought home to the grantee or plaintiff.[13]

[9] Same cases.

"The rule is well settled that the acknowledgment of the receipt of a consideration in a deed . . . is not conclusive, but it may be shown by parol that the consideration agreed upon has not been paid." Erickson *v.* Wiper, 33 N. D. 193, 157 N. W. Rep. 592. See also Deaver *v.* Deaver, 137 N. C. 240, 49 S. E. Rep. 113.

[10] Murray *v.* Smith, 1 Duer, 412; Strawbridge *v.* Cartledge, 7 Watts & S. 394.

The acknowledgment in a deed of the receipt of a consideration not being conclusive, it may be shown by parol that a consideration greater or lesser than, or different from, that expressed in the deed was in fact agreed upon. Erickson *v.* Wiper, 33 N. D. 193, 157 N. W. Rep. 592.

And in an action to compel specific performance of a contract whereby the defendant promised to execute two judgment notes in consideration of a conveyance of certain lots to him, it was held that the receipt in the deed was only presumptive evidence of the real consideration, and that it might be overcome by parol evidence of another or greater consideration, if not directly inconsistent with the deed. McGary *v.* McDermott, 207 Pa. St. 620, 57 Atl. Rep. 46.

[11] Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35.

"Deeds conveying lands may be signed and executed by the grantor only, but if accepted by the grantee covenants contained therein must be kept by him." Thistle *v.* Jones, 45 Misc. 215, 92 N. Y. Supp. 113.

A grantee who accepted the benefits of a deed which provided for the payment of a note given by the grantor was held bound to carry out such provision even though he did not sign the deed. Spencer *v.* Spencer, 253 Pa. 315, 98 Atl. Rep. 571. See also Silver Springs, etc., R. R. Co. *v.* Van Ness, 45 Fla. 559, 34 So. Rep. 884.

[12] Reed *v.* Reed, 12 Penn. St. 117.

[13] Trimmer *v.* Trimmer, 13 Hun, 182.

3. — incumbrance.

Plaintiff may show that, as a condition of delivery or acceptance of a deed without covenants, defendant orally promised to pay an incumbrance.[14] Otherwise if the promise was only for the consideration mentioned in the deed and the deed contains special covenants, and the incumbrance was not created by the party.[15]

4. Promise to Third Person to Pay Plaintiff.

A promise on a valid consideration, to pay a third person,[16] will sustain an action by the latter in his own name, though

[14] Remington *v.* Palmer, 62 N. Y. 31, rev'g 1 Hun, 619, s. c., 4 Supm. Ct. (T. & C.) 696. And see 12 Moak's Eng. 243, n.

When a purchaser withholds from the purchase price an amount sufficient to cover the incumbrance there is an implied promise on his part to pay it. Lamka *v.* Donnelly, 163 Iowa, 255, 143 N. W. Rep. 869.

A clause in a deed requiring the grantee to assume a mortgage as part of the purchase price does not estop the grantee from setting up against a claim by the mortgagee, that there was a different understanding as to the purchase price. Logan *v.* Miller, 106 Iowa, 511, 76 N. W. Rep. 1005.

[15] Howe *v.* Walker, 4 Gray, 318, 1 Greenl. Ev. 13th ed. 327, note; 2 Whart. Ev., § 1014.

In McDonough *v.* Martin, 88 Ga. 675, 16 S. E. Rep. 59, 18 L. R. A. 343, where it appeared that the grantor in giving a quit claim deed, with a special warranty, for a number of lots told the defendant that, with respect to several of these lots, an ejectment suit was then pending, the court held that even if the grantor had promised to defend the ejectment action, it would not be allowable, in an action for a breach of warranty, to attach such a parol promise to a deed containing no such undertaking, in the absence of an issue of fraud.

When a plaintiff who had conveyed land to the defendant by a deed containing a special warranty against incumbrances brought an action to recover the amount which it had, prior to the conveyance, paid in taxes, claiming an oral promise on the part of the defendant to pay this sum as part of the consideration for the deed, it was held that since the oral agreement would not have been available to the plaintiff in an action for breach of warranty, it could not be made the basis of the present suit. Edison Electric Illum. Co. *v.* Gibby Foundry Co., 194 Mass. 258, 80 N. E. Rep. 479.

[16] As distinguished from a bond conditioned for such payment. Turk *v.* Ridge, 41 N. Y. 201.

he was not privy to the consideration.[17] The promise may

Where the plaintiff's debtor turned over his store to the defendant and informed the latter of all his indebtedness which the defendant promised to pay, it was held that a creditor could enforce his claim against the defendant. Mackay-Nisbet Co. *v.* F. H. Kuhlman, 119 Ill. App. 144.

And a plaintiff who, in reliance upon the defendant's promise to pay the note of third persons, extended the time for the payment thereof, was allowed to recover the full amount notwithstanding the defendant's claim for deductions because of the payment of other claims against the makers. Bank of Lemoore *v.* Gulart, 6 Cal. Unrep. Cas. 165, 54 Pac. Rep. 1111.

In Styles *v.* F. R. Long Co., 70 N. J. Law, 301, 57 Atl. Rep. 448, it was held that for a third person to maintain an action on a contract to which he was not a party, it must appear that the contract was made for his benefit, not merely that he received a benefit from its performance.

[17] Lawrence *v.* Fox, 20 N. Y. 268; Hutchings *v.* Miner, 46 Id. 456; Hall *v.* Robbins, 61 Barb. 33, s. c., 4 Lans. 463; Barlow *v.* Myers, 64 N. Y. 41, rev'g 3 Hun, 270; Hendrick *v.* Lindsay, 93 U. S. (3 Otto) 143; and cases collected in 2 Abb. N. Y. Dig. New ed. 170, 174, 5 Id. 289. *Contra*, except in cases of trust, agency, &c. Exch. Bk. of St. Louis *v.* Rice, 107 Mass. 37, s. c., 9 Am. Rep. 1.

An agreement by a grantee to assume and pay a mortgage as part of the purchase price of the property is a valid contract which can be enforced by the mortgagee. Bernheimer *v.* Blumental, 42 N. Y. App. Div. 193, 58 N. Y. Supp. 1003.

Where a grantee accepts a deed which states that he assumes the payment of a certain mortgage, a promise on his part to pay such mortgage is implied. Jager *v.* Vollinger, 174 Mass. 521, 55 N. E. Rep. 458.

The action will lie even if the plaintiff paid no consideration for the promise. Olson *v.* Ostby, 178 Ill. App. 165.

The plaintiff must show that the promise was made for his benefit. Clark *v.* P. M. Hennessey Const. Co., 122 Minn. 476, 142 N. W. Rep. 873.

The plaintiff being the person for whose benefit the promise was made is entitled to bring the action even though he was not a party to the agreement. Torpe *v.* Jahn, 177 Ill. App. 85.

Where a contractor assigns to his surety all payments which might become due to him under a proposed agreement, and the surety agrees to pay the sub-contractors out of the moneys so received, the sub-contractors are intended to be benefited and will have a right to hold the surety. Bradley *v.* McDonald, 157 N. Y. App. Div. 572, 142 N. Y. Supp. 702.

A resident of a village may en-

be implied from the acceptance of a conveyance expressed to be subject to the payment of a specified incumbrance,[18]

force a contract which was made by a water company with the village to supply pure and wholesome water to the residents at a specified rate. Pond *v.* New Rochelle Water Co., 183 N. Y. 330, 76 N. E. Rep. 211, 1 L. R. A. N. S. 958, 5 Ann. Cas. 504.

A child may enforce a contract made between its father and a third person whereby the latter was to bring up the child and devise all his property to the child; and it is not necessary for the child to have known of the existence of any such contract. Bridgewater *v.* Hooks, 159 S. W. Rep. (Tex. Civ. App.) 1004.

Where one agrees to pay the debt of another to a third person, the latter can enforce the promise even though he had no knowledge of it at the time it was made. Washer *v.* Independent Mining, etc., Co., 142 Cal. 702, 76 Pac. Rep. 654; Maxfield *v.* Schwartz, 43 Minn. 221, 45 N. W. Rep. 429.

A railroad which contracts with a city to pay all damage done in the course of the erection of a railroad bridge will be liable to abutting owners for damages by reason of a change of the grade of the street in front of their premises. Rigney *v.* New York Central, etc., R. R. Co., 161 N. Y. App. Div. 187, 146 N. Y. Supp. 395.

Where in a chattel mortgage there is a recital that it is given as security for the payment of certain notes which the mortgagor agrees to pay, the promise is enforceable even though the notes are outlawed. Dinniny *v.* Gavin, 4 N. Y. App. Div. 298, 39 N. Y. Supp. 485, aff'd in 159 N. Y. 556, 54 N. E. Rep. 1090.

Where a deed contained a provision that the grantee pay off a note secured by a mortgage executed to a third person, it was held that an agreement on the part of the grantee to pay this note and discharge the mortgage was implied in law by the acceptance of the deed. Felker *v.* Rice, 110 Ark. 70, 161 S. W. Rep. 162.

[18] Collins *v.* Rowe, 1 Abb. New Cas. 97, and cases cited. For the theories sustaining this implication, see note in Binsse *v.* Paige, 1 Abb. Ct. App. Dec. 138.

One who assumes the payment of a mortgage referred to in his deed makes himself personally liable for the payment of such mortgage to the mortgagee. Ingram *v.* Ingram, 172 Ill. 287, 50 N. E. Rep. 198.

A clause in a deed whereby the grantee assumes a mortgage on the property raises the presumption that the mortgage is a part of the purchase price which the grantee promised to pay. Cobb *v.* Fishel, 15 Colo. App. 384, 62 Pac. Rep. 625.

The mere fact that one agrees to purchase lands on which there is a mortgage does not imply that he assumes personal responsibility for the mortgage. The production

or a specified sum.[19] If in writing, the instrument must be produced, or accounted for.[20] If the language of the promise is indefinite or ambiguous,—as, for instance, to pay "your account with A.,"—it may be explained by parol evidence, to show whether a past or future account was intended.[21]

Proof of the statement of the third person, at the time of incurring the debt, is sufficient evidence of his indebtedness to the plaintiff.[22] A judgment upon the merits recovered against the third person, even after the promise, in an action fully litigated and deliberately and intelligently decided by a competent court, is *prima facie*, and usually conclusive, evidence, against the promisor, of the amount of the debt, unless fraud or collusion is shown.[23] If the precise obligation incurred is identified by the promise,—as in case of a covenant to pay a designated mortgage,—the defendant cannot question the existence and validity of the obligation, but may show that it has been paid.[24] It is not necessary to prove the concurrence or assent of other beneficiaries,[25] unless the contract requires it. But revocation by the prom-

of a recorded deed containing an assumption clause is sufficient to establish the personal liability of the grantee, in the absence of any other testimony. But if the agreement to assume the mortgage debt is denied, and there is no evidence of an antecedent agreement to that effect, and the delivery and acceptance of the deed are under such circumstances as do not charge the grantee with actual knowledge of the existence of the assumption clause, and it is not found that he had such knowledge, the mere production of the deed containing such a clause is not enough to fix a personal liability for the debt upon the grantee. Raffel *v.* Clark, 87 Conn. 567, 89 Atl. Rep. 184.

[19] Dingeldein *v.* Third Ave. R. R. Co., 37 N. Y. 575, rev'g 9 Bosw. 79.

[20] Hatch *v.* Pryor, 2 Abb. Ct. App. Dec. 343.

[21] Wallrath *v.* Thompson, 4 Hill. 200.

[22] Lawrence *v.* Fox, 20 N. Y. 268. And see Draper *v.* Austin, 46 Vt. 215 and chapter XIII, paragraph 14 of this vol.

[23] See Luddington's Petition, 5 Abb. New Cas. 307, and cases cited.

[24] Hartley *v.* Tatham, 2 Abb. Ct. App. Dec. 339; and see Ritter *v.* Phillips, 53 N. Y. 586, affi'g 34 Super. Ct. (J. & S.) 289, 35 Id. 388.

[25] Seaman *v.* Hasbrouck, 35 Barb. 151.

isee, before assent by the plaintiff, will bar the action.[26] Oral evidence that the promisor was agent for the creditor is not competent as between them, to exonerate the promisor from liability, unless the face of the instrument bears some indication of the agency.[27]

5. Promise to Plaintiff to Pay Third Person.

Upon a promise to plaintiff to pay a third person, plaintiff need not show that he has paid the debt.[28]

[26] Kelly *v.* Roberts, 40 N. Y. 432, 16 Alb. L. J. 378; and see Devlin *v.* Murphy, 5 Abb. New Cas. 242.

[27] Auburn City Bank *v.* Leonard, 40 Barb. 119.

[28] Stout *v.* Folger, 34 Iowa, 71, s. c., 11 Am. Rep. 138; Furnas *v.* Durgin, 119 Mass. 500, s. c., 20 Am. Rep. 341, 15 Alb. L. J. 424. Otherwise if the promise was only to indemnify.

Where a grantee assumes a mortgage he can only be held by the grantor if the latter is personally liable. Wood *v.* Johnson, 117 Minn. 267, 135 N. W. Rep. 746.

Where the grantee in a deed assumes the payment of a mortgage, the grantor may at the maturity of the mortgage recover from the grantee the amount of the mortgage even though the grantor has not himself paid any part of the mortgage debt. Stichter *v.* Cox, 52 Neb. 532, 72 N. W. Rep. 848; Rubens *v.* Prindle, 44 Barb. (N. Y.) 336.

CHAPTER XXI

ACTIONS ON NEGOTIABLE PAPER

I. Rules applicable to negotiable paper generally.

1. General order of proof.
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3. Lost or destroyed paper.
4. Proof of execution.
5. Admissions.
6. Testimony of the supposed writer.
7. Direct testimony to signature.
8. Witness who knows the handwriting generally.
9. Means of knowledge.
10. Opinion or belief.
11. Refreshing memory.
12. Testing the witness.
13. Comparison of hands.
14. Opinions of witnesses.
15. Matters of description.
16. Qualifications of witness.
17. Photographs.
18. Mark.
19. Identity of names.
20. Fictitious person.
21. Joint makers, &c.
22. Married woman.
23. Agent's signature.
24. Partnership signature.
25. Corporation paper.
26. Oral evidence to show real party.
27. Evidences of title.
28. Delivery.
29. Consideration.
30. Accommodation paper.
31. Alterations.

I. Rules applicable to negotiable paper generally — *continued.*

32. — how pleaded.
33. — mode of proof.
34. Blanks.
35. Marks of cancellation.
36. General rule as to oral evidence to vary.
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38. Time of payment.
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40. Medium.
41. Interest.
42. Place of payment.
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45. Subsequent modification.
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48. Indorsement as a transfer of title.
49. Demand.
50. Non-payment.
51. Indorsements of payment, &c.
52. Competency of a party to the instrument to impeach it. The New York rule.
53. — the United States Court rule.
54. Admissions and declarations.
55. Foreign law.

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56. Plaintiff's case.

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61. Refusal to accept.
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V. Action against drawer, &c.; on non-payment.
63. Acceptance and presentment.

VI. Action against indorsers, &c.
64. Execution of the instrument.
65. Pleading facts to charge indorser.
66. Cogency of the evidence.
67. Time of demand.
68. Place.
69. Authority.
70. Identity of maker or drawee, and authority of agent or servant.
71. Production of the instrument.
72. Due diligence in demand.
73. Official protest as evidence.
74. Sealed certificate.
75. Unsealed certificate.
76. Copy.
77. Secondary evidence.

VI. Action against indorsers, &c.—*continued.*
78. Memoranda to refresh memory.
79. Memoranda of deceased person.
80. Legal notice to charge indorser.
81. Identity of person served.
82. Executors and administrators.
83. Time of service.
84. Actual notice.
85. Due diligence by the holder.
86. Place of directing notice.
87. Due diligence in inquiry.
88. Evidence of the contents of the notice.
89. Extrinsic evidence as to imperfect notice.
90. Mailing.
91. Inference of delivery or mailing from ordinary course of business.
92. Admissions of demand made and notice received.
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XIII. Bank checks.
126. Stamp.
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128. Oral evidence to vary.
129. Laches.
130. Action against drawer.
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132. Stock notes.
133. Premium notes.
134. Losses and assessments.
135. Defenses.

I. RULES APPLICABLE TO NEGOTIABLE PAPER GENERALLY

1. General Order of Proof.

In all classes of cases the usual order of proof [29] is, for plaintiff:

[29] See paragraphs 112 and 113, below, and Michigan Bank *v.* Eldred, 9 Wall. 548; and paragraphs 114–118, below. See, as

1. To produce the paper sued on;

2. If execution be not admitted, to prove the signatures, and the necessary indorsements, if any;

3. To give such extrinsic evidence, if any, as may be necessary to explain the paper. If the action is against an indorser, or against a drawer of a bill, plaintiff will go on;

4. To prove presentment, and demand and dishonor (and, if necessary, protest), or circumstances to excuse these; and

5. Notice of dishonor, etc., to the indorser, or circumstances to excuse it.

The possession and proof of execution, etc., raise a legal presumption of consideration, and of title in plaintiff by a transfer before maturity in good faith and for value.[30] If plaintiff was not an original party to the paper, evidence of certain infirmities (below stated), will throw on him the burden of affirmative proof of title before maturity and for

to order of proof, Siegel *v.* Oehl, 110 N. Y. Supp. 916.

Chapter 38, of the Consolidated Laws of the State of New York, which is Chapter 43 of the Laws of 1909, contains the statutory law of that state on the subject of negotiable instruments. This act is very similar to, and in many respects identical with, acts passed in other states on the same subject, as a result of the labors of the Commission for the Promotion of Uniformity of Legislation in the United States. The original draft was prepared by Mr. John J. Crawford of New York city and after its adoption by the Commission and with slight change to suit the various jurisdictions, it has become the law of every state in the Union except Maine, California, Georgia, Mississippi and Texas. In cases not provided for by this chapter, the rules of the law merchant still govern. Neg. Instr. L., § 7.

[30] See paragraphs 27, 46, 97, 103, 112, 123, and 127, below, and Chambers County *v.* Clews, 21 Wall. 317.

Plaintiff establishes a *prima facie* case by proving (1) that he is the owner and holder of the note; (2) that it was delivered to him; (3) that defendant signed and executed it; (4) that the note was due and unpaid; and by introducing the note in evidence. Exchange Bank *v.* Veirs, 3 Cal. App. 71, 84 Pac. Rep. 455.

Neither indorsement signature nor signature of the maker need be proved unless denied by pleas under oath. Bank, etc., Co. *v.* Smith, 89 Miss. 298, 42 So. Rep. 345; Clarke *v.* Newton, 235 Ill. 530, 85 N. E. Rep. 747; Milton *v.* Pensacola Bank, etc., Co., 190 Fed. Rep. 126, 111 C. C. A. 166.

value; and this having been given, defendant may then prove that, nevertheless, plaintiff had notice of the infirmity. Though defendant be not able to prove such infirmity in the inception of the paper as will cast this burden on plaintiff, he may show that plaintiff was not a *bona fide* holder for value, before maturity; and *prima facie* evidence to negative either of these elements in plaintiff's title will let in evidence of any equity in favor of defendant that would be available against the original payee, if properly pleaded. As the mode of proof of some of the facts thus involved is common to actions of a great variety of classes, the most useful method will be to state first those rules applicable in actions of several classes, and afterward those peculiar to actions by Payee against Maker, Indorsee against Indorser, and the like.

2. Production.

If the making or contents of the paper are in issue, the paper must be produced,[31] or its absence accounted for.[32] It is not an excuse to show that the paper is without the jurisdiction, and in the possession of an adverse claimant by defective title.[33] Defendant does not waive nonproduction of a negotiable note by going into evidence on the merits.[34] Production at the trial is enough, although the paper had been previously lost, if no objection was made to, and no prejudice suffered by, demand and notice while lost.[35]

If the paper was intentionally destroyed by plaintiff himself, he must give a satisfactory explanation preliminary to secondary evidence.[36] If plaintiff's pleading and evidence

[31] Potter *v.* Earnst, 51 Ind. 384.

[32] By the English rule, even when not in issue, interest is not recoverable without production. Hutton *v.* Ward, 15 Q. B. 26, L. J. 19 Q. B. 293; Rosc. N. P. 350.

Where the defense is that a new note was given in payment of the note in suit, either the new note must be produced or the foundation for introducing secondary evidence concerning it must be laid. Matthews *v.* Richards, 13 Ga. App. 412, 79 S. E. Rep. 227.

[33] Van Alstyne *v.* Commercial Bank, 4 Abb. Ct. App. Dec. 452.

[34] Kirby *v.* Sisson, 2 Wend. 550.

[35] Smith *v.* Rockwell, 2 Hill, 482.

[36] Blade *v.* Noland, 12 Wend. 173; and see Steele *v.* Lord, 70

trace the note into defendant's possession, the action itself is sufficient notice to produce it, to allow secondary evidence of its contents,[37] and of its indorsement of whatever kind,[38] if he does not produce it.

A statute excusing proof of *execution* unless there is a sworn denial of signature, does not dispense with production of the note.[39] A rule of court excusing plaintiff from proving execution, if defendant omits to file an affidavit denying it, means only actual making and delivery of the paper, not its validity, and only enables plaintiff to make out a *prima facie* case, not a conclusive one.[40] If execution is admitted,

N. Y. 283. Compare Vanauken *v.* Hornbeck, 2 Green (N. J.), 178.

"If she [plaintiff] had voluntarily destroyed the notes, and rendered herself unable to produce evidence of her cause of action without excuse, she could not succeed." Sturman *v.* Sturman, 118 Iowa, 620, 623, 92 N. W. Rep. 886.

[37] Hammond *v.* Hopping, 13 Wend. 505.

In an action on a note it appeared that the instrument was in defendant's possession, which fact plaintiff knew. The declaration did not allege that plaintiff had possession of the note but averred that he would produce it upon the trial. The defendant pleaded payment, admitted that she had possession of the note, but failed to comply with a notice to produce it. The court refused to compel the production of the note and directed a verdict for the defendant on the ground that "there were two theories upon which plaintiff might have proceeded (1) That the note was lost; and (2) That, if it was not lost, the declaration ought to apprise defendant of the plaintiff's claim of the manner in which the note came into her hands." It was decided on appeal that the action of the court below was erroneous because (1) a party who has knowledge of the whereabouts of the instrument cannot sue as on a lost one, and (2) Whether the note was negotiable or not, the sole question was whether it had been paid by the defendant. Page Woven Wire Fence Co. *v.* Pool, 129 Mich. 57, 87 N. W. Rep. 1043.

Where plaintiff alleges that the note is in defendant's possession, and defendant denies it, the burden is upon plaintiff to prove the allegation. Caffey *v.* Allison, 107 Ark. 153, 154 S. W. Rep. 202.

[38] Howell *v.* Huyck, 2 Abb. Ct. App. Dec. 425. It may be proved by a witness testifying that he has seen the note in defendant's possession, and that he knows the signature to be genuine. Prescott *v.* Ward, 10 Allen, 203.

[39] Sebree *v.* Dorr, 9 Wheat. 681.

[40] Freeman *v.* Ellison, 37 Mich. 459, s. c., 18 Alb. L. J. 210.

the existence of the instrument is proved by its production and evidence of identity.

3. Lost or Destroyed Paper.

The loss or destruction need not be alleged in the complaint.[41] The question whether the evidence of loss or destruction is sufficient to admit secondary evidence is for the court, not the jury.[42] Positive and unequivocal evidence is not essential.[43] Parol evidence of the contents of a lost

[41] Renner *v.* Bank of Columbia, 9 Wheat. 581.

If the note is lost after the action has been commenced, it is not necessary to amend the pleadings. Austin *v.* Calloway, 73 W. Va. 231, 80 S. E. Rep. 361, Ann. Cas. 1916, E. 1112.

In West Virginia suit cannot be maintained upon a lost negotiable note unless at the time of the trial the note is destroyed or the statute of limitations has run out. Campbell *v.* Myers, 72 W. Va. 428, 78 S. E. Rep. 671, 48 L. R. A. N. S. 648. But see Embree *v.* Emerson, 37 Ind. App. 16, 74 N. E. Rep. 44, 1110, holding that a complaint upon a negotiable instrument, lost before maturity, must allege that such instrument was not endorsed; and Sturman *v.* Sturman, 118 Iowa, 620, 92 N. W. Rep. 886, holding that evidence that the notes in question were destroyed by duress cannot be received unless that fact be specifically pleaded.

[42] Page *v.* Page, 15 Pick. 374. Whether the loss was by destruction, so that indemnity is dispensed with, may be a question for the jury. Swift *v.* Stevens, 8 Conn. 436.

Where a note has been destroyed, the burden of proving that it was not destroyed for fraudulent purposes rests upon the party moving to prove its contents. If he can prove that the act of destruction was attributable to other motives than fraudulent purposes, secondary evidence will be admissible. Schlemmer *v.* Schendorf, 20 Ind. App. 447, 49 N. E. Rep. 968.

[43] Swift *v.* Stevens (above).

Where, in an action upon an alleged lost note for $28,368.90, claimed to have been made by a person since deceased, the executor-defendant denied that such a note was ever made and contended that plaintiff's claim was fictitious and fraudulent, testimony that at or about time the alleged note was claimed to have been given plaintiff was largely in debt and without means to make such a loan was held admissible and evidence examined and held sufficient to support a verdict for defendant. Haines *v.* Goodlander, 73 Kan. 183, 84 Pac. Rep. 986. See also Neal *v.* Neal, 181 Mich. 114, 147 N. W. Rep. 624. In an action upon a lost instrument, and an affidavit by plaintiff stating: "that the said

note or bill is admissible; [44] but the court is to require indemnity, if it was negotiable.[45] To entitle to indemnity, there must be some evidence that the paper was negotiable;[46] but there need not now be evidence that it was indorsed or payable to bearer. The statute [47] requires indemnity, though unindorsed.[48] It is not necessary to prove tender of indem-

draft has not been paid by the defendants nor any of them, and that said draft is not now in the possession of the plaintiff, this affiant, nor in the possession of any one for him; that he has not seen the said draft since the day he purchased it; that he is not aware whether he endorsed the said draft or not, but believes he did not endorse it, nor is he aware what he did with the said draft or what became of it" is insufficient to prove title in him. Arnold *v.* Mangan, 89 Ill. App. 327.

Where, in an action upon a lost check, it appeared that the check had never been indorsed by the plaintiff to whose order it was made payable, and it having been lost, and appellees having made diligent search for it, without being able to find it, all of which appears from the preceding statement, it was competent to prove its contents by secondary evidence. Petrues *v.* Wakem & McLaughlin, 99 Ill. App. 463. Where the note is sued on as a lost instrument, plaintiff cannot be required to submit evidence as to who has possession of the note. Champenois *v.* Collins (Miss.), 36 So. Rep. 72.

[44] N. Y. Code Civ. Pro., §§ 1917, 1918. Even though lost since the commencement of the suit. Jacks *v.* Darrin, 1 Abb. Pr. 148, s. c., 3 E. D. Smith, 548. For the conflicting rules, where no such statute exists, see 2 Pars. on Pr. N. &c. 290, &c. Being beyond the jurisdiction, and adversely held, is not a loss. Van Alstyne *v.* Commercial Bank, 4 Abb. Ct. App. Dec. 449.

The plaintiff may recover on a lost note if he proves clearly that he had title to it and that the note was lost after maturity. Austin *v.* Calloway, 73 W. Va. 231, 80 S. E. Rep. 361, Ann. Cas. 1916, E. 112.

Secondary evidence as to the contents of a lost note is admissible. Austin *v.* Calloway, 73 W. Va. 231, 80 S. E. Rep. 361, Ann. Cas. 1916, E. 112.

The record of a mortgage given to secure a lost note is admissible secondary evidence to prove the execution of the note. Embree *v.* Emerson, 37 Ind. App. 16, 74 N. E. Rep. 44, 1110.

[45] Same statute.

[46] Blade *v.* Noland, 12 Wend. 173, and see Wright *v.* Wright, 54 N. Y. 441.

[47] N. Y. Code Civ. Pro., §§ 1917, 1918.

[48] Frank *v.* Wessels, 64 N. Y. 158. Compare 2 Pars. on Pr. N. & B. 290.

The fact that a bond of indemnity has been furnished does not

nity before trial,[49] except for the purpose of recovering interest where the party was not in default without it, and, in some cases, costs.[50] Proof of actual destruction, whether accidental [51] or explained, dispenses with indemnity.

Proving loss or destruction does not dispense with proof of the execution and identity of the original. A sworn copy, given in evidence, excludes parol evidence to vary the contract, as would the original.[52] But it is not necessary to prove the original consideration, nor nonpayment, merely because of loss or destruction.

4. Proof of Execution.

The signature of the party to be charged, if execution is not admitted,[53] must be proved, before the note can be put

relieve plaintiff from proving his ownership of the alleged lost instrument. Arnold *v.* Mangan, 89 Ill. App. 327.

[49] Frank *v.* Wessels, 64 N. Y. 158, 159.

[50] 2 Pars. on Pr. N. & B. 302.

[51] Des Arts *v.* Leggett, 16 N. Y. 586, 588.

[52] Reed *v.* United States Express Co., 48 N. Y. 462.

[53] Stone *v.* Goldberg, 6 Ala. App. 249, 60 So. Rep. 744; Gillespie *v.* Hester, 160 Ala. 444, 49 So. Rep. 580. Or, if execution is denied on oath, where that is required by the statute. Holmes *v.* Riley, 14 Kan. 131. In Minnesota it is provided by statute that: "Every written instrument purporting to have been signed or executed by any person shall be proof that it was so signed or executed until the person by whom it purports to have been signed or executed shall deny the signature or execution of the same by his oath or affidavit." This is a rule of evidence and not of pleading. Moore *v.* Holmes, 68 Minn. 108, 70 N. W. Rep. 872. If the defendant has denied the execution of the note, and on the trial the plaintiff fails to produce any evidence of its execution, the complaint should be dismissed. Strong *v.* Sewell, 13 Ky. Law. Rep. 736. If the answer does not deny the execution of the note or allege that the same has been materially altered since its execution, evidence to sustain such defenses is inadmissible. Noble *v.* Gilliam, 136 Ala. 618, 33 So. Rep. 861. When the action is brought against defendant as co-surety upon an alleged lost note which the defendant has not seen for over twenty-five years, a denial of his signature upon information and belief is sufficient to raise in issue the execution of the note. Hall *v.* Woodward, 30 S. C. 564, 9 S. E. Rep. 684.

in evidence.[54] The signer, though competent and available as a witness, need not be called.[55] Proof of signature is *prima facie* sufficient, without other proof of genuineness.[56] But if there was a subscribing witness, he must be called,[57] or his absence accounted for by showing that he is not living,[58] or not competent to testify, or not within the jurisdiction of the court, or not to be found with due diligence; and where his absence is thus excused, his handwriting must be proved. If there are several subscribing witnesses, it is sufficient to produce either who can prove the note; but the absence of all must be accounted for before the note can be proved by the handwriting of either.[59] The fact that the

[54] Id. Marks *v.* Munson, 59 Colo. 440, 149 Pac. Rep. 440, Ann. Cas. 1917, A. 766; Penton *v.* Williams, 163 Ala. 603, 51 So. Rep. 35. The mere fact that the defendant denies the execution of the note does not shift the burden of proof as to execution from the plaintiff to the defendant. Ableman *v.* Haehnel, 103 N. E. Rep. (Ind. App.) 869.

[55] Smith *v.* Prescott, 17 Me. 277.

[56] St. John *v.* Am. Mut. Life Ins. Co., 2 Duer, 412; and see Irvine *v.* Lumberman's Bank, 2 Watts & S. 190. The fact that the handwriting in the body of a check was not that of the drawer, raises no presumption that the check was not genuine, especially where there is evidence that the usage of the drawer was to have his checks filled up by a clerk or bookkeeper. Redington *v.* Woods, 45 Cal. 406, s. c., 13 Am. Rep. 190.

In an action against two persons individually, a *prima facie* case is established by producing a note which is signed by them as president and secretary, respectively. Decowski *v.* Grabarski, 181 Ill. App. 279.

[57] 2 Pars. on Pr. N. & B. 474. This rule is now changed by statute in New York. Code Civ. Pro., § 961 b.

Also in Illinois, where the execution may be proved without producing or accounting for the absence of a subscribing witness. Snyder *v.* Travers, 45 Ill. App. 253.

[58] Or, unless plaintiff can prove an admission. See paragraph 5.

When it appears that the attesting witness when last seen was practising his profession in another state and that a return of *non est inventus* was rendered upon a subpœna of the constable of the town in which he resided before he left the state, secondary evidence is admissible to prove the execution. Troeder *v.* Hyams, 153 Mass. 536, 27 N. E. Rep. 775.

[59] In South Dakota under § 533, Code Civ. Pro., a party seeking to enforce a promissory note is

execution was abroad raises a presumption that the subscribing witness is beyond jurisdiction.[60] Plaintiff may prove that a name written at the left hand, in the place usual for the signature of a subscribing witness (though without a prefix indicating that it was a witness' signature), was, in fact, the signature of a maker.[61] If the subscribing witness leaves the question of execution in doubt,[62] other evidence of execution becomes admissible. A note bearing a seal is admissible under a complaint not alleging that it was sealed;[63] and if the words of the instrument refer to a seal, or make no reference to mode of authentication, the presumption is that the seal was duly affixed;[64] but, if the words of the

not absolutely required to produce the subscribing witnesses to it, but the execution of the note may be proved in the same manner that it might be proved where there are no subscribing witnesses thereto. Mississippi Lumber, etc., Co. *v.* Kelly, 19 S. D. 577, 104 N. W. Rep. 265, 9 Ann. Cas. 449.

Calling only one of the subscribing witnesses, though the others are available, is sufficient. Sowell *v.* Bank of Brewton, 119 Ala. 92, 24 So. Rep. 585.

[60] Savage *v.* D'Wolf, 1 Blatchf. 343.

[61] Rape *v.* Westcott, 18 N. J. L. (3 Harr.) 245. So he might show that a signature appearing to be that of a witness was a fictitious one, or a subsequent memorandum for purposes of identification, or an unauthorized addition. Id. Per Hornblower, C. J.

But in the absence of evidence to the contrary, the presumption is that a signature in the left hand side is that of a witness. Kripner *v.* Lincoln, 66 Ill. App. 532.

[62] Either by imperfect recollection; Quimby *v.* Buzzell, 16 Me. 470; or by denying all knowledge of the matter. Talbot *v.* Hobson, 7 Taunt. 254.

The testimony of a subscribing witness, who was eleven and a half years old at the date of the note, to the effect that the name looked like his handwriting and he thought it was; "that, if he signed it, he might have seen the maker sign it or must have known that he signed it," has been held competent, the court saying: "It often happens in practice, that an attesting witness to a will, deed or other paper, executed long before he testifies, is unable to recollect the fact or the circumstances of his attestation, and can only swear that, in his judgment his signature is genuine, and that he saw the maker execute it." Thompson *v.* Fisher, 123 Mass. 559.

[63] Parkinson *v.* McKim, Burn. (Wis.) 53. *Contra*, Helfer *v.* Alden, 3 Minn. 332.

[64] Merritt *v.* Cornell, 1 E. D.

note refer to signing only, as "witness my hand this," etc., a seal if affixed should be proved as well as the signature.[65]

5. Admissions.

The admission of defendant,[66] or his attorney in the cause,[67] is competent proof of the genuineness of the signature. But the evidence must tend to identify the note admitted with that produced. If the note was shown when the admission was made, a very general admission that it is all right, is enough; [68] if not shown, an admission referring to it either

Smith, 335; Muckleroy *v.* Bethany, 27 Tex. 551.

[65] Merritt *v.* Cornell (above).

[66] Though made pending negotiation for compromise. Waldridge *v.* Kennison, 1 Esp. 143.

Where the answer expressly admits the execution and delivery of the note as alleged, and denies that there was anything due and owing thereon, the plaintiff will not be required to prove the execution of the note. Creecy *v.* Joy, 40 Ore. 28, 66 Pac. Rep. 295.

A recital in a mortgage which describes the note for which the mortgage was given as security, may be sufficient as an admission of the execution of the note. Embree *v.* Emerson, 37 Ind. App. 16, 74 N. E. Rep. 44, 1110.

An affidavit of defense, containing an admission, may be read in evidence to prove the execution. Bowen *v.* DeLattre, 6 Whart. (Pa.) 430.

[67] Giving notice to produce a bill describing it as signed by the party is an admission of signature. Steph. Ev. 26.

In an action against a surviving partner on a note signed by a deceased partner, the admissions of the latter made during his lifetime to the effect that he signed the note are admissible. Adams *v.* Brownson, 1 Tyler (Vt.), 452.

In an action upon a lost check an admission of its contents by defendant's attorney at the trial, coupled with proof of non-indorsement, loss of the check and inability to find it after diligent search, constitute a *prima facie* case for plaintiff. Petrue *v.* Wakem & McLaughlin, 99 Ill. App. 463.

[68] Suydam *v.* Coombs, 3 Green (N. J. L.), 133.

Where suit is brought on a note it is competent for the defendant to offer in evidence, as an admission against the plaintiff, a tax schedule made by the plaintiff of his personal property after the note was made, which schedule did not disclose the note. Green *v.* Smith, 180 Ill. App. 572.

Not every casual statement of a party that he had given a note corresponding in some particulars with the note in suit will dispense with the ordinary proof of execution. If the note was not shown when the admission was made,

by the amount alone,[69] or by the name of the payee alone,[70] is not enough. If only a copy was shown there must be other evidence that the note produced on the trial is the original and genuine one.[71]

If the note is not under seal, proof of an admission by the signer of its genuineness, dispenses with the necessity of calling a subscribing witness.[72] If under seal it does not.[73]

The admission alone is not conclusive;[74] but if made deliberately, and with knowledge that the signature was not genuine, it may be available as a ratification, even though the facts do not raise an estoppel.[75] Evidence that defendant accredited the paper by acknowledging it to be genuine, and that plaintiff acted,[76] or refrained from acting,[77] on the faith

an admission referring to it by amount alone is not enough. But where the plaintiffs told defendant that they desired to discount the note, and the note was read to the defendant and he admitted that he had given such a note and stated that it was "all right," the admission made under such circumstances is sufficient to warrant the court in receiving the note in evidence and in submitting the question of execution to the jury, even though the note was not actually exhibited to and inspected by, the defendant at the time he made the admission. Stewart *v.* Gleason, 23 Pa. Super. Ct. 325.

When it is sought to prove the execution of a note by an admission of the maker, the admission must identify the note as by its date, amount, or consideration for which it was given, in order to be received. Smith *v.* Witton, 69 Mo. 458.

Evidence that the maker stated to the holder that he owed the amount of the note but that he would not pay it until he was ready to do so, is competent as an admission against the maker. Kyger *v.* Stallings, 55 Ind. App. 196, 103 N. E. Rep. 674.

[69] Palmer *v.* Manning, 4 Den. 131; Maun *v.* Forein, 166 Ill. 446, 46 N. E. Rep. 1119.

[70] Shaver *v.* Ehle, 16 Johns. 201. Compare Minard *v.* Mead, 7 Wend. 68.

[71] Pentz *v.* Winterbottom, 5 Den. 51.

[72] Hall *v.* Phelps, 2 Johns. 451.

[73] Hogland *v.* Sebring, 1 South (4 N. J. L.), 105. *Contra*, Stark, Ev. 506.

[74] Salem Bank *v.* Gloucester Bank, 17 Mass. 1, 27; Dan. Neg. Inst., § 1220.

[75] Hefner *v.* Vandolah, 62 Ill. 483, s. c., 14 Am. Rep. 106.

[76] Rosc. N. P. 359, citing Leach *v.* Buchanan, 4 Esp. 226.

[77] Casco Bank *v.* Keene, 53 Me. 103.

of such representation, estops defendant from denying the genuineness. Evidence that defendant had previously recognized the validity of similar unauthorized signatures, with knowledge that they were such, is competent, as tending to show authority in the one who assumed to sign.[78]

6. Testimony of the Supposed Writer.

One cannot be required to testify whether a signature is his until he has been shown the body of the paper itself.[79] The party[80] or a witness[81] who has testified as to whether a signature is his own, is not entitled, and cannot be required to write in court as a test;[82] but it is not error to permit him to do so by consent.[83] He may be asked if the body of the note is in his handwriting.[84]

The testimony of the writer, though he be in court and

[78] Hammond *v.* Varian, 54 N. Y. 398. Whether it is conclusive, without showing plaintiff's reliance on the recognition, compare Weed *v.* Carpenter, 4 Wend. 219, and Morris *v.* Bethel, L. R. 5 C. P. 47, 4 Id. 765.

[79] North Am. Fire Ins. Co. *v.* Throop, 22 Mich. 161. But on cross-examination it is in the discretion of the Court to allow this. Hardy *v.* Norton, 66 Barb. 527.

[80] King *v.* Donahue, 110 Mass. 155, s. c., 14 Am. Rep. 589.

[81] Hutchin's Case, 4 City Hall Rec. 119.

[82] Gilbert *v.* Simpson, 6 Daly, 29. Compare Chandler *v.* Le Baron, 45 Me. 534.

Where in an action on a promissory note the defendant denies having made the note, an expert will not be permitted to testify for the defendant, for the purpose of showing that the signature on the answer differs from that on the note. The defendant may have disguised his handwriting. Travers *v.* Snyder, 38 Ill. App. 379; Springer *v.* Hall, 83 Mo. 693, 53 Am. Rep. 598.

There are cases in which a witness denies his signature, and may on cross-examination be compelled in the presence of the court to write his name for the purposes of comparison. The signature written in the presence of the court becomes a part of the examination of the witness and takes it out of the rule against making a comparison between the writing in question and extraneous papers not in evidence. U. S. Health, etc., Ins. Co. *v.* Hill, 9 Ala. App. 222, 62 So. Rep. 954.

[83] Hayes *v.* Adams, 2 Supm. Ct. (T. & C.) 593.

[84] Haughey *v.* Wright, 12 Hun, 179. Especially if the terms of the note are in controversy. Id.

competent, is not exclusively the primary evidence. Other modes of proof, below stated, may be resorted to without calling him.[85] The testimony of the party is not a substitute for calling a subscribing witness, if there be one.

7. Direct Testimony to Particular Signature.

A witness may testify positively, in the first instance, that he knows the signature shown him to be that of the defendant,[86] and without stating in the first instance his means of knowledge. It is for the opposite party to ascertain by cross-examination, how he acquired his knowledge.[87]

8. Witness Who Knows the Handwriting Generally.

If the witness cannot swear thus positively to the particular signature, he is incompetent to prove the signature without proof of having seen the person write, or of other circumstances to show knowledge of the handwriting which he is called to prove.[88] Such a witness therefore should be asked first if he "knows" the handwriting of the defendant, or if he is "acquainted" with it, or questions to that effect;

[85] Edw. Notes to 2 Cow. & H. 507, and auth. cit.; S. P. An indictment for forgery. Foulker's case, 2 Rob. (Va.) 836.

[86] Whittier *v.* Gould, 8 Watts (Penn.), 485; Goodhue *v.* Bartlett, 5 McLean, 186. See Wines *v.* State Bank, 22 Ind. App. 114, 53 N. E. Rep. 389. *Contra*, Slaymaker *v.* Wilson, 1 Penr. & W. 216.

One who is personally familiar with the signature to an instrument is qualified to give an opinion as to the genuineness of the instrument. In re Marchall, 126 Cal. 95, 58 Pac. Rep. 449.

[87] Whittier *v.* Gould; Goodhue *v.* Bartlett (above). See Talbott *v.* Hedge, 5 Ind. App. 555, 32 N. E. Rep. 788.

[88] The rule in Slaymaker *v.* Wilson (above), to the effect that means of knowledge must be shown in the first instance, is a sound rule for cases where the witness testifies to his opinion from his knowledge of the party's handwriting as distinguished from testifying directly to the genuineness of the signature from his knowledge of the particular instrument; and this accords with the general principle as to opinion evidence. But Moody *v.* Rowell, 17 Pick. 490, admits the testimony in both cases, leaving the means of opinion to cross-examination. See Hawkins *v.* Citizens Bank, etc., Co., 18 Ga. App. 263, 89 S. E. Rep. 450.

and next should be asked to state his means of knowledge;[89] and then, whether the signature is that of the party; or whether he believes it to be. The opinion or belief of the witness should be excluded, unless foundation is thus first laid.[90] The adverse party may interpose by cross-examination on this as a preliminary question;[91] and it is for the judge to pass on the competency of the witness to express an opinion or belief.

9. Means of Knowledge.

There is no precise standard fixing the degree of knowledge necessary.[92] The question of qualification depends rather on the source of knowledge than its degree.[93]

It is sufficient for the purpose if it appear either;[94]

[89] Pate *v.* People, 8 Ill. 644, 660. Even though he have apparent means of knowledge, he is not competent if he can only say he rather thinks he could tell the handwriting. Burnham *v.* Ayer, 36 N. H. 182.

[90] McCracken *v.* West, 17 Ohio, 16. The better opinion is, that if no objection is made to the qualification of the witness, the omission to show the source of his knowledge is waived.

[91] See Henderson *v.* Bank, 11 Ala. 855; Barnich *v.* Wood, 3 Jones (N. C.) L. 306, 310; Moody *v.* Rowell, 17 Pick. 490.

[92] Hartung *v.* People, 4 Park. Cr. 319, 324; Poncin *v.* Furth, 15 Wash. 201, 46 Pac. Rep. 241. No arbitrary limit of time can be fixed within which a witness must have seen writing done. His intelligence, habits of observation, and apparent strength and confidence of memory must first be considered by the court, and if it determines to admit his evidence, the jury must then determine what weight they will accord it. Wilson *v.* Van Leer, 127 Pa. St. 371, 14 Am. St. Rep. 854, 17 Atl. Rep. 1097.

[93] Smith *v.* Walton, 8 Gill (Md.), 77.

A charge to the jury that they must be satisfied from all the evidence that defendant executed the note is erroneous because requiring too high a degree of proof, when all that the law requires is that the jury be reasonably satisfied. Gillespie *v.* Hester, 160 Ala. 444, 49 So. Rep. 580.

[94] There is no good reason, says DAVIS, J., for excluding testimony founded on any other mode of getting knowledge of handwriting, if the court, on the preliminary examination, can see that the witness has that degree of knowledge which will enable him to judge. Rogers *v.* Ritter, 12 Wall. 317.

1. That the witness has seen defendant write at least once;[95] or,

2. That he has seen writings which defendant either directly,[96] or indirectly, acknowledges to be in his handwriting—as, for instance, a note which the defendant paid;[97] or,

3. That he has received letters, or other documents, purporting to be written or signed by the defendant, in answer to communications[98] written by himself, or under his au-

[95] Magee *v.* Osborn, 32 N. Y. 669, rev'g 1 Rob. 689; Hammond *v.* Varian, 54 N. Y. 398; Smith *v.* Walton, 8 Gill (Md.), 77; Edelen *v.* Gough, Id. 87; Rideout *v.* Newton, 17 N. H. 71. Having seen him sign by initials was held sufficient where the belief in genuineness depended on their form. Jackson *v.* Van Dusen, 5 Johns. 144. The testimony is not incompetent because he only saw defendant write many years ago, R. *v.* Hornstooke, 25 St. Tr. 71, cited in Steph. Ev. 58; or since the date of the disputed signature, Keith *v.* Lathrop, 10 Cush. 453; but if only since the controversy arose it is insufficient, if not incompetent. Utica Ins. Co. *v.* Badget, 3 Wend. 102. But seeing defendant in the act of writing is not enough, if there was no inspection of what he wrote. See Brigham *v.* Peters, 1 Gray, 139. The fact that the witness is not absolutely positive of the identity of the defendant with the person whom he saw write, does not render his testimony incompetent. See Woodford *v.* McCluahan, 9 Ill. 85; Warren *v.* Anderson, 8 Scott, 384.

"If the witnesses called by the plaintiff to prove that the signature of Mrs. Williams on the note in question was genuine, predicated their judgment, in whole or in part, upon signatures to notes they saw her sign, and the signatures to those notes differed from the signature to the note in question, it seems plain that the defendant had the right to call out that fact in cross-examination, as it was a fact proper for the consideration of the jury in determining what weight they should give to the opinions of the witnesses who gave their opinion that the note was genuine." Bevan *v.* Atlanta Nat. Bank, 142 Ill. 302, 31 N. E. Rep. 679.

[96] State *v.* Spence, 2 Harr. (Del.) 348.

[97] Johnson *v.* Daverne, 19 Johns. 134; Hammond *v.* Varian, 54 N. Y. 398; and see Hess *v.* State, 5 Ohio, 5; State *v.* Cheek, 13 Ired. L. (N. C.) 114, 120.

[98] Webb *v.* Mauro, 1 Morr. (Iowa) 329.

"A letter purporting to come from one, and signed in his name, will not furnish a sufficient basis of knowledge to permit the one who received such letter to give

thority, and addressed to defendant, and has acted on them as such; [99] or, if the acts of the witness done pursuant to the letters purporting to come from defendant have been ratified by defendant; [1] or,

4. That, in the ordinary course of business, writings or signatures purporting to be made by defendant, have been habitually passed through his hands, and acted on by him as such; [2] or,

5. That, as a public officer, he has been called upon to pass on what he believed to be the defendant's signature, and has done so.[3]

an opinion respecting the genuineness of the signature of the putative writer to another instrument unless the one whose name was signed to the letter, in some manner, subsequently acknowledged the signature to be his." Talbott *v.* Hedge, 5 Md. App. 555, 32 N. E. Rep. 788.

[99] Tilford *v.* Knott, 2 Johns. Cas. 211; Southern Express Co. *v.* Thornton, 41 Miss. 216. But it is not enough to show that the witness has had some business with defendant. Mapes *v.* Leal, 27 Tex. 345. Nor that he had seen letters purporting to come from him, or said, by other persons not produced to have come from him. Philadelphia, &c. R. R. Co. *v.* Hickman, 28 Penn. St. 318, 329; Goldsmith *v.* Bane, 3 Halst. (8 N. J. L.) 87; even though the witness acted on them. Cunningham *v.* Hudson River Bank, 21 Wend. 557. Compare Steph. Ev. art. 51. Or though he can testify that from their contents he knows they must have come from defendant. Philadelphia, &c. R. R. Co. *v.* Hickman (above).

[1] Bronson, J. Cunningham *v.* Hudson River Bank, 21 Wend. 557. But, in all these cases, personal knowledge of the facts constituting the means of forming an opinion must be in the witness who is to express the opinion. Knowledge in one, and belief of another, will not do. Power *v.* Frick, 2 Grant (Penn.), 306. The writings by which the witness acquired his conversance with the handwriting need not be produced. Jackson *v.* Murray, Anth. N. P. 143.

[2] Bowman *v.* Sanborn, 25 N. H. 87. As in the case of a bank cashier passing the bills of a neighboring bank. So, also, of the case of a messenger carrying defendant's letters to the post-office. See Doe & Mudd *v.* Suckermore, 5 Ad. & E. 703, 740; Hess *v.* State, 5 Ohio, 5. See Riggs *v.* Powell, 142 Ill. 453, 32 N. E. Rep. 482.

[3] Bank of Commonwealth *v.* Mudgett, 44 N. Y. 514, affi'g 45 Barb. 663; U. S. *v.* Champagne, 1 Ben. 241, 243; Amherst Bank *v.* Root, 2 Metc. 522, 532.

If it appear that the knowledge was acquired for the purpose of the present controversy, the witness is not qualified.[4]

10. Opinion or Belief.

After showing knowledge of the handwriting (or of the signature alone as distinguished from the handwriting generally),[5] founded on adequate means of knowledge, the witness may testify to his belief or his opinion,[6] as to genuineness; and this evidence is sufficient to go to the jury in proof of execution.[7] An expression of belief, though not positive, is competent; but if hesitating or qualified, it may not alone be sufficient.[8]

[4] 1 Whart. Ev., § 707.

[5] McKonkey *v.* Gaylord, 1 Jones L. (N. C.) 94.

[6] Shitler *v.* Bremer, 23 Penn. St. 413; Clark *v.* Freeman, 25 Id. 133; Fash *v.* Blake, 38 Ill. 363.

[7] Hopkins *v.* Megguire, 35 Me. 78; Magee *v.* Osborn (above).

[8] Smith *v.* Walton (above); Warson *v.* Brewster, 1 Penn. St. 381. Compare Wiggin *v.* Palmer, 31 N. H. 251, 270.

A witness testified that he "used to be" acquainted with the signature of decedent but had not seen it for several years. Upon being shown the signature on the note, he said: "I could say nothing to a certainty. I have a general memory of her signature several years ago. It looks like probably it might be her signature; it is something after my memory that it is. I cannot say it is her signature. I will say it is probably her signature. It has a general appearance as I remember it. I do not know that I have information enough to say, or that I would form an opinion that I would abide by. I can only judge from the general appearance, and from that form an impression, but I do not know. It is my impression that would be her handwriting, just from the looks of it." The court held that while the testimony of the witness was not strong or positive, yet he had such an acquaintance with the signature of the decedent as to enable him to have an impression or belief upon the question, and the declaration of such impression or belief amounted practically to the expression of an opinion. The witness was not interrogated with relation to the source of his knowledge of the signature of the decedent, but having declared that he was acquainted with it at one time, and being able to form a belief with respect to the genuineness of the signature in question, he was a competent witness, and the court properly admitted the note upon his testimony. The source of his knowledge, if unsatisfactory to the appellant, should have been

It is not competent for a witness who cannot swear to belief or opinion to testify that the writing is like defendant's.[9]

11. Refreshing Memory.

A witness who satisfies these rules may, before[10] or at the trial,[11] refer to papers in his possession which he knows to be in defendant's handwriting, to refresh his memory, before testifying; but if, after so doing, he is not able to speak to the genuineness of the signature in suit, except from comparing the two, his testimony on the point is not competent.[12]

12. Testing Witness.

To test or impeach the witness, he cannot be shown, and examined as to the genuineness of papers, neither in evidence, nor adduced for comparison.[13] A witness cannot be required to answer as to part of a signature before being permitted to see the whole; [14] but may express an opinion as to part, though unable to form one as to the rest.[15] A witness who has sworn to the genuineness of a disputed signature to a note, may be asked further if he would act upon it if it came to him in an ordinary business transaction.[16]

explored by cross-examination. Talbott *v.* Hedge, 5 Ind. App. 555, 32 N. E. Rep. 788.

[9] *Contra*, 1 Whart. Ev., § 709. The reason why it is not competent is that evidence that one handwriting is like another, or resembles another, is no evidence whatever that it is the same.

[10] Redford *v.* Peggy, 6 Rand. (Va.) 316; see chapter XVI, paragraph 37 of this vol.

[11] Smith *v.* Walton, 8 Gill (Md.), 77; McNair *v.* Commonwealth, 26 Penn. St. 388.

[12] Id.

[13] Van Wyck *v.* McIntosh, 14 N. Y. 439. *Contra*, 1 Whart. Ev., § 710. Nor can a party allowed to do this contradict the answers. Van Wyck *v.* McIntosh (above).

[14] See North Am. Fire Ins. Co. *v.* Throop, 22 Mich. 161. Compare 41 Ala. 626, 634. Testing *party* by signature of concealed paper, allowed. Hardy *v.* Norton 66 Barb. 527.

[15] Smith *v.* Walton, 8 Gill (Md.), 77.

[16] Holmes *v.* Goldsmith, 147 U. S. 150.

13. Comparison of Hands.

The statute [17] is,—"Comparison of a disputed writing with any writing [18] proved [19] to the satisfaction of the court to be the genuine handwriting of any person, claimed on the trial

[17] N. Y. Code Civ. Pro., § 961, d. Same Stat. 28 & 29 Vict. c. 18, § 8; Iowa Code, § 3, 655. Same rule without statute, in *Connecticut*, Lyon *v.* Lyman, 9 Conn. 55, 61; *Maine*, Woodman *v.* Dana, 52 Me. 9; *Mississippi*, Wilson *v.* Beauchamp, 50 Miss. 24; *Massachusetts*, Moody *v.* Rowell, 17 Pick. 490; *New Hampshire*, State *v.* Hastings, 53 N. H. 452.

[18] Unsigned writings may be used. Richardson *v.* Newcomb, 21 Pick. 315, 317. But not letter-press copies. Commonw. *v.* Eastman, 1 Cush. 189.

The "disputed writing" referred to by the statutes is any writing which one party upon a trial seeks to prove as the genuine handwriting of any person, and which is not admitted to be such, provided that the writing is not inadmissible under other rules of evidence. Peop. *v.* Molineux, 168 N. Y. 264, 61 N. E. Rep. 286, 62 L. R. A. 193.

[19] Beyond doubt. Martin *v.* Maguire, 7 Gray (Mass.), 177, 178. For instance, by a witness who saw the person write the very paper (1 Iowa, 159); or by the admission of the writer, or of his counsel (2 Me. [2 Greenl.] 33), unless offered on his own behalf (1 Iowa, 159). The opinion of a witness is not enough (1 Cush. 189). Nor letters merely proved to have been received (108 Mass. 344). Nor a certificate of acknowledgment (7 Gray, 177, 1 Iowa, 159).

The following quotation from People *v.* Molineux, 168 N. Y. 264, 327, 61 N. E. Rep. 286, 62 L. R. A. 193, may be pertinent though coming from a murder case: "The words 'proved to the satisfaction of the Court' are to be construed in the light of the obvious purpose for which these statutes were enacted. At common law a paper properly in evidence for general purposes can be compared with a disputed writing, but only when the genuineness of the handwriting of the former is admitted or proved beyond a reasonable doubt. . . . Since these statutes were designed to amplify and broaden the common law rule by permitting the use of genuine writings as standards of comparison even when they are not competent or relevant for other purposes, it must be assumed that the language prescribing the manner in which the genuineness of such writings is to be established was carefully and deliberately chosen by the legislature. While it is obvious that the words 'proved to the satisfaction of the court' do not invest the trial court with a mere personal discretion which is to be exercised without reference to rules of evidence, it is equally plain that the failure of these statutes to prescribe the precise method or degree

to have made or executed the disputed instrument, or writing shall be permitted and submitted to the court and jury in like manner." The evidence of the genuineness of the standard should be so clear that if it were one of the issues in the case for the jury to determine a verdict would be directed in favor of its genuineness by the court.[20] How the

of proof necessary to establish the genuineness of a writing for purposes of comparison with a disputed writing renders it necessary to resort to the general rules of the common law for that purpose. Thus the genuineness of a writing may be established (1) by the concession of the person sought to be charged with the disputed writing made at or for the purposes of the trial, or by his testimony; (2) or by witnesses who saw the standards written, or to whom, or in whose hearing, the person sought to be charged acknowledged the writing thereof; (3) or by witnesses whose familiarity with the handwriting of the person who is claimed to have written the standard enables them to testify to a belief as to its genuineness; (4) or by evidence showing that the reputed writer of the standard has acquiesced in or recognized the same, or that it has been adopted or acted upon by him in his business transactions or other concerns. . . . Writings proved to the satisfaction of the court by the methods and under the rules adverted to may be used as standards for purposes of comparison with a disputed writing subject, however, to the qualification that writings which are otherwise incompetent, should never be received in evidence for purposes of comparison."

[20] Clark *v.* Douglass, 5 App. Div. (N. Y.) 547, 550, 551. But in the more recent case of People *v.* Molineux, above, it was stated by the higher tribunal that the genuineness of the standard "must be established by a fair preponderance of the evidence" in civil cases, and beyond a reasonable doubt in criminal cases.

The word "court" in the statutes is used in its general sense, and includes both judge and jury in a case where a jury is present. People *v.* Molineux, 168 N. Y. 264, 61 N. E. Rep. 286, 62 L. R. A. 193.

The genuineness of disputed handwriting cannot be proved by comparing it with other handwriting of the party, unless the paper admitted to be in the handwriting of the party or to have been subscribed by him is in evidence for some other purpose in the cause. Hickory *v.* United States, 151 U. S. 303, 38 L. ed. 170, 14 Supm. Ct. Rep. 334.

The genuineness may be proved by the admission of the party against whose interest the paper is offered, which admission must be made voluntarily in court or on the record; he cannot be put on

proof is to be made depends upon the general rules of evidence applicable to the proof of a party's handwriting.[21] If the party alleged to have written the paper disputes it he has the right to introduce in evidence other writings, satisfactorily proved to have been executed by him, for the purpose of comparison.[22] The act, however, does not authorize the admission in evidence of writings other than those of the person whose signature is in question.[23] At common law, this comparison may be made with writings already in evidence;[24]

the stand and asked to testify as to the genuineness of a writing to be used for comparison. Hazzard *v.* Vickery, 78 Ind. 64; Shorb *v.* Kinzie, 80 Ind. 500.

Signatures of the defendant on papers otherwise irrelevant, and not admitted to be genuine, are admissible for the mere purpose of comparison with the signature in dispute, if they are first shown to be genuine to the satisfaction of the court. University of Illinois *v.* Spalding, 71 N. H. 163, 51 Atl. Rep. 731, 62 L. R. A. 817.

Where the plaintiff offers and uses the signature of the defendant as found on the answer for the purposes of comparison it becomes an undisputed standard of comparison. Elsenrath *v.* Kallmeyer, 61 Mo. App. 430.

[21] McKay *v.* Lasher, 121 N. Y. 477, 482–483, 24 N. E. Rep. 711; People *v.* Molineux (Id.)

[22] Mutual Life Ins. Co. *v.* Suiter, 131 N. Y. 557, 29 N. E. Rep. 822.

He also has the right to refuse to give specimens of his handwriting if requested to do so. People *v.* Molineux, 168 N. Y. 264, 61 N. E. Rep. 286, 62 L. R. A. 193.

[23] Peck *v.* Callaghan, 95 N. Y. 73.

See Keyser *v.* Pickrill, 4 App. D. C. 198, holding that documents, in order to be admissible for purposes of comparison, must have some relevancy to the matters involved in the litigation.

[24] Moore *v.* U. S. 91 U. S. (1 Otto), 270; Hickory *v.* United States, 151 U. S. 303; Williams *v.* Conger, 125 U. S. 397; Henderson *v.* Hackney, 16 Ga. 521; Williams *v.* Drexel, 14 Md. 566; Gaunt *v.* Harkness, 53 Kan. 405, 42 Am. St. Rep. 297, 36 Pac. Rep. 739. And, according to some authorities, any proceeding in the cause, incontestably signed by the party. [Northern Bk. *v.* Buford, 1 Duv. (Ky.) 335; Dunlop *v.* Silver, 1 Cranch C. Ct. 27; Shannon *v.* Fox, Id. 133.] Where the action is on a note signed by a cross-mark and the defendant in his plea sets up forgery, no comparison can be made between the signature to the plea and that of the note, on the principle that no party can manufacture evidence for himself. Travers *v.* Snyder, 38 Ill. App. 379.

but not with others,[25] except to prove an ancient document.[26]

[25] Moore *v.* U. S. (above), unless by consent (Kannon *v.* Galloway, 58 Tenn. 230). This rule has been applied also in *Alabama*, State *v.* Givens, 5 Ala. 747; *Illinois*, Bd. of Trustees *v.* Misenheimer, 78 Ill. 22; Stitzel *v.* Miller, 157 Ill. App. 390; *Kentucky*, McAllister *v.* McAllister, 7 B. Mon. 269; *Maryland*, Tome *v.* Parkersburgh R. R. Co., 39 Md. 36, s. c., 17 Am. Rep. 540, 561; *Michigan*, Van Sickle *v.* People, 29 Mich. 61; *New Jersey*, West *v.* State, 22 N. J. L. (2 Zab.) 212; *North Carolina*, Otey *v.* Hoy, 3 Jones, 407; *Tennessee*, Clark *v.* Rhodes, 2 Heisk. 206; *Texas*, Hanley *v.* Gandy, 28 Tex. 211; *Virginia*, Rowt *v.* Kyle, 1 Leigh, 216; *West Virginia*, Clay *v.* Alderson, 10 W. Va. 49; *Wisconsin*, Pierce *v.* Northey, 14 Wis. 9.

In *Indiana* (Burdick *v.* Hunt, 43 Ind. 281), writings, *admitted* to be genuine, are thus used. Writings proved or admitted are used for purposes of *corroboration* only, in *Indiana*, Clark *v.* Wygatt, 15 Ind. 271, but see 43 Id. 281; *Pennsylvania*, Haycock *v.* Greup, 57 Penn. St. 438; *South Carolina*, Bennett *v.* Matthews, 5 S. C. 478.

Writings which are not in evidence, and not being papers in the case, may be used for comparison by experts, if their genuineness is admitted by the opposite party, but, except by agreement, such papers may not be submitted to the jury. Ashwell *v.* Miller, 54 Ind. App. 381, 103 N. E. Rep. 37.

The fact that the signature which is offered for comparison is on a *post litem motam* writing does not exclude it; its genuineness can be admitted. Ashwell *v.* Miller, 54 Ind. App. 381, 103 N. E. Rep. 37.

[26] Strother *v.* Lucas, 6 Pet. 763; Woodard *v.* Spiller, 1 Dana (Ky.), 179, 181.

"While it is obvious that the words 'proved to the satisfaction of the court' do not invest the trial court with a mere personal discretion which is to be exercised without reference to rules of evidence, it is equally plain that the failure of these statutes to prescribe the precise method or degree of proof necessary to establish the genuineness of a writing for purposes of comparison with a disputed writing renders it necessary to resort to the general rules of the common law for that purpose. Thus the genuineness of a writing may be established (1) by the concession of the person sought to be charged with the disputed writing made at or for the purposes of the trial, or by his testimony; (2) or by witnesses who saw the standards written, or to whom, or in whose hearing, the person sought to be charged acknowledged the writing thereof; (3) or by witnesses whose familiarity with the handwriting of the person who is claimed to have written the standard enables them to testify to a belief as to its genuineness; (4) or by evidence showing that the reputed

A skilled witness may give opinion as to the identity or difference of the handwritings.[27] And the jury may compare them.[28]

writer of the standard has acquiesced in or recognized the same, or that it has been adopted and acted upon by him in his business transactions or other concerns. Since common-law evidence is competent to establish the genuineness of a writing sought to be used as a standard of comparison, it is apparent, in the absence of a statutory rule as to the degree of proof to be made, that the general rule of the common law as to the sufficiency of evidence must prevail. In civil cases the genuineness of such a paper must be established by a fair preponderance of the evidence and in criminal cases beyond a reasonable doubt. Writings proved to the satisfaction of the court by the methods and under the rules adverted to, may be used as standards for purposes of comparison with a disputed writing, subject, however, to the qualification that writings which are otherwise incompetent, should never be received in evidence for the purposes of comparison." People *v.* Molineux, 168 N. Y. 264, 327, 61 N. E. Rep. 286, 62 L. R. A. 193.

[27] Moody *v.* Rowell, 17 Pick. (Mass.) 490, 496. *Contra,* Travis *v.* Brown, 43 Penn. St. 9. In Jackson *v.* Adams, 100 Iowa, 163, 69 N. W. Rep. 427, the court held that it was proper to charge the jury that "evidence of this character being in fact the result only of a comparison of the controverted signature with the genuine signature of the defendant, as the same is remembered and impressed upon the mind of the witness whose opinion is so given, or with the other signatures proven to be those of the defendant, it is regarded by the law as unsatisfactory, and such as ought not to overthrow the positive and direct testimony of a credible witness who testifies from personal knowledge." An agent of the plaintiff, a corporation, may testify to his opinion as to the genuineness of the signature of defendant's testator, where his opinion is given as an expert and is based upon a comparison of the signature in question with other admittedly genuine writings. Patton *v.* Bank of La Fayette, 124 Ga. 965, 53 S. E. Rep. 664, 5 L. R. A. N. S. 592, 4 Ann. Cas. 639.

Expert testimony is competent to prove the signature to a note. Roy *v.* First Natl. Bk. (Miss.) 33 So. Rep. 494.

[28] State *v.* Hastings, 53 N. H. 452. *Contra,* Huston *v.* Schindler, 46 Ind. 38.

Where there are several papers in evidence, and all of them are admitted to be genuine, the jury may compare them, either with or without the help of experts. Swales *v.* Grubbs, 126 Ind. 106, 25 N. E. Rep. 877; Keyser *v.* Pickrill (above); Kelly *v.* Keese,

14. Opinions of Witnesses.

In order to express an opinion directly upon the question, whether the writing shown the witness is that of the person to whom it is imputed, when this is the question for the jury, the witness must know the handwriting, by means of knowledge such as are indicated above.[29] But an expert properly qualified, although he does not know the handwriting, may express an opinion as to the characteristics of the writing in evidence—for instance, as to the age of the writing, and of the paper; as to whether the writing is simulated or constrained, or natural; [30] whether the whole was written at the

102 Ga. 700, 29 S. E. Rep. 591.

[29] Paragraphs 8 and 9. This I understand to be the common-law rule still in force in New York and some other States. Goodyear *v.* Vosburgh, 63 Barb. 156; Frank *v.* Chemical Bank, 37 Super. Ct. (J. & S.) 31; People *v.* Spooner, 1 Den. 543; Tome *v.* Parkersburgh R. R. Co., 39 Md. 36, s. c., 17 Am. Rep. 540; although the rule is not uniformly applied in practice. The rule is a proper corollary of that which excludes comparison of hands; for otherwise an expert might testify to an opinion formed on a comparison of hands out of court, and exclude the comparison from the jury. *Contra*, Moody *v.* Rowell, 17 Pick. 490 (the leading case in favor of expert opinions as to genuineness); Hicks *v.* Person, 19 Ohio, 426, 441; Withee *v.* Rowe, 45 Me. 571, 589; Woodman *v.* Dana, 52 Id. 9; and see Lyon *v.* Lyman, 9 Conn. 55; Travis *v.* Brown, 43 Penn. St. 9; and 5 Am. L. Rev. 238. The rule which prohibits a non-expert from giving an opinion based upon a comparison of handwriting has no application when the party whose name is signed is himself being examined as to whether the signature is his or not. First Natl. Bank *v.* Allen, 100 Ala. 476, 46 Am. St. Rep. 80, 14 So. Rep. 335.

If the witness does not know the handwriting, he will not be permitted to testify unless he is first qualified as an expert. Griffin *v.* State, 90 Ala. 596, 8 S. O. Rep. 670.

The weight of the expert opinion is a question for the jury. Rangeley *v.* Harris, 165 N. C. 358, 81 S. E. Rep. 346.

A non-expert witness, who has seen the alleged maker of the note write may testify that the signature is not genuine and indicate the points of difference between the signature in question and the handwriting of the person who is alleged to have written the signature. Nagle *v.* Schnadt, 239 Ill. 595, 88 N. E. Rep. 178.

[30] People *v.* Hewit, 2 Park. Cr. 20. But the mere denial of a sig-

same time,[31] by the same hand,[32] and with the same pen and ink; [33] whether it has been altered; [34] whether writing upon a crease in the paper was made before or after the crease; [35] and whether writing upon an erasure was made before or after the body of the document was written,[36] and in general as to all matters which require special skill and scientific research to discover and explain.[37] An expert, when speaking as a witness only from a comparison of handwriting, should have before him in court the two writings compared.[38]

nature, without allegation or evidence that it is simulated, does not justify the admission of evidence that it is not simulated. Kowing *v.* Manly, 49 N. Y. 192, 203, s. c., 13 Abb. Pr. N. S. 276.

The opinion of an expert cannot be received unless the writing is before the court. Reilly *v.* Frias, 85 N. Y. Misc. 162, 147 N. Y. Supp. 84.

[31] Dubois *v.* Baker, 30 N. Y. 355, 363, 365, affi'g 40 Barb. 556; Quinsigamond Bank *v.* Hobbs, 11 Gray, 250, 257.

[32] State *v.* Ward, 39 Vt. 225, 236. But compare Lodge *v.* Phipher, 11 Serg. & R. 333; and Fulton *v.* Hood, 34 Penn. St. 365.

[33] Fulton *v.* Hood, 34 Penn. St. 365.

[34] Moye *v.* Herndon, 30 Miss. 110, 118.

[35] Bacon *v.* Williams, 13 Gray, 525. *Contra*, Sackett *v.* Spencer, 29 Barb. 187. Unsound.

[36] Dubois *v.* Baker, 30 N. Y. 355. But not whether erasures were made by a peculiar instrument found in the party's possession. Commonwealth *v.* Webster, 5 Cush. 295.

[37] Frank *v.* Chemical Natl. Bk., 37 Super. Ct. (J. & S.) 31.

In an action to cancel an alleged forged note, an expert cannot testify that a forger, in disguising and imitating handwritings, is more accurate and particular at the beginning than at the closing of such effort. The court said: "The question seems not to have been within the domain of expert testimony. It presented no question of science, and involved no rule not subject to as many variations as there might be efforts at forging. The case of one man is not evidence of the care which may be exercised by another in an effort to commit a forgery, any more than is the skill of one man, in executing the imitation or disguise, evidence of the skill of another." Miller *v.* Dill, 149 Ind. 326, 49 N. E. Rep. 272.

[38] Hynes *v.* McDermott, 82 N. Y. 41. A comparison of a signature in dispute with photographic copies of other writings, for the purpose of getting an opinion from an expert as to the character of the signature as real or feigned, where the originals from which the copies

The grounds and reason of his opinion may be called for on direct as well as on cross-examination.[39]

15. Matters of Description.

Beside the expression of opinion, a competent witness may describe the condition and appearance of the document, so far as material, for the purpose of having them stated in the record.[40] So one not an expert may, of course, testify to facts he observed, such as the apparent effect of a powder found on the alleged forger's person.[41]

16. Qualifications of Witness.

The qualifications of the expert must be such as are appropriate to the questions on which his opinion is sought. Special conversance with handwriting, whether acquired in teaching it as a writing-master,[42] or in scrutinizing it as a bank cashier,[43] or as a business man in commercial employments,[44] qualifies a witness to express some opinion as to handwriting; for the qualification does not depend on vocation, but on intelligence, means of knowledge and practical experience; and it is not necessary that the witness claim to be an expert;[45] although experience in the special duty of examining and detecting alterations, erasures and forgeries, enhances the qualification of the witness. But mere skill in judging handwriting does not necessarily qualify to ex-

are made are not brought before the jury and cannot be shown to other witnesses, should not be permitted, at least where there is no proof as to the manner and exactness of the photographic method used. (Id.)

[39] Keith *v.* Lathrop, 10 Cush. 453.

[40] Dubois *v.* Baker (above).

[41] People *v.* Brotherton, 47 Cal. 388.

[42] Moody *v.* Rowell, 17 Pick. 490; Bacon *v.* Williams, 13 Gray, 525; Exchange Bank *v.* Veirs, 3 Cal. App. 71, 73, 84 Pac. Rep. 455.

[43] Dubois *v.* Baker, 30 N. Y. 355.

[44] Hyde *v.* Woolfolk, 1 Iowa, 159, 165.

[45] Id.

One who as a detective and police official has had years of experience in comparing handwriting is qualified to testify as an expert. U. S. Health, etc., Ins. Co. *v.* Hill, 9 Ala. App. 222, 62 So. Rep. 954; Christman *v.* Pearson, 100 Iowa, 634, 69 N. W. Rep. 1055.

press an opinion as to the age of writing; [46] or whether an erasure has been made.[47]

17. Photographs.

In aid of evidence on the question of genuineness, magnified photographs of the writing in evidence are competent,[48] upon preliminary proof of their accuracy,[49] and the photographer may be examined as an expert.[50]

18. Mark.

Signature by mark does not require any special allegation,[51] nor any different mode of proof.[52] An expert may testify that a mark, purporting to be the signature of a very old man, could not have been made by the unaided hand of such a man.[53]

[46] Clark *v.* Bruce, 12 Hun, 271.

[47] Swan *v.* O'Fallon, 7 Mo. 231, 237.

[48] Marcy *v.* Barnes, 16 Gray, 161. *Contra*, Tome *v.* Parkersburgh, &c. R. R. Co., 39 Md. 36, s. c., 17 Am. Rep. 540.

Where the disputed signature as well as the genuine signatures to be compared are before the court, photographs of the disputed and genuine signatures taken side by side for the purpose of convenient comparison are inadmissible. Crane *v.* Horton, 5 Wash. 479, 32 Pac. Rep. 223.

[49] Taylor Will Case, 10 Abb. Pr. N. S. 301.

[50] Marcy *v.* Barnes (above).

[51] Walbridge *v.* Arnold, 21 Conn. 424, 429. A mere cross or mark cannot be identified and therefore no comparison between one cross mark and another is admissible. Travers *v.* Snyder, 38 Ill. App. 379. Promissory notes found among the papers of an illiterate deceased person, purporting to have been signed by him with his mark and which he had paid, are, on the trial of an action against his administrator upon another promissory note also purporting to have been signed by the intestate with his mark, admissible in evidence for the purpose of comparing the signatures by mark, the defense being forgery. Little *v.* Rogers, 99 Ga. 95, 24 S. E. Rep. 856.

[52] See Jackson *v.* Van Dusen, 5 Johns. 144, 1 Whart. Ev., § 696.

Where a note has been signed with an X mark and there are no attesting witnesses, the execution may be proved by the admissions of the maker. Hilborn *v.* Alford, 22 Cal. 482. An opinion as to the genuineness of a signature by mark is not admissible. Matter of Corcoran, 145 N. Y. App. Div. 129, 129 N. Y. Supp. 165.

[53] Lansing *v.* Russell, 3 Barb.

19. Identity of Names.

A discrepancy in name between the pleading and the bill or note, or between the name of the payee and the indorser, should be explained by evidence of identity.[54] Where the names are identical, identity of person is presumed in support of the action, unless the name is too common to allow the reasonableness of a presumption of identity; [55] or there are circumstances negativing it,[56] or it appears that there are two persons of similar name and residence, or similar name and vocation.[57] Parol evidence of identity is admissible, and a variance in the pleading amendable.

20. Fictitious Person.

The fact that a person to whose order the paper was payable was a fictitious person,[58] may be shown by parol; and as evidence of the party's knowledge of the fact, it is competent to show that he had executed other similar paper, under circumstances implying such knowledge.[59]

Ch. 325. But such testimony loses its force if the subscribing witness testify that the hand was guided by another. Mere marks, or scratches, used either perpendicularly or horizontally over a signature, apparently for the purpose of cancelling it, are not writings, and the opinion of a handwriting expert as to the identity of the person who made the marks will not be admitted. In re Hopkins, 172 N. Y. 360, 65 N. E. Rep. 173, 65 L. R. A. 95, 92 Am. St. Rep. 746.

[54] 2 Pars. on Pr. N. & B. 474, 479. Compare Hunt *v.* Stewart, 7 Ala. 525; where the omission of a middle initial was not held sufficient to require evidence of identity, and see 2 Dan. Neg. Inst. 221; and see Fletcher *v.* Conly, 2 Greene (Iowa), 88. But identity of holder with payee of the same name was not presumed in Curry *v.* Bank of Mobile to defeat claim to be *bona fide* indorsee before maturity.

[55] 1 Whart. Ev. 665, § 701.

[56] See chapter IV, paragraph 49, of this vol.

[57] 2 Whart. (above). For a collection of authorities on names, see 18 Alb. L. J. 126.

[58] 1 N. Y. R. S. 768, § 5.

[59] Gibson *v.* Hunter, 2 H. Bl. 288, Rosc. N. P. 93.

It is only where the maker of the instrument knows that the payee is a fictitious person, that the instrument can be treated as payable to bearer. Neg. Instr. Law, § 28, Sub. 3; Seaboard Natl. Bank *v.* The Bank of America, 193 N. Y. 26, 85 N. E. Rep. 829, 22 L. R. A. N. S. 499.

21. Joint Makers, &c.

Where a joint note is shown to have been given upon a joint liability, it will be presumed it was intended the note should be several as well as joint, except in the case of a mere surety.[60]

22. Married Women.

In an action on notes made by a married woman to the order of and indorsed by her husband, there must be extrinsic evidence that they were in fact made in her separate business, or for the benefit of her separate estate. The fact that she gave them to her husband to be discounted raises no presumption for this purpose.[61]

[60] Yorks *v.* Peck, 14 Barb. 644. For the rules of proof in case of joint admissions, see chapter VII of this vol.

A note which reads "we promise to pay, etc.," and is signed by two persons will be held to be joint and several. Tritthart *v.* Tritthart, 24 Idaho, 186, 133 Pac. Rep. 121.

Where an officer of a corporation signs a note which reads "we promise to pay" for the corporation and then indorses it as surety, the liability will be joint. Canadian, etc., Telephone Co. *v.* Seiber, 159 S. W. Rep. (Tex. Civ. App.) 897.

Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly and severally liable thereon. Neg. Instr. Law, § 36, Sub. 7.

There is a presumption, but not conclusive, that the signers of a note of more than one are all principals. Williams *v.* People's Bank, 9 Ga. App. 714, 72 S. E. Rep. 177.

[61] Second Natl. Bk. of Watkins *v.* Miller, 63 N. Y. 639, affi'g 2 Supm. Ct. (T. & C.) 104. This rule has now been changed in New York and some other states by the Married Women's Acts.

Where a married woman has executed a promissory note the burden is on the holder to establish by a preponderance of the evidence that she signed with the intention of pledging her separate estate with the payment of the note. Citizens' State Bk. *v.* Smout, 62 Neb. 223, 86 N. W. Rep. 1068.

Where a married woman obtains money on her note indorsed by her husband she will be liable on the note to the extent that the proceeds went to the benefit of her separate estate. Nat. Lumberman's Bk. *v.* Miller, 131 Mich. 564, 91 N. W. Rep. 1024, 100 Am. St. Rep. 623.

A married woman's power to execute a note and thereby become guarantor or surety for another is forbidden; but under the law a note given by a married

23. Agent's Signature.

If the signature or indorsement is by an agent, his handwriting and authority must be proved.[62] An allegation of agency is not necessary, and if it be alleged, a further allegation of authority is not needed.[63] If the allegation is that the defendant signed or indorsed, an admission of execution

woman not appearing on its face to be affected by statutory exceptions to her power, is *prima facie* valid; and the burden of proving its invalidity rests upon those who would annul it. Wilson *v.* Fitzgerald, 25 Pa. Super. Ct. 633.

Where a married woman alone executed a promissory note she will not be precluded from showing that she signed as surety. Gillett *v.* Citizens' Natl. Bk., 56 Ind. App. 694, 104 N. E. Rep. 775.

Under South Carolina Rev. Stat., 1893, § 2167, which enlarges the powers of a married woman, she cannot become an accommodation indorser, guarantor or surety, nor shall she be liable on any promise to pay the debt or answer for the default or liability of another person. When, therefore, it appears that the contract in question shows on its face that it was made by her, she becomes liable thereon, unless she can show that the contract is one of such a character as she had no power to make. The burden of proof in this respect is upon her. Christensen *v.* Wells, 52 S. C. 497, 30 S. E. Rep. 611.

One who presents a money obligation of a married woman since the Pennsylvania Married Persons Property Act of 1887 (P. L. 32), has made out a *prima facie* case which can only be defeated by showing that the contract is one of the kinds prohibited by said act. Children's Aid Soc. *v.* Benford, 26 Pa. Super. Ct. 555.

[62] See Nixon *v.* Palmer, 8 N. Y. 398; Beach *v.* Vandewater, 1 Sandf. 265; Farmers', etc., Bank *v.* Germania Life Ins. Co., 150 N. C. 770, 64 S. E. Rep. 902; Ritchie County Bank *v.* Bee, 62 W. Va. 457, 59 S. E. Rep. 181.

The authority of the agent may be established as in other cases of agency. Neg. Instr. L., § 38.

In some jurisdictions, however, the authority of the agent need not be proved unless it is denied in the answer. Moore *v.* Holmes, 68 Minn. 108, 70 N. W. Rep. 872; Dexter *v.* Powell, 14 Pa. Super. 162.

[63] Moore *v.* McClure, 8 Hun, 557.

An allegation "that the defendant made, signed, and delivered the note" is a sufficient statement of the cause of action, so far as that fact is concerned. Santa Rosa Bk. *v.* Paxton, 149 Cal. 195, 86 Pac. Rep. 193.

A pledgee in order to recover on a note which has been indorsed to him as collateral security, need not aver the fact that he holds the note as such collateral. Baxter

will usually include admission of the authority of the agent; but if the signature is that of an apparent agent, and the allegation is that the agent signed, an admission of the execution with a denial of all other allegations, will put in issue the authority of the agent.[64] But an admission of the agent's authority without qualification, admits that he acted within its scope.

The authority of an agent to sign or to indorse may be shown by oral communications or by implication.[65] Written evidence is not necessary. Authority may be inferred even where no express authority existed, from the usage of the agent to make such paper, with the knowledge and tacit assent of the principal; and evidence of such a fact is competent even though it be not also shown that it was known to the plaintiff. Evidence that the plaintiff knew the fact and in good faith relied on it as showing authority, is competent, and may raise an equitable estoppel in his favor.

One who seeks to support a transaction with an agent in his own name, by a previous course of dealing implying authority, should show that the form of the previous transactions were such as to justify reliance of the agent's authority;[66] or, at least, to amount to a holding out of the agent

v. Moore, 56 Ind. App. 472, 105 N. E. Rep. 588.

[64] Chambers County *v.* Clews, 21 Wall. 322.

[65] 2 Greenl. on Ev. 49, § 61; Trull *v.* True, 33 Me. 367; Moore *v.* Bank of Metropolis, 13 Pet. 302. As to what amounts to evidence of authority, compare N. Y. Dig. new ed. Prin. & A. 76, 82, 95, 114.

The agent's authority to indorse negotiable paper will not be implied from a general authority to do business for the principal unless such authority to indorse is essential to the line of business. Utah Banking Co. *v.* Newman, 44 Utah, 194, 138 Pac. Rep. 1146.

The authority of the agent to sign a draft on his principal may be established by showing the custom of the principal in doing business. Germain Co. *v.* Bank of Camden Co., 14 Ga. App. 88, 80 S. E. Rep. 302.

Evidence of fifty other notes upon which the agent signed the principal's name is admissible to show the authority of the agent to sign a note. Bowman *v.* Broadway First Natl. Bk., 115 Va. 463, 80 S. E. Rep. 95.

[66] Thus an agent of a firm who

as authorized. Authority to buy and sell does not imply authority to make negotiable paper even in buying.[67] Authority to sign as maker or surety cannot be inferred from a general usage to indorse.[68]

To charge one personally, who signs as agent in a form adequate to bind his principal, the burden is on plaintiff to show that defendant was not in fact authorized to sign.[69]

24. Partnership Signature.

The partnership of the defendants having been proved, as stated elsewhere,[70] it is enough to prove the signature, unless by reason of the character of the business, etc., evidence of authority is necessary; and the signature may be proved by evidence of the handwriting of him who wrote it, or by admission of either partner. The partnership, and their signature being shown, plaintiff may rely on the presumption of law that the signature was given for partnership purposes, or by authority of the other partners (even though the partner be individually a party) [71] without showing that

took a draft from their debtor payable to "my order" instead of to "our order," is not presumed to have been authorized, from mere proof that he had previously taken drafts in the course of his agency, unless the form of the previous drafts is shown. Hogarth *v.* Wherley, L. R. 10 Com. Pl. 630, s. c., 14 Moak's Eng. 474. Compare Exchange Bank *v.* Monteath, 26 N. Y. 505; Reed *v.* Carpenter, 10 Wend. 403; Llewellyn *v.* Winckworth, 13 M. & Tr. 598, Rosc. N. P. 358.

[67] But an amendment so as to recover on the original consideration is allowable. Vibbard *v.* Roderick, 51 Barb. 616.

An agent authorized to negotiate loans has implied authority to execute promissory notes. The "Banco," etc., *v.* Bolivar, 7 Porto Rico, 68.

[68] Early *v.* Reed, 6 Hill, 12.

[69] Walker *v.* Bank of State of N. Y., 9 N. Y. 582, affi'g 13 Barb. 636; and see Sheffield *v.* Ladue, 16 Minn. 388, s. c., 10 Am. Rep. 145. According to the Massachusetts cases also, he must show that defendant intended to use the name to bind himself. Bartlett *v.* Tucker, 104 Mass. 336, s. c., 6 Am. Rep. 240; or actually received the consideration. Compare White *v.* Madison, 26 N. Y. 117, s. c., less fully, 26 How. Pr. 481.

[70] Chapter IX, paragraphs 8–17 of this vol.

[71] Bank of Commonwealth *v.* Mudgett, 44 N. Y. 514.

the firm was a commercial or trading firm, or that the act was ratified, unless some of these facts are alleged in his pleading.[72] If it appear, however, on the face of the paper[73] or otherwise, either that the firm was a non-trading firm, in which such authority is not implied,[74] or that the paper was given by a member out of the firm business,[75] the burden is upon the plaintiff,[76] holder of the note, to prove the au-

A partner does not have the implied power to bind the persons or separate estates of his non-assenting copartners by a note under seal containing a warrant of attorney authorizing the confession of a judgment thereon, and while a judgment entered on the note will be sustained against the partner confessing it and, for the purposes of the execution, against the goods of the firm, it will be vacated as to the nonassenting copartners individually. Funk *v.* Young, 241 Pa. 72, 88 Atl. Rep. 291. A note signed by one member of a firm and indorsed by the firm binds all the partners, where such note was delivered to carry out a firm contract to borrow money from the payee. Reed *v.* Bacon, 175 Mass. 407, 56 N. E. Rep. 716.

[72] Carrier *v.* Cameron, 31 Mich. 373, s. c., 18 Am. Rep. 192; Gansevoort *v.* Williams, 14 Wend. 134, 1 Wood's Coll. 678, note.

[73] As, for instance, where the firm sign as surety. Boyd *v.* Plumb, 7 Wend. 309.

[74] Smith *v.* Sloan, 37 Wis. 285, s. c., 19 Am. Rep. 757.

It is within the usual scope of the firm business for a copartnership of stockbrokers, who sell stocks in London and Paris, to draw bills of exchange. John Nemeth *v.* Tracy, 159 N. Y. App. Div. 497, 144 N. Y. Supp. 901.

"Unless there are restrictions limiting his authority, one member of a commercial firm may borrow money for use in their business and issue in payment the promissory note of the partnership, without knowledge of his associates, who will be bound by his action. . . . But, even where there are such private limitations, they cannot affect a holder who takes the note without knowledge of them." Feigenspan *v.* McDonnell, 201 Mass. 341, 87 N. E. Rep. 624.

[75] Gansevoort *v.* Williams (above); Hoskinson *v.* Eliot, 62 Penn. St. 393; Manning *v.* Hays, 6 Md. 5; Leverson *v.* Lane, 13 C. B. N. S. 278; Kendall *v.* Wood, L. R. 6 Exch. 243.

[76] As to *bona fide* transferees, see subsequent paragraphs.

The firm name signed by one partner to a note under seal given in the course of the firm's business will bind the firm. Swygert Bros. *v.* Bank of Haralson, 13 Ga. App. 640, 79 S. E. Rep. 759.

The execution of a promissory note in the firm name by one of the partners ostensibly for the firm will bind the firm. Miller *v.*

thority, necessity, usage or ratification which may sustain the act. The fact that paper indorsed was negotiated to plaintiff by the maker or payee, is *prima facie* evidence that it was accommodation.[77] If it was in terms payable to the firm, in whose name it is indorsed, the fair inference is that it was indorsed in usual course of business.[78] Evidence that it was accommodation paper is sufficient to throw on plaintiff the burden of giving further evidence to bind the other partners than the one who signed the firm name.[79]

As against one who has made negotiable paper payable to a firm name,[80] or indorsed negotiable paper drawn by a firm name,[81] the production of the paper is sufficient evidence of the existence of the firm; and the names of the third persons who constituted the firm need not be alleged.[82]

25. Corporation Paper.

A business[83] corporation, in the absence of special provision of charter, has implied power to make negotiable paper in the usual course of its business,[84] but the authority of the

McCord, 159 S. W. Rep. (Tex. Civ. App.) 159.

The burden of proof is upon the holder, in cases where he has notice or knowledge when he takes a note, that the indorsement of the name of the firm is that of a mere surety, and he must show in addition to the mere name upon it, the authority to make that kind of an indorsement, because it is not generally in the line of partnership business, and ordinarily one partner would have no right to make such indorsement. Union Natl. Bk. *v.* Wickahm, 18 Oh. Cir. Ct. Rep. 685, 6 Oh. Cir. Dec. 790.

[77] Hendric *v.* Berkowitz, 37 Cal. 113.

[78] Catskill Bank *v.* Stall, 15 Wend. 366, 18 Id. 466.

[79] Lemoine *v.* Bank of North America, 3 Dill. C. Ct. 48. Otherwise, of a guaranty. Natl. Bank *v.* Carpenter, 34 Iowa, 433.

[80] Blodgett *v.* Jackson, 40 N. H. 21.

[81] Dalrymple *v.* Hillenbrand, 62 N. Y. 5, s. c., 20 Am. Rep. 438.

[82] Bacon *v.* Cook, 1 Sandf. 77.

[83] As to municipal corporations, see Mayor, &c. *v.* Ray, 19 Wall. 468.

So has a trading corporation. Star Mills *v.* Bailey, 140 Ky. 194, 130 S. W. Rep. 1077, 140 Am. St. Rep. 370.

[84] McCullough *v.* Moss, 5 Den. 567; Benedict *v.* Lansing, Id. 283; and see Moss *v.* McCullough, 7 Barb. 279. As to distinction between this and accommodation

officer or agent, and the fact that the note was given in the legitimate business of the company, must be proven. An allegation that the paper was made or indorsed by defendants implies a lawful making or indorsement; and the burden is on defendants to show that it was not lawfully done. It need not be averred in the complaint that the note was indorsed by defendants in the course of their legitimate business.[85]

paper, see Olcott *v.* Tioga R. R. Co., 27 N. Y. 546, affi'g 40 Barb. 179; Morford *v.* Farmers' Bank of Saratoga Co., 26 Barb. 568; Bridgeport City Bank *v.* Empire Stone Dressing Co., 30 Barb. 421, s. c., 19 How. Pr. 51; Mechanics' Bank. Assoc. *v.* N. Y. & Saugerties White Lead Co., 35 N. Y. 505, affi'g 23 How. Pr. 74, s. c., less fully, 20 Id. 509.

It is not within the powers of a commercial corporation to become an accommodation indorser. Piser *v.* Serota, 182 Ill. App. 390.

A cattle corporation has no power to issue accommodation notes. Smith *v.* Nelson Land, etc., Co., 212 Fed. Rep. 56, 128 C. C. A. 512.

Even though a corporation note is not signed by those officers who are authorized by the by-laws to sign, recovery may be had upon proof that the corporation never observed those by-laws and that the by-laws were not known to the plaintiff. Washington, etc., Ry. Co. *v.* Murray, 211 Fed. Rep. 440, 128 C. C. A. 112. Where it was shown that the note in suit was made by an officer of a corporation in the name of the corporation but without the authority thereof, the burden was then placed upon the plaintiff to show that he was a holder in due course. De Jonge *v.* Woodport Hotel, etc., Co., 77 N. J. L. 233, 72 Atl. Rep. 439.

[85] Mechanics' Banking Association *v.* Spring Valley Shot & Lead Co., 25 Barb. 419, rev'g 13 How. Pr. 227.

The fact that the indebtedness of a corporation at the time that certain notes were executed exceeded that permitted by its articles of incorporation will not interfere with recovery on the notes. It is the debt and not the notes evidencing it which the articles of incorporation prohibited. Marshall Field Co. *v.* Oren Ruffcorn Co., 117 Iowa, 157, 90 N. W. Rep. 618.

There is no presumption that the act of the secretary of a corporation is the act of the corporation and even in the absence of a special plea denying the secretary's authority, the burden is upon plaintiff to prove the authority. Walsh *v.* Marvel, 130 Ill. App. 305. Same rule applies as to president. Star Mills *v.* Bailey, 140 Ky. 194, 130 S. W. Rep. 1077, 140 Am. St. Rep. 370.

The cashier of a bank is presumed to have authority to indorse and transfer paper belonging to it, in the ordinary course of business,[86] but not to indorse for his own accommodation.[87] Authority in other officers is sufficiently shown by evidence of their constant usage to do so,[88] known to the corporation or board.[89]

26. Oral Evidence to Show Real Party.

Persons dealing with negotiable instruments are presumed to take them on the credit of the parties whose names appear upon them; but if there are sufficient indications on the face of the paper to show that it might reasonably have been intended as a contract by [90] or with [91] another than the one named,—as, for instance, where a corporation note is signed by an officer, or where a note is expressed or indorsed as payable to a cashier,—oral evidence is admissible for the purpose of enabling the real party to recover; and equally to charge the real party; [92] but not usually for the purpose

[86] Matthews *v.* Mass. Natl. Bk., 1 Holmes, 396, and see 3 Am. L. Rev. 612, and cases cited.

[87] West St. Louis Sav. Bk. *v.* Shawnee Co. Bk., 95 U. S. (5 Otto) 537, affi'g 3 Dill. 403. Compare Pope *v.* Bank of Albion, 57 N. Y. 126, rev'g 59 Barb. 226.

Where a corporation indorses a promissory note merely for accommodation of a third party, it will be liable to a *bona fide* holder without notice. Savannah Ice Co. *v.* Canal-Louisiana Bank, etc., Co., 12 Ga. App. 818, 79 S. E. Rep. 45.

[88] Marine Bank *v.* Clements, 31 N. Y. 33, affi'g 6 Bosw. 166.

"The president of a corporation has not the inherent power to borrow money for it, and to execute a note in its behalf. Such power must be delegated to him either by the by-laws or resolutions of its governing body, or by its charter, or by its custom of dealing. . . . Custom cannot arise out of a single transaction." Star Mills *v.* Bailey, 140 Ky. 194, 130 S. W. Rep. 1077, 140 Am. St. Rep. 370.

[89] Lawrence *v.* Gebhard, 41 Barb. 575. Whether the bank is estopped by statement of cashier to surety, whom he knew to be such, that note was paid, compare Cocheco Natl. Bank *v.* Haskell, 51 N. H. 116, s. c., 12 Am. Rep. 67 and 75, note, and Bank *v.* Seward, 37 Me. 519.

[90] Mechanics Bank *v.* Bank of Columbia, 5 Wheat. 326, 337.

[91] Baldwin *v.* Bank of Newbury, 1 Wall. 234.

[92] Compare Baldwin *v.* Bank of Newbury, 1 Wall. 234; Briggs *v.*

of exonerating the signer,[93] unless to show that he contracted as agent for a government.[94] For the purpose of thus showing the real party, the conversations of the parties to the transaction, at the time of making the paper, and at the time of creating the consideration for the bill or note, are admissible as part of the *res gestæ*.[95] When individuals subscribe their proper names to a promissory note, *prima facie* they are liable personally, though they add a description of the character in which the note is given; but such presumption of liability may be rebutted, as between the original parties, by proof that the note was in fact given by the makers as agents, with the payee's knowledge of that fact.[96] But even where the signature is with an addition indicating agency or official character, it is not always enough to prove that

Partridge, 65 N. Y. 363, and cases cited; Eastern R. R. Co. *v.* Benedict, 5 Gray, 566, and see chapter XXX, paragraph 41 of this vol. Caldwell *v.* Mohawk Bank, 64 Barb. 333, and cases cited; and see 9 Moak's Eng. 15, and cases cited. The Supreme Court of the United States sanctions the same rule where nothing appears on the face of the paper to indicate agency. A certificate of deposit signed with an individual name may be shown by parol evidence in an action against one not named to be the contract of the latter made by the signer as the clerk or agent of the latter. Coleman *v.* First Natl. Bank, 53 N. Y. 388, 64 Barb. 33. Evidence that the transaction was at defendant's counter, in the usual course of their business, in pursuance of inquiry for defendants and without mention of the agent's name, is sufficient to sustain a finding that the contract was by the defendants. Compare Shields *v.* Niagara Savings Bank, 3 Hun, 477; Rich *v.* Niagara Savings Bank, 3 Hun, 481; and Van Leuven *v.* First Natl. Bank, 54 N. Y. 671, affi'g 6 Lans. 373.

For the rule where there is no extrinsic evidence, see De Witt *v.* Walton, 9 N. Y. 571; Fisher *v.* Eldridge, 12 Gray, 472; and see 9 Am. Rep. 161.

[93] Compare Brown *v.* Porter, 7 Allen, 337; Barbour *v.* Litchfield, 4 Abb. Ct. App. Dec. 655; Schmittler *v.* Simon, 114 N. Y. 176, 189, 21 N. E. Rep. 162.

[94] Goodwin *v.* Robarts, L. R., 10 Exch. 337, s. c., 14 Moak's Eng. 591.

[95] Bank *v.* Kennedy, 17 Wall. 24.

[96] Haile *v.* Pierce, 33 Md. 327; Hood *v.* Hallenbeck, 7 Hun, 362. *Contra*, Tucker Co. *v.* Fairbanks, 98 Mass. 101, and cases cited; Carpenter *v.* Farnsworth, 106 Id. 561, s. c., 8 Am. Rep. 360; Sturdevant *v.* Hall, 59 Me. 172, s. c., 8 Am. Rep. 409.

the other contracting parties knew the facts, and that the consideration went to the principal or corporation; for the parties may have intended to pledge the personal credit of the apparent signers.[97]

As between principal and agent, an agent who signs or indorses in his own name, may prove by parol, that it was not the intention that he should be bound personally,[98] but the evidence should be clear and strong.[99]

27. Evidences of Title.

Where on the trial of an action brought upon a promissory note plaintiff produces the note, a presumption arises that the plaintiff is the owner of the note.[1] Plaintiff's posses-

[97] Powers *v.* Briggs, 79 Ill. 493, s. c., 22 Am. Rep. 175. Compare Houghton *v.* First Natl. Bank of Elkhorn, 26 Wis. 663, s. c., 7 Am. Rep. 107.

Where nothing appears in the body of the contract to indicate the maker, and it is subscribed by a person who adds words to his signature indicating that he signs it in a representative capacity without disclosing his principal, the obligation is *prima facie* that of the individual; but parol evidence is admissible to show the intention of the parties and the right of the signer to bind the party whom he claims to have represented. Phelps *v.* Webber, 84 N. J. Law, 630, 87 Atl. Rep. 469.

Where a promissory note by its terms binds a guardian personally, parol evidence that he was not to be so bound is inadmissible. Andrus *v.* Blazzard, 23 Utah, 233, 63 Pac. Rep. 888, 54 L. R. A. 354.

[98] Lewis *v.* Brehme, 33 Md. 412, s. c., 3 Am. Rep. 190, qualifying Story on Ag., § 157, Chitty on B. 46. Similarly one who signed a note will be permitted to testify that he signed it as surety, where the note does not show this on its face. Dale *v.* Christian, 140 Ga. 790, 79 S. E. Rep. 1127.

[99] Id.

[1] Newcome *v.* Fox, 1 App. Div. 389; Henderson *v.* Davisson, 157 Ill. 379, 41 N. E. Rep. 560; Spreckels *v.* Bender, 30 Ore. 577, 48 Pac. Rep. 418; Ames & Frost Co. *v.* Smith, 65 Minn. 304, 305; 67 N. W. Rep. 999; Kells *v.* Northwestern Live-stock Ind. Co., 64 Minn. 390, 67 N. W. Rep. 215; Magel *v.* Milligan, 150 Ind. 582, 50 N. E. Rep. 564; City Natl. Bank *v.* Thomas, 46 Neb. 861, 65 N. W. Rep. 895.

One who holds an indorsed promissory note has the right to sue the maker, even if he holds it only as an agent or trustee. Loeb *v.* Weil, 126 Cir. Ct. App. 430, 209 Fed. Rep. 608; Farmers Bk. *v.*

sion[2] of negotiable paper, not expressed or indorsed to be payable to another person,[3] is *prima facie* (but not conclusive) evidence of his title, and if it be expressly payable to him, or, if not so expressed, if it be payable after its date, he holds it clothed with the presumption that it was negotiated for value in the usual course of business at the time of its execution, and without notice of any equities between the prior parties to the instrument.[4] Even if he once indorsed it away, his possession is presumptive evidence of his title, whether his and subsequent indorsements be cancelled[5] or not.[6] If the paper is restricted "to order," and title is not

Riedlinger, 27 N. D. 318, 146 N. W. Rep. 556.

The holder of a negotiable instrument is presumed to have taken it before maturity, for valuable consideration, and without notice of any objection to which it was liable, and this presumption stands until overcome by sufficient proof. Pickens Tp. *v.* Post, 41 C. C. A. 1, 99 Fed. Rep. 659.

[2] Actual possession as distinguished from constructive possession, or symbolical delivery essential. Muller *v.* Pondir, 55 N. Y. 325, affi'g 6 Lans. 472.

[3] Collins *v.* Gilbert, 94 U. S. (4 Otto) 753, and cases cited. The presumption is sufficient even where it appears that plaintiff, not being the original party, paid nothing for it. Brown *v.* Penfield, 36 N. Y. 473, affi'g 24 How. Pr. 64; May *v.* Richardson, 3 Gray, 142. If the plaintiff, with possession, has other lawful documents going with the instrument—as a genuine letter of introduction from a correspondent this presumption is strengthened. And in general this presumption is stronger in proportion as it would be easy to rebut it if erroneous. 2 Pars. on Pr. N. &c. 480. Where the paper is to bearer or indorsed in blank, allegations in the complaint as to how the holder acquired title thereto from the payee are unnecessary. Mechanics' Bank *v.* Straiton, 3 Abb. Ct. App. Dec. 269; and if made need not be proved. Bedell *v.* Carll, 33 N. Y. 581. If plaintiff, appearing on the record individually, be an executor or administrator, the objection that he holds as such, if material, must be raised at the trial in order that he may give further evidence as to his personal interest. See Barlow *v.* Myers, 64 N. Y. 41, 46.

[4] Collins *v.* Gilbert, 94 U. S. (4 Otto) 753.

The legal holder of a promissory note is entitled to sue on it even though he is under obligation to account to the last indorser for part of the proceeds. Perry *v.* Pye, 215 Mass. 403, 102 N. E. Rep. 653.

[5] Dollfus *v.* Frosch, 1 Den. 367.

[6] Mottram *v.* Mills, 1 Sandf. 37;

shown as above, plaintiff must give evidence of his title.[7] In an action by an indorsee against the drawer of a bill or acceptor or maker of a note payable to order, the payee's indorsement must be proved; [8] but when sufficient has been proved to show the istrument payable to bearer, subsequent indorsements need not be proved, in the first instance, although restrictive.[9] Against an indorser proof of his indorsement is sufficient proof of all the previous indorsements through whom the holder chooses to deduce title.[10]

28. Delivery.

Delivery is *prima facie* shown by production of the paper.[11]

Marshall *v.* Meyers, 96 Mo. A. 643, 70 S. W. Rep. 927.

[7] Dorn *v.* Parsons, 56 Mo. 601; Frankenstein *v.* Levini, 65 N. Y. Supp. 562; Stewart *v.* Gregory, 9 N. D. 618, 84 N. W. Rep. 553. *Contra*, Garner *v.* Cook, 30 Ind. 331; Roy *v.* Duff, 170 Iowa, 319, 152 N. W. Rep. 606; Robertson *v.* Dunn, 87 N. C. 191.

[8] 2 Pars. on Pr. N. & B. 485.

[9] Id.

[10] 2 Pars. on Pr. N. & B. 484.

[11] Sawyer *v.* Warner, 15 Barb. 282. As to proof of actual delivery, see Kinne *v.* Ford, 43 N. Y. 587, affi'g 52 Barb. 194. Delivery is essential to give a note a binding force as an obligation of the maker. Hansford *v.* Freeman, 99 Ga. 376, 27 S. E. Rep. 706; Stitzel *v.* Miller, 157 Ill. App. 390; Pastene *v.* Pardini, 135 Cal. 431, 67 Pac. Rep. 681. Such production casts the burden upon defendant to prove nondelivery and, where the evidence is conflicting, the question is one for the jury. Lachenmaier *v.* Hanson, 196 Fed. Rep. 773, 116 C. C. A. 397.

While generally possession is *prima facie* evidence of delivery, where it appears that the note has never been actually delivered and no negligence or fault can be imputed upon the maker but it was put in circulation by force or fraud, there can be no recovery upon it even in the hands of a *bona fide* holder. Linick *v.* Nutting, 140 App. Div. 265, 125 N. Y. Supp. 93.

Where, in an action by the holder of a note by indorsement brought against the maker, the latter interposes a verified plea of *non est factum*, it is incumbent upon plaintiff to prove not only the execution of the indorsements but also the delivery of the note to each of the successive indorsees. Walsh *v.* Marvel, 130 Ill. App. 305.

The time [12] and purpose [13] of delivery may be proved by parol. If delivered by letter the letter is competent, as part of the *res gestæ;* [14] if manually delivered, the conversation is competent.[15]

Unless the note be sealed, oral evidence is competent to show that it was delivered to the party in whose favor it was drawn,[16] upon a condition, such that without performance of the condition he acquired no right to enforce it.[17]

[12] Good *v.* Martin, 95 U. S. (5 Otto) 90, 96.

See, as to presumption of delivery before maturity, Exchange Bank *v.* Veirs, 3 Cal. App. 71, 84 Pac. Rep. 455.

[13] Bank *v.* Kennedy, 17 Wall. 26. The person who delivered it may state for what purpose. Id. But the mere belief or impression of a witness of the transaction is not competent. Head *v.* Shaver, 9 Ala. 791; Crounse *v.* Fitch, 14 Abb. Pr. 346.

[14] See Bank of Monroe *v.* Culver, 2 Hill, 531; Darling *v.* Miller, 54 Barb. 149. But compare Bailey *v.* Wakeman, 2 Den. 220.

Delivery of a note by letter is deemed consummated at the place from which the letter was mailed. Garrigue *v.* Kellar, 164 Ind. 676, 74 N. E. Rep. 526, 108 Am. St. Rep. 324, 69 L. R. A. 870.

[15] Bank *v.* Kennedy (above).

[16] Or to a third person. Vallett *v.* Parker, 6 Wend. 615; Chapman *v.* Tucker, 38 Wisc. 43, s. c., 20 Am. Rep. 1. Parol evidence is admissible to prove nondelivery of a note which does not on its face purport to have been delivered. Hansford *v.* Freeman, 99 Ga. 376, 27 S. E. Rep. 706.

[17] Seymour *v.* Cowing, 4 Abb. Ct. App. Dec. 200; and see Couch *v.* Meeker, 2 Conn. 302; Barton *v.* Martin, 52 N. Y. 570; Bookstaver *v.* Jayne, 60 N. Y. 146; McFarland *v.* Sikes, 54 Conn. 250, 1 Am. St. Rep. 111, 7 Atl. Rep. 408; Higgins *v.* Ridgway, 153 N. Y. 130, 47 N. E. Rep. 32. The evidence, to be admissible, must qualify the delivery, as distinguished from the terms of the note. Compare Erwin *v.* Saunders, 1 Cow. 249, and cases cited. The fact that the note recites that a condition upon which the maker's liability depended has been performed, will not preclude a defense based upon its nonperformance. Dooley *v.* Gorman, 104 Ga. 767, 31 S. E. Rep. 203. Delivery may be shown, as between all others than *bona fide* holders, to have been in escrow. Stone *v.* Goldberg, 6 Ala. App. 249, 60 S. E. Rep. 744.

"Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto. As between immediate parties, and as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made

But the defense must be pleaded, and evidence that notes were delivered conditionally, under an agreement that they were not to become operative until certain other security had been exhausted, is not admissible under the general issue.[18]

29. Consideration.

The burden of proof of the existence of a consideration between the original parties, is on plaintiff, and in case of a conflict of evidence, remains on him to satisfy the jury by a preponderance of evidence.[19]

either by or under the authority of the party making, drawing, accepting or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional, or for a special purpose only, and not for the purpose of transferring the property in the instrument. But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is conclusively presumed. And when the instrument is no longer in the possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved." Neg. Inst. L., § 35; Hansford *v.* Freeman, 99 Ga. 376, 27 S. E. Rep. 706; Straus *v.* Citizens State Bank, 164 Ill. App. 420; Grannis *v.* Stevens, 216 N. Y. 583, 111 N. E. Rep. 263; First State Bank *v.* Kelly, 30 N. D. 84, 152 S. W. Rep. 125.

[18] Moore *v.* Prussing, 165 Ill. 319, 46 N. E. Rep. 184. Where a note was delivered to an agent of the payee with directions to deliver it to the payee upon the happening of a certain event, and the agent delivered the note to the payee notwithstanding the event had not happened, the payee acquired no right to enforce it. Hansford *v.* Freeman, 99 Ga. 376, 27 S. E. Rep. 706.

[19] Small *v.* Clewley, 62 Me. 155, s. c., 16 Am. Rep. 410; Delano *v.* Bartlett, 6 Cush. 364; Story on Pr. N., § 181; 1 Dan. Neg. Inst. 129. But see Sawyer *v.* McLouth, 46 Barb. 350. Whether the rule is the same as to a failure of consideration, see Burnham *v.* Allen, 1 Gray, 496.

The defendant has the burden of proving want of consideration. George J. Cooke Co. *v.* Pisano, 174 Ill. App. 609; Rushing *v.* Citizens' Natl. Bk., 162 S. W. Rep. (Tex. Civ. App.) 460; Piner *v.* Brittain, 165 N. C. 401, 81 S. E. Rep. 462.

The plaintiff must convince the jury of the truth of his statement that there was a consideration by the weight of the evidence, and his unsupported oath is not sufficient. Moore *v.* Phillips, 6 Pa. Super. Ct. 570.

But the production of negotiable paper, whether made by individuals or corporations,[20] is presumptive evidence of consideration[21] both in the original making,[22] and in the

After the plaintiff has made a *prima facie* case, and the defendant has given evidence of want of consideration, the burden shifts to the plaintiff to prove consideration to the satisfaction of the jury. Bangor First Natl. Bk. *v.* Paff, 240 Pa. 513, 87 Atl. Rep. 841.

Where the defendant admits the execution and indorsement of the note and pleads lack of consideration, it does not follow that he must prove it by a clear preponderance of the evidence. Frace *v.* Brown, 117 Cal. 324, 49 Pac. Rep. 213.

While the production of the note, with the admission or proof of the signature, makes a *prima facie* case, yet if the defendant introduces evidence of want of consideration, the burden of proof does not shift, but remains upon the plaintiff, who must satisfy the jury, by a fair preponderance of the evidence, that the note was for a valid consideration. Huntington *v.* Shute, 180 Mass. 371, 62 N. E. Rep. 380, 91 Am. St. Rep. 309.

The burden of proving want of consideration is on the defendant, under Rem. & Bal. Code, § 3415, and one witness will be sufficient to sustain the burden, which in turn will overcome the presumption of consideration. Nicholson *v.* Neary, 77 Wash. 294, 137 Pac. Rep. 492.

Want of consideration is distinguished from failure of consideration, the latter being a distinct proposition, the burden is on the defendant to make it out against the *prima facie* case of the plaintiff. Commey *v.* Macfarlane, 97 Pa. 361; Danner *v.* Hess, 19 Pa. Super. Ct. 182.

The burden of proving failure of consideration is on the defendant. Brokaw *v.* McElroy, 162 Iowa, 288, 143 N. W. Rep. 1087, 50 L. R. A. N. S. 835; Copeland *v.* McClelland, 12 Ga. App. 785, 78 S. E. Rep. 479; De Lay *v.* Galt, 141 Ga. 406, 81 S. E. Rep. 195.

[20] See Willmarth *v.* Crawford, 10 Wend. 341.

[21] Reed *v.* First Natl. Bank, 23 Colo. 380, 384, 48 Pac. Rep. 507. Whether the words for "value received" are in it or not. Kinsman *v.* Birdsall, 2 E. D. Smith, 395; Bringman *v.* Von Glahn, 71 App. Div. 537, 75 N. Y. Supp. 845; Benedict *v.* Kress, 97 App. Div. 65, 89 N. Y. Supp. 607; Natl. Park Bank *v.* Saitta, 127 App. Div. 624, 111 N. Y. Supp. 927; Pittsburgh First Natl. Bank *v.* Stallo, 160 App. Div. 702, 145 N. Y. Supp. 747.

"Every negotiable instrument is deemed *prima facie* to have been

[22] Black River Savings Bank *v.* Edwards, 10 Gray, 387; Pfister *v.* Heins, 136 App. Div. 457, 121 N. Y. Supp. 173.

issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value." Neg. Instr. L., § 50.

The plaintiff, to begin with, may read the note in evidence and rest, taking advantage of the presumption that the note is a valid obligation based upon a good and legal consideration. If the defendant offers evidence showing or tending to show want of consideration, the burden is then thrown on the plaintiff to show "by a fair preponderance of evidence upon the whole case that there was no consideration." Bringman *v.* Von Glahn, 71 App. Div. 537, 75 N. Y. Supp. 845.

Where, however, the defendant has interposed a verified plea of *non est factum*, the burden is cast upon the plaintiff to prove in the first instance that he had paid value for the same, even though the note is in his possession. Walsh *v.* Marvel, 130 Ill. App. 305.

As to the recent statutes avoiding notes given for patent rights unless so expressed, see note in 22 American Reports, 67; and Neg. Inst. L. (1909), § 330.

There is a presumption that a promissory note was given for a sufficient consideration. Powers *v.* Hambrick, 25 Ky. Law Rep. 30, 74 S. W. Rep. 660; Woodworth *v.* Veitch, 29 Ind. App. 589, 64 N. E. Rep. 932.

Promissory notes whether negotiable or not, whether they express value received or not, import a consideration. Carnwright *v.* Gray, 127 N. Y. 92, 27 N. E. Rep. 835, 24 Am. St. Rep. 424, 12 L. R. A. 845.

The plaintiff may rely on the presumption of consideration. The burden of proof of want of consideration is on the maker. Cox *v.* Cox, 25 Ky. Law Rep. 1934, 79 S. W. Rep. 220.

While a note which is payable to a specific payee and not to bearer or order, is nonnegotiable under N. Y. Negotiable Instruments Law, § 20, the fact that it recites on its face the words "for value received" will suffice to import a consideration. Owens *v.* Blackburn, 161 N. Y. App. Div. 827, 146 N. Y. Supp. 966.

Every note is deemed *prima facie* to have been issued for a consideration and every person whose signature appears thereon is deemed to have become a party thereto for value. Towles *v.* Tanner, 21 App. D. C. 530.

Under Rev. Stat. 1899, § 894, a promissory note imports a consideration until some contrary showing is made. Tapley *v.* Herman, 95 Mo. App. 537, 69 S. W. Rep. 482.

One who executes and delivers a promissory note is presumed to have received a consideration for it. Bear Creek Lumber Co. *v.* Second Natl. Bk., 120 Md. 566, 87 Atl. Rep. 1084.

Where the evidence shows that certain lost notes did not contain the words "for value received" but also shows that they were negotiable in form, there is a presumption that they were based on

transfers by which plaintiff acquired it.[23] This presumption may be repelled by extrinsic evidence,[24] or by the terms of

a consideration. Taylor *v.* Taylor's Estate, 138 Mich. 658, 101 N. W. Rep. 832.

If the defendant does not deny the execution of the note, the consideration will be presumed. Goding *v.* MacArthur Co., 181 Ill. App. 373.

Proof of the signature raises the presumption of consideration. McQuillan *v.* Eckerson, 178 Mich. 281, 144 N. W. Rep. 510.

Under § 50 of the Negotiable Instruments Law, consideration will be presumed from execution and delivery. Pittsburgh First Natl. Bk. *v.* Stallo, 160 N. Y. App. Div. 702, 145 N. Y. Supp. 747.

A check imports a consideration. Muth *v.* St. Louis Trust Co., 77 Mo. App. 493.

The mere possession of a check by the plaintiff, to whose order it was drawn, is presumptive evidence that it was given in payment of a debt, or was given for cash received for it at the time. Ritchie *v.* Deposit, etc., Co., 189 Pa. St. 410, 42 Atl. Rep. 20.

Inadequacy of consideration, without fraud, is no defense. Dean *v.* Carruth, 108 Mass. 242.

An instruction that the burden of proof that the note was without consideration, is on the defendant, is incorrect. The mere presumption of consideration does not relieve the plaintiff of the burden of proving consideration. Best *v.* Rocky Mountain Natl. Bank, 37 Colo. 149, 85 Pac. Rep. 1124, 7 L. R. A. N. S. 1035.

[23] Collins *v.* Gilbert, 94 U. S. (4 Otto) 753; Scribner *v.* Hanke, 116 Cal. 613, 48 Pac. Rep. 714. From the issuing and delivery of negotiable drafts for money, though illegal, there is a legal presumption that the consideration was money. Oneida Bank *v.* Ontario Bank, 21 N. Y. 490.

Where the plaintiff produces the note it will be presumed that he acquired it before maturity for a consideration. Astry *v.* Fox River Distilling Co., 182 Ill. App. 339.

Where it is shown that there was fraud in the inception of the contract the burden is on the plaintiff to show that it is a *bona fide* holder. Fidelity Trust Co. *v.* Whitehead, 165 N. C. 74, 80 S. E. Rep. 1065, Ann. Cas. 1915, D. 200; Stotts *v.* Fairfield, 163 Iowa, 726, 145 N. W. Rep. 61; Ostenberg *v.* Kavka, 95 Nebr. 314, 145 N. W. Rep. 713; Peterson *v.* Fowler, 162 N. Y. App. Div. 21, 147 N. Y. Supp. 280.

In an action by an indorsee of a note, the defendant has the burden of showing want of consideration and notice thereof to the holder. Natl. Bank *v.* Rominee, 136 Mo. App. 57, 117 S. W. Rep. 104.

[24] Dodge *v.* Pond, 23 N. Y. 69; Higgins *v.* Ridgway, 153 N. Y. 130, 47 N. E. Rep. 32; Hawkins *v.* Collier, 101 Ga. 145, 28 S. E. Rep. 632; Spies *v.* Rosenstock, 87 Md. 14, 39 Atl. Rep. 268; Cheuvront

the note itself, as where it shows the value was received from a third person.[25] And where consideration must be proved, the words "value received" in the paper set out in the pleading, is a sufficient allegation, even as against indorsers; [26] and the consideration need not be an equivalent, even as between the original parties.[27] The plaintiff does

v. Bee, 44 W. Va. 103, 28 S. E. Rep. 751.

The plaintiff does not have to prove that he paid a consideration until the defendant has proved want of consideration. Toledo, etc., Ry. Co. *v.* Peters, 177 Mich. 76, 143 N. W. Rep. 18.

The presumption of consideration may be rebutted by direct testimony of the maker that there was no consideration. Williams *v.* Hasshagen, 166 Cal. 386, 137 Pac. Rep. 9.

Oral evidence is competent to show that there was no consideration for the note. Herring *v.* First Natl. Bk., 13 Ga. App. 492, 79 S. E. Rep. 359.

The extrinsic evidence must be clear and satisfactory to overcome the statutory presumption of consideration for a note. Estes *v.* Ballard, 22 Cal. App. 344, 134 Pac. Rep. 361.

The presumption will be rebutted by proof that the maker was a very old woman and that the payee was her son who dominated her. Parker *v.* O'Bryen, 181 Mo. App. 487, 164 S. W. Rep. 648.

[25] Tenyck *v.* Vanderpoel, 8 Johns. 120. To recover on a note given for no other consideration than payment of the debt of another, the payee must prove the privity or assent of the debtor. Williams *v.* Sims, 22 Ala. 512.

[26] Meyer *v.* Hibsher, 47 N. Y. 265. Otherwise at common law. Saxton *v.* Johnson, 10 Johns. 418. See also Bourne *v.* Ward, 51 Me. 191. When the presumption of consideration is sufficiently rebutted, the words "value received" do not require a submission of the question of consideration to the jury. Kramer *v.* Kramer, 181 N. Y. 477, 74 N. E. Rep. 474, rev'g 90 App. Div. 176, 86 N. Y. Supp. 129.

The words "value received" incorporated in the note do not affect the rule that the burden of proving a valid consideration is upon plaintiff. Huntington *v.* Shute, 180 Mass. 371, 62 N. E. Rep. 380, 91 Am. St. Rep. 309.

[27] Worth *v.* Case, 42 N. Y. 362, affi'g 2 Lans. 264. If an executory consideration is indorsed on the note, it may be notice of equities to transferees, but does not prevent the note's being admitted as a negotiable instrument; and plaintiff should prove performance, if required at the trial. Sanders *v.* Bacon, 8 Johns. 485. Where a promissory note recites on its face that it is given in payment of a money loss caused to the payee by the maker, the court is bound to assume, nothing appearing to the

not, by giving evidence showing an actual consideration, waive the right to avail himself of the presumption that the note is a valid obligation based upon a good and legal consideration, or to relieve the defendant from the burden of proving want of consideration.[28] Inadequacy of considera-

contrary, that such loss constituted a legal liability on the maker, the settlement of which was sufficient consideration to support the note. Hickok *v.* Bunting, 92 App. Div. 167, 86 N. Y. Supp. 1059.

[28] Durland *v.* Durland, 153 N. Y. 67, 47 N. E. Rep. 42. See Hickok *v.* Bunting, 92 App. Div. 167, 86 N. Y. Supp. 1059.

The plaintiff may at the outset rely upon the presumption of consideration, and not offer any direct proof thereof. Towles *v.* Tanner, 21 App. D. C. 530.

The production of the note is *prima facie* proof of consideration, and if the defendant has alleged want of consideration he has the burden of proving it. McMicken *v.* Safford, 197 Ill. 540, 64 N. E. Rep. 540; Brown *v.* Johnson Bros., 135 Ala. 608, 33 So. Rep. 683; Gates *v.* Morton Hardware Co., 146 Ala. 692, 40 So. Rep. 509.

Where the defense is want of consideration the burden is on the defendant to prove it by a preponderance of evidence. Gallagher *v.* Kiley, 115 Ga. 420, 41 S. E. Rep. 613.

Where the note is proved a *prima facie* case is made, and it is only where there is evidence of want of consideration that the burden is imposed upon the plaintiff to prove consideration by a preponderance of evidence. Taylor *v.* Taylor, 138 Mich. 658, 101 N. W. Rep. 832.

Proof of consideration is competent though unnecessary under New Jersey Neg. Inst. Acts, 1902, § 24. Marine Trust Co. *v.* St. James African M. E. Church, 85 N. J. L. 272, 88 Atl. Rep. 1075.

The mere plea that there was no consideration is sufficient; it need not specify under what circumstances the note or order was wanting in consideration. The burden is on the defendant to prove want of consideration. Ragsdale *v.* Gresham, 141 Ala. 308, 37 So. Rep. 367.

On a plea of no consideration for a promissory note the burden of proof is upon the defendant. Kiesewetter *v.* Kress, 24 Ky. Law Rep. 1239, 70 S. W. Rep. 1065.

As a note imports consideration on its face, the burden is on the defendant to show that there was no consideration. Wood *v.* Flanery, 89 Mo. App. 632; Cox *v.* Cox, 25 Ky. Law Rep. 1934, 79 S. W. Rep. 220.

In an action against the maker of a note the burden of proof to overcome the presumptively legal claim of the plaintiff is upon the defendant. Allerton *v.* Grundy, 67 N. J. L. 55, 50 Atl. Rep. 352.

The mere fact that the note was no benefit to the promisor is no defense, for there may have been a consideration in loss or detri-

tion[29] is not a defense,[30] unless fraud be in issue, and then it may be a relevant circumstance.[31] A consideration consisting of a prior indebtedness on an account stated or the like, may be proved by parol without producing the document evidencing the consideration; but the document is competent.[32] Evidence that the paper was given in consideration

ment to the promisee which is sufficient to support the promise made upon it. Dalrymple *v.* Wyker, 60 Ohio St. 108, 53 N. E. Rep. 713.

Parol evidence as to the consideration for a note is admissible as tending to show the purpose for which the note was given and to show that it was a mere memorandum. Franklin State Bk. *v.* Chaney, 94 Neb. 1, 142 N. W. Rep. 537.

Under Missouri Rev. Stat., 1899, § 894, when the plaintiff makes out a *prima facie* case by producing the promissory note, a consideration is presumed until the contrary is shown. The burden of proof is upon the defendant to establish the want of consideration which he alleges. Holmes *v.* Farris, 97 Mo. App. 305, 71 S. W. Rep. 116.

The defendants having alleged in their answer that the plaintiff failed to tender a deed conveying a good title to land, which averment was denied in the reply, any failure upon the plaintiff's part to allege the performance of a condition precedent, in an action upon a negotiable promissory note, if such were necessary in case of the failure of consideration either wholly or *pro tanto*, when the evidence of such failure is contained in a separate memorandum, is cured by the verdict, when the transcript shows that evidence was introduced at the trial which tended to prove the performance of such condition. Sayre *v.* Mohney, 35 Ore. 141, 56 Pac. Rep. 526.

[29] As distinguished from usury pleaded, and from grossly unconscionable bargain.

[30] Earl *v.* Peck, 64 N. Y. 598.

[31] Especially where incapacity or undue influence is alleged. Molson *v.* Hawley, 1 Blatchf. 409.

Where the defendant gave a promissory note for the purchase of certain goods which were falsely misrepresented by the plaintiff's agent, evidence of such false representations is admissible under the defendant's pleading of failure of consideration. Iowa City First Natl. Bk. *v.* Smith, 55 Colo. 516, 136 Pac. Rep. 460.

[32] Leland *v.* Manning, 4 Hun, 7; Priedman *v.* Johnson, 21 Minn. 12.

Parol evidence may be introduced to prove that the consideration was a prior indebtedness. Knight *v.* Kerfoot, 102 N. E. Rep. (Ind. App.) 983.

A written contract is admissible to show that the consideration for a note was the cost of installing some fixtures in defendant's premises. George J. Cooke Co. *v.* Johnson, 179 Ill. App. 83.

of the surrender of a prior note made by the same party is *prima facie* sufficient, and raises a legal presumption that differences as to the validity of the former note were settled.[33] But this, even if expressed, is not conclusive as between the original parties,[34] and those limited to their rights. If a note is expressed to carry interest from a time prior to its date, the presumption is not that it is usurious, but that it was given for an antecedent consideration.[35]

Where a written contract recites the consideration for a note parol evidence is not admissible to show that the consideration was different. Blumer *v.* Schmidt, 164 Ia. 682, 146 N. W. Rep. 751.

Where a receipt is produced showing on its face that the note was given in payment of certain shares of stock, oral evidence is admissible to show that the shares of stock were not the real consideration for the note. Spittall *v.* Allee, 55 Pa. Super. Ct. 636.

"Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time." Neg. Inst. L., § 51.

If an antecedent debt is the consideration, it must appear that the debt was cancelled and discharged or that the time of payment was extended. Harris *v.* Fowler, 59 Misc. 523, 110 N. Y. Supp. 987.

[33] Garrigue *v.* Kellar, 164 Ind. 676, 74 N. E. Rep. 523, 108 Am. St. Rep. 324, 69 L. R. A. 870; Piper *v.* Wade, 57 Ga. 223; and see Davis *v.* Gray, 17 Ohio St. 330. A promise to forbear suit on an old note is good consideration for a new note. Lowell *v.* Bickford, 201 Mass. 543, 88 N. E. Rep. 1; Emerson *v.* Sheffer, 113 App. Div. 19, 98 N. Y. Supp. 1057. Rescission of a valid existing contract is sufficient consideration to support a promissory note. McLeod *v.* Hunter, 49 App. Div. 131, 63 N. Y. Supp. 153, aff'g 29 Misc. 558, 61 N. Y. Supp. 73. A promise to forbear suit is sufficient consideration to support a promissory note. Emerson *v.* Sheffer, 113 App. Div. 19, 98 N. Y. Supp. 1057. A note given to induce the payee to refrain from pressing payment of an indebtedness is supported by sufficient consideration. Harris *v.* Buchanan, 100 App. Div. 403, 91 N. Y. Supp. 484.

[34] McDougall *v.* Cooper, 31 N. Y. 498.

[35] Ewing *v.* Howard, 7 Wall. 505.

"Where a sum of money apparently in excess of the legal rate of interest was retained by the lender, it is competent for a witness to testify that part of the same was received in payment of an independent claim, and not reserved as interest upon the loan." Patton *v.* Bank of LaFayette, 124 Ga. 965, 968, 53 S. E. Rep. 664, 5 L. R. A. N. S. 592, 4 Ann. Cas. 639.

In cases where the existence of a consideration between the original parties is open to inquiry, the writing does not exclude oral evidence. The purpose for which a note was made is admissible if entirely consistent with its terms and conditions; [36] and a witness who knows the purpose may testify directly to the fact,[37] but not whether it would or would not have been made in a supposed case.[38] A witness having knowledge of the transaction may be asked directly what was the consideration,—whether two notes were part of the same transaction—and the like, leaving details to be called for by cross-examination.[39]

The declarations of a prior party[40] are not generally admissible against the right of a subsequent holder, except within the rules stated in Chapter I, or when part of the *res gestæ* of an act properly in evidence,[41] or unless some further connection between the two persons is shown.[42]

30. Accommodation Paper.

The presumption of consideration, even where the paper is expressed to be for value received, does not estop maker, drawer,[43] acceptor,[44] or indorser,[45] from proving that his

[36] Bell *v.* Shibley, 33 Barb. 610, and cases cited. Compare Mathews *v.* Crosby, 56 N. H. 21.

Oral evidence may not be introduced to show that the note was given on conditions different from those stated in it. Ward *v.* Thompson, 13 Ga. A. 152, 78 S. E. Rep. 1012.

The consideration for a note may be shown by parol. Folmar *v.* Siler, 132 Ala. 297, 31 So. Rep. 719; Keuka College *v.* Ray, 167 N. Y. 96, 60 N. E. Rep. 325, affirming 41 App. Div. 200, 58 N. Y. S. 745; McPeters *v.* English, 141 N. C. 491, 54 S. E. Rep. 417.

[37] Osborn *v.* Robbins, 36 N. Y. 365, s. c., 4 Abb. Pr. N. S. 15, rev'g 37 Barb. 481.

[38] Newell *v.* Doty, 33 N. Y. 83.

[39] Ayrault *v.* Chamberlain, 33 Barb. 229.

[40] Even though he be since deceased. Kent *v.* Walton, 7 Wend. 256.

[41] See Snyder *v.* Willey, 33 Mich. 483; First Nat. Bank *v.* McMaingle, 69 Penn. St. 156; Nutter *v.* Stover, 48 Me. 163.

[42] Phillips *v.* Cole, 10 Ad. & E. 106, Rosc. N. P. 384.

[43] Corlies *v.* Howe, 11 Gray, 125. Oral testimony may be given by

[44] Clark *v.* Sisson, 22 N. Y. 312, affi'g 5 Duer, 468.

[45] Patten *v.* Pearson, 55 Me. 39. Where action is brought against

act was done for accommodation; but such proof does not alone (except as between the original parties and those subject to their equities), throw the burden on plaintiff to give further evidence of consideration.[46]

31. Alterations.

If any material alteration,[47] whether apparently advantageous to the holder or not,[48] appears on the face of the

the maker he has the burden of proving that the note was given for accommodation. Spencer & Co. *v.* Brown, 143 N. Y. Supp. 994.

Where a contractor, desiring to obtain a contract from an owner of land to erect a house thereon, indorses the owner's note given to obtain money for building the house, such indorsement is not for accommodation. Vitkovitch *v.* Kleinecke, 33 Tex. Civ. App. 20, 75 S. W. Rep. 544.

[46] Ellicott *v.* Martin, 6 Md. 509, 61 Am. D. 327, 1 Dan. Neg. In. 129.

[47] Or an immaterial one fraudulently made. 1 Greenl. Ev. 608, § 568.

"Any alteration which changes:

"1. The date;

"2. The sum payable, either for principal or interest;

"3. The time or place of payment;

"4. The number or the relation of the parties;

"5. The medium or currency in which payment is to be made; or which adds a place of payment where no place of payment is specified, or any other change or addition which alters the effect of the instrument in any respect, is a material alteration." Neg. Instr. La., § 206.

See Moskowitz *v.* Deutsch, 46 Misc. 603, 92 N. Y. Supp. 721.

[48] If the alteration was apparently disadvantageous to the holder, this goes to relieve the case from suspicion that it was made after execution and without consent; see Bailey *v.* Taylor, 11 Conn. 531; but even if shown to have been so made, does not prevent the alteration from defeating the action. See Heins *v.* Cargill, 67 Me. 554; Franklin Ins. Co. *v.* Courtney, 6 Rep. 712; Huntington *v.* Finch, 3 Ohio St. 445, 2 Dan. Neg. In. 376. For other cases on the different views that have prevailed on this question, see also 17 Am. Rep. 97, 14 Moak's Eng. 585, 16 Id. 585, 16 Alb. Law J. 64, 80. "Where alterations appear, beneficial to the holder of the paper, the presumption is against the party seeking to recover thereon;

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the maker of a note that it was understood and agreed that the note was made for accommodation. Spencer & Co. *v.* Brown, 143 N. Y. Supp. 994.

paper, or in the indorsements on which his action depends,[49] he should be prepared with at least some evidence tending to explain it. The question whether the alteration is such that the absence of an explanation excludes the paper, is one for the court.[50] If there is nothing suspicious about the alteration, it is not error to admit the paper without explanation.[51] If there is anything suspicious, the court should

and he is required to explain such alteration." Matter of Pinkerton, 49 Misc. Rep. 363, 99 N. Y. Supp. 492.

[49] Otherwise of words written on the back, and thus not essential. See Bay *v.* Schrader, 30 Miss. 326; Kimball *v.* Lawson, 2 Vt. 138.

[50] Tillou *v.* Clinton, &c. Ins. Co., 7 Barb. 564.

The question of whether an alteration has been made is for the jury; but the materiality of the alteration is a question of law for the court. A material alteration vitiates the instrument. Richardson *v.* Fellner, 9 Okla. 513, 60 Pac. Rep. 270.

Under Georgia Civ. Code, § 3703, the materiality of an alteration is a question to be decided by the court, while the fact of an alteration is a question for the jury. Heard *v.* Tappan, 116 Ga. 930, 43 S. E. Rep. 375.

Where the evidence is uncontroverted that the note was materially altered without the maker's consent, the court may withdraw the case from the consideration of the jury and direct a verdict for the defendant. Bowers *v.* Rineard, 209 Pa. St. 545, 58 Atl. Rep. 912.

The maker of a note will be permitted to testify as to the contents of a memorandum which was attached to the note at the time it was delivered, and which qualified the contract, where such memorandum has been removed by the holder. Payne *v.* Long, 121 Ala. 385, 25 So. Rep. 780.

Where the maker delivered his note for " . . . hundred dollars " leaving a blank space before the word "hundred," he constitutes the person to whom he delivers the note his agent to complete it and will be bound by the latter's acts. The contention of the maker that such note must be regarded as a note for one hundred dollars, and that when the word "thirteen" was filled into the blank space, it was an alteration, cannot be sustained. Merritt *v.* Boyden, 191 Ill. 136, 60 N. E. Rep. 907, 85 Am. St. Rep. 246.

[51] Where a written instrument shows upon its face a material and obvious alteration, the presumption of law is that such alteration was made before the instrument was finally executed and delivered; and such instrument is not rendered incompetent evidence solely because such alteration appears therein. Dorsey *v.* Conrad, 49 Neb. 443, 453, 68 N. W. Rep. 645, overruling previous decisions.

require explanation; and the evidence offered for this purpose,—which may include all the circumstances of its history, its nature, the appearance of the alterations, the possible or probable motives for the alteration or against it, and its effect upon the parties respectively,—ought to be submitted to the jury with the paper itself.[52]

Where the execution of the note is admitted by the defendant an immaterial erasure appearing on the face of the note will not render it inadmissible in evidence. Brown *v.* Feldwert, 46 Ore. 363, 80 Pac. Rep. 414.

Where the alteration is material and such as to reasonably excite suspicion, the burden is imposed on the party offering the note to give some evidence in explanation of its condition. Ofenstein *v.* Bryan, 20 App. D. C. 1.

Where plaintiff sues on a note which shows on its face that the amount has been changed to a larger amount, and the defendant pleads that the note was "raised," the burden is on the plaintiff to explain the alteration. Winkles *v.* Guenther, 98 Ga. 472, 25 S. E. Rep. 527.

By the Negotiable Instruments Law, a note in the hands of a holder in due course may be enforced notwithstanding a material alteration therein. Mutual Loan Assoc. *v.* Lesser, 76 App. Div. 614, 78 N. Y. Supp. 629.

[52] Maybee *v.* Sniffen, 2 E. D. Smith, 1, s. c., 10 N. Y. Leg. Obs. 18; Artisans Bank *v.* Backus, 31 How. Pr. 242, 36 N. Y. 100, s. c., 3 Abb. Pr. N. S. 273. "The note in question has been produced upon the argument of the present appeal for our inspection, and it certainly bears marks indicating that it may have been altered from the form in which it was first written. The body of the paper, all but the signature, is in the handwriting of the defendant, who has had possession of it always, and who would benefit by the changes which are alleged to have been made in the date and amount. Under such circumstances, I understand the rule in this State to be that the burden of explaining the apparent alterations in the instrument is upon the party producing the paper. (Tillou *v.* Clinton, &c. Ins. Co., 7 Barb. 565; O'Donnell *v.* Harmon, 3 Daly, 424.) In the case at bar the proper instruction to the jury would have been that if from the appearance of the paper they believed it had been altered as alleged, then the burden was upon the defendant of showing that the alteration had been made before the note was signed." Gowdey *v.* Robbins, 3 App. Div. (N. Y.) 353, 355–356. Four different rules contend for control on this vexed question. 1. That an alteration apparent on the face of the paper raises no presumption either way, but the question is for the jury. (Hunt *v.*

Gray, 35 N. J. L. 227; Hayden *v.* Goodnow, 39 Conn. 164, and see Davis *v.* Jenney, 1 Metc. 221.) 2. That it raises a presumption against the paper, and requires, therefore, some explanation to render the paper admissible. (Rosc. N. P. 351, 384, 2 Pars. on Contr. 228; and see 2 Dan. Neg. In. 314, 374, &c.; Mills *v.* Barnes, 11 N. H. 395; Low *v.* Merrill, Burn, [Wis.] 185.) 3. That it raises such a presumption when it is suspicious, otherwise not. (1 Whart. Ev. 601, § 629, 1 Greenl. 604, § 564; Welch *v.* Coulbord, 3 Houst. [Del.] 647.) Compare Farnsworth *v.* Sharp, 4 Sneed [Tenn.] 55.) 4. That it is presumed, in the absence of explanation, to have been made before delivery, and, therefore, requires no explanation in the first instance. (White *v.* Hass, 32 Ala. 470; Paramour *v.* Lindsey, 63 Mo. 63.) The third rule, though somewhat vague, is the true one. It is impossible to sustain the unqualified assertion that every alteration must raise a presumption either way, or that there can be no alteration that will not raise a presumption against the note. Thus a cancellation of the printed word "bearer" and insertion of "order," in the same hand and ink as the other writing, could not ordinarily exclude the paper for want of explanation. On the other hand, an increase of the amount, written over an erasure, and exceeding the marginal figures would require explanation before the case could go to the jury. Between such extremes there is every variety of degree; and the only safe guide is that stated in the text. For cases, where the particular kinds of alteration are considered, see, as to altering date, Low *v.* Merrill, Burn. (Wis.) 185; Wood *v.* Steele, 6 Wall. 80; time to run, Davis *v.* Jenney, 1 Metc. 221; place of payment, White *v.* Hass, 32 Ala. 470; Corcoran *v.* Dall, 32 Cal. 82; Meikel *v.* State Savings Bank, 36 Ind. 355; diminishing the amount, Heins *v.* Cargill, 67 Me. 554; adding interest clause, Iron Mountain Bank *v.* Murdock, 62 Mo. 70; precluding interest except after maturity, Franklin Ins. Co. *v.* Courtney (Ind. S. Ct. 1878), 6 Reporter, 712. compare Paramour *v.* Lindsey, 63 Mo. 63; alteration in clause "without defalcation or discount," Hunt *v.* Gray, 35 N. J. L. 227; inserting charge on separate estate, Taddiken *v.* Cantrell, 69 N. Y. 597; erasure from printed form, Corcoran *v.* Dall, 32 Cal. 82; Paramour *v.* Lindsey, 63 Mo. 63; changing the name of a bank, according to a change in its name, Melton *v.* Pensacola Bank & Trust Co., 190 Fed. Rep. 126, 111 C. C. A. 166. For the rule as to sealed instruments, compare Little *v.* Herndon, 10 Wall. 31, and cases cited; Smith *v.* U. S., 2 Id. 231; and see 1 Id. 282, and chapter XLVIII, paragraph 7.

If the alteration was made by a stranger without any complicity with any of the parties interested, it is a spoliation and does not prevent a recovery on the original contract. The question of whether the change in the note was an alteration or a spoliation is for the

An interlineation or addition, in a hand different from the other writing in the body of the note and from the signature, is presumptively an alteration, within these rules. Otherwise of the mere use of a different ink for part of the writing.[53]

Alteration, though not appearing on inspection, may be shown by extrinsic evidence; and this throws the same burden on the party offering the instrument, to explain the alteration.[54]

32. How Pleaded.

If the action is on the instrument in its original form, a material alteration raises a question of variance or failure of

jury. White *v.* Harris, 69 S. C. 65, 48 S. E. Rep. 41, 104 Am. St. Rep. 791.

[53] Wilson *v.* Harris, 35 Iowa, 507.

[54] Herrick *v.* Malin, 22 Wend. 388; Jackson *v.* Osborn, 2 Id. 555.

Where the alteration is material and it has once been shown, the burden is on the plaintiff to explain it. Maguire *v.* Eichmeier, 109 Ia. 301, 80 N. W. Rep. 395.

Where it is doubtful on the face of the note whether or not the alteration was made it is a question for the jury. Colonial Trust Co. *v.* Getz, 28 Pa. Super. Ct. 619.

When the alteration is apparent on the face of the note the plaintiff has the burden of proving that it was done with the consent of the maker. Davis *v.* Crawford (Tex. Civ. App.), 53 S. W. Rep. 384.

Where the note on its face shows that the amount has been altered and the defendant in his plea sets up that the note has been "raised," the burden is on the plaintiff to explain the alteration. Winkles *v.* Guenther, 98 Ga. 472, 25 S. E. Rep. 527.

Where in his answer the defendant sets up alteration after execution, the burden is on him to show such alteration unless the same is apparent on the face of the note. Bouldin *v.* Barclay, 121 Ala. 427, 25 So. Rep. 827.

If there is no apparent alteration on the face of the note the burden shifts to the defendant to prove his claim of material alteration, and thereupon the burden is on the plaintiff to explain the alteration or deny it. Merritt *v.* Dewey, 218 Ill. 599, 75 N. E. Rep. 1066, 2 L. R. A. N. S. 217.

After the plaintiff has made out a *prima facie* case by proving the signature, the other party may introduce proof to rebut the *prima facie* case and throw back the burden of accounting for the alteration. Ofenstein *v.* Bryan, 20 App. D. C. 1.

If the defendant alleges forgery in his plea or affidavit it is not re-

proof, as well as admits the objection that the instrument has been made void.[55] If the action is on the instrument in its altered form, an answer admitting execution, without alleging the alteration, precludes evidence of alteration;[56] but under a denial of execution[57] or a general denial, evidence that an alteration was made after delivery is admissible.[58] Proof of the defendant's signature is *prima facie* evidence that the whole body of the note written over it is the act of the defendant (subject to the rules as to suspicious alterations above stated); but the burden of proof remains on the plaintiff to show, on the whole evidence, that the note declared on was the note of the defendant.[59]

33. Mode of Proof.

Alterations may be proved by a witness who saw the instrument prior to alteration, although not present when made;[60] and he may testify that he has no knowledge or recollection that the alteration existed when he inspected the instrument;[61] and, under the rules already stated, experts and those who are acquainted with the handwriting,

quired in the first instance to be disproved by the plaintiff. Forgery is a matter of defense. Towles *v.* Tanner, 21 App. D. C. 530; Ofenstein *v.* Bryan, 20 App. D. C. 1.

[55] *Contra*, Hirschman *v.* Budd, L. R. 8 Ex. 171, s. c., 5 Moak's Eng. 361.

[56] Smedbergh *v.* Whittlesey, 3 Sandf. Ch. 320.

[57] Rosc. N. P. 384.

Where the defendant denies the execution of the note he may nevertheless produce evidence that the note was altered. Coburn *v.* Webb, 56 Ind. 96, 26 Am. St. Rep. 15.

Under a plea of *non est factum* testimony as to alterations may be introduced, but in that case the signature to the note is not put in issue. Davis *v.* Crawford, 53 S. W. Rep. (Tex. Civ. App.) 384.

A general answer of *non est factum* is not inconsistent with a special plea setting up alterations. Fudge *v.* Marquell, 164 Ind. 447, 72 N. E. Rep. 565, 73 N. E. Rep. 895.

[58] Boomer *v.* Koon, 6 Hun, 645; Lincoln *v.* Lincoln, 12 Gray, 47.

[59] Simpson *v.* Davis, 119 Mass. 269, s. c., 20 Am. Rep. 324; Willett *v.* Shepard, 34 Mich. 106.

[60] Ansley *v.* Peterson, 30 Wisc. 653.

[61] Abel *v.* Fitch, 20 Conn. 90, 97.

may be examined.[62] Original memoranda or entries of the transaction are competent also, under rules already stated.[63]

The fact that the defendant was the maker or indorser of other paper having a similar clause to the one alleged to be an alteration, is not admissible in evidence, for the purpose of raising an inference that the clause was not an alteration.[64] The fact that the party to whom the alteration is imputed, was in embarrassed circumstances, when he negotiated the paper, is not competent as tending to show that it was altered by him so as to increase its amount before negotiation.[65] Evidence that defendant has paid interest on the altered paper, is relevant to show consent.[66] Evidence that plaintiff demanded payment, is not necessarily a ratification of an unauthorized alteration made by a third person.[67] A general consent or authority to add or alter may be proved; and it is not material that the maker was not informed what addition was made.[68]

[62] Paragraphs 8 to 17. If reliance is put on the fact that a part is in different ink from the rest, interrogate a witness as to the fact, so as to have it on the record. See Hardy *v.* Norton, 66 Barb. 528.

[63] Kennedy *v.* Crandell, 3 Lans. 1; and chapter XVI, paragraph 38 of this vol.

[64] Iron Mountain Bank *v.* Murdock, 62 Mo. 70; Paramour *v.* Lindsey, 63 Id. 63. But he may be asked whether he ever made any such note whatever. First Natl. Bank of Plattsburgh *v.* Heaton, 6 Supm. Ct. (T. & C.) 37; Jourden *v.* Boyce, 33 Mich. 302.

[65] Agawam Bank *v.* Sears, 4 Gray, 95.

[66] Rosc. N. P. 383.

If the defendant made payments on the note after he knew of the separation of a memorandum from the note, it would amount to a ratification of the act, and estop him from setting it up as avoiding the note. Payne *v.* Long, 121 Ala. 385, 25 So. Rep. 780.

[67] Laugenberger *v.* Kroeger, 48 Cal. 147, s. c., 17 Am. Rep. 418.

[68] Taddiken *v.* Cantrell, 69 N. Y. 597. Compare Davidson *v.* Lanier, 4 Wall. 447.

Where a note is altered with the knowledge and acquiescence of the maker it is binding on him. Schmelz *v.* Rix, 95 Va. 509, 28 S. E. Rep. 890.

Where it is expressly agreed that the alteration shall be made, this may be done by the payee, though without knowledge of the payer. Phillips *v.* Crips, 108 Iowa, 605, 69 N. W. Rep. 373.

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34. Blanks.

Evidence that a party to the instrument intrusted it to another, for use as such, with blanks not filled, is *prima facie* evidence of authority to complete it by filling them, but not to vary or alter its material terms by erasing what was written or printed as a part thereof, nor to pervert its scope or meaning by filling the blanks with stipulations repugnant to what was plainly and clearly expressed in the instrument; [69] and this authority enures to successive holders who take it with the blank unfilled; [70] and evidence of the blank

[69] Angle *v.* Northwestern Mutual Life Insurance Co., 92 U. S. (2 Otto) 330; Abbott *v.* Rose, 62 Me. 194, s. c., 16 Am. Rep. 427; Redlich *v.* Doll, 54 N. Y. 234.

When one delivers an instrument so executed as to give it full validity upon the filling up of blanks, authority for the holder to do that is implied. Friend *v.* Yahr, 126 Wis. 291, 104 N. W. Rep. 997, 1 L. R. A. N. S. 891, 110 Am. St. Rep. 924.

Where a note is made payable to four payees and then indorsed by an accommodation indorser, and thereafter and before delivery to the payees the maker erases one of the names of the payees without authority from the accommodation indorser to do so, the accommodation indorser will not be liable to the transferee of the note. Brooklyn First Natl. Bk. *v.* Gridley, 112 App. Div. 398, 98 N. Y. Supp. 445.

Where there is a skeleton note at the foot of a contract and the defendant has signed his name just following such note, and later the note is wrongfully separated from the contract and the blanks filled in and the note negotiated, authority to separate the note and fill in the blanks will not be implied as it makes a totally different contract. Porter *v.* Hardy, 10 N. D. 551, 88 N. W. Rep. 458.

Where the maker executes a note leaving blanks therein unfilled, the subsequent alteration of the note by filling up the blanks is no defense against a *bona fide* purchaser. Statton *v.* Stone, 15 Colo. App. 237, 61 Pac. Rep. 481.

The insertion of the number "6" in the blank contained in the following provision in the note: "interest at —— per cent" does not amount to a material alteration, inasmuch as the note "would have carried interest at 6 per cent by implication of law; that being the legal rate of interest in Missouri when not otherwise stipulated." Parol evidence is inadmissible to contradict the inserted interest stipulation. Haas *v.* Commerce Trust Co., 194 Ala. 672, 69 So. Rep. 894.

[70] Page *v.* Morrel, 3 Abb. Ct. App. Dec. 433; and see Spitler *v.* James,

and of the filling of it, is admissible under an allegation describing simply the completed paper.[71]

35. Marks of Cancellation.

Lines cancelling the whole instrument,[72] or the stamp "Paid,"[73] raise a presumption of discharge; but this may be rebutted.[74] The presumption of discharge arising from actual cancellation is not necessarily rebutted by evidence that the discharge was not by payment or set-off.[75]

36. General Rule as to Oral Evidence to Vary.

Parol evidence of an oral agreement alleged to have been made at the time of the drawing, making, or indorsing of a bill or note, cannot be permitted[76] to vary, qualify, or con-

32 Ind. 202, s. c., 1 Am. Rep. 334, and note; Michigan Bank *v.* Eldred, 9 Wall. 544; Davidson *v.* Lanier, 4 Wall. 447. If one negligently leaves blanks in a note executed by him, he cannot defend against an innocent purchaser for value before maturity on the ground that the blanks were improperly filled in even though the purchaser had notice of facts which would have excited the suspicion of an ordinarily prudent man. Leseure *v.* Weaver, 89 Ill. App. 628.

[71] Rosc. N. P. 352.

Where the maker of a note carelessly allows a blank space to remain on the note, in which an alteration can be made without defacing the note, he will be liable upon it to a *bona fide* holder without notice. First State Savings Bk. *v.* Webster, 121 Mich. 149, 79 N. W. Rep. 1068.

[72] Pitcher *v.* Patrick, 5 Ala. (1 Stew. & P.) 478.

[73] See Turner *v.* Bank of Fox Lake, 4 Abb. Ct. App. Dec. 434.

[74] Same cases.

In order to cancel a note it is not enough for the holder to write the word "paid" across the face of it and sign his name thereto; he must deliver the note to the maker. Wittman *v.* Pickens, 33 Colo. 484, 81 Pac. Rep. 299.

"A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but when an instrument or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake or without authority." Neg. Instr. L., § 204.

[75] Gray *v.* Gray, 2 Lans. 173, but see 47 N. Y. 552.

[76] Unless performed and accepted. Bank of Lyons *v.* Demmon, Hill & D. Supp. 398; Milan

tradict, or to add to or subtract from the absolute terms of the written contract, there being no fraud, accident or mistake.[77] If the names of the parties are so placed upon it, as to leave it doubtful what the real intention of the parties is,

First Natl. Bank *v.* Wells, 98 Mo. App. 573, 580, 73 S. W. Rep. 293.

[77] Forsythe *v.* Kimball, 91 U. S. (1 Otto) 291, 294. Compare 1 Greenl. Ev. 13th ed. 322, note. But a contemporaneous memorandum between the same parties, and not merely collateral (Webb *v.* Spicer, 13 Q. B. 894, affi'g 3 H. L. C. 510); if shown to be founded on good consideration (McManus *v.* Bark, L. R. 5 Ex. 65); is admissible for that purpose, whether on the same or a separate paper (Leeds *v.* Lancashire, 2 Camp. 205; Bowerbank *v.* Monteiro, 4 Taunt. 844); and though not alleged to be in writing (Young *v.* Austen, L. R. 4 C. P. 553; Corkling *v.* Massey, L. R. 8 C. P. 395); but the allegation will not be proved unless an agreement in writing is given in evidence in support of it at the trial. Young *v.* Austen, *supra;* Abrey *v.* Crux, L. R. 5 C. P. 37; Rosc. N. P. 389. At the trial of an action on a promissory note, evidence of an oral agreement that payment was not to be called for until after certain paintings of the maker had been sold is an attempt to vary the written instrument by parol, and is rightly excluded. Wooley *v.* Cobb, 165 Mass. 503, 43 N. E. Rep. 497. But a statement in a promissory note that it was given for money loaned is not conclusive; it is open to either party to show the actual consideration. Miller *v.* McKenzie, 95 N. Y. 575.

Parol evidence of fraud, accident or mistake can alone successfully contradict or set aside a promissory note. Fuller *v.* Law, 207 Pa. St. 101, 56 Atl. Rep. 333.

An oral agreement made between the maker and payee before execution of the note cannot be set up as a defense to the note unless fraud, accident or mistake affected the execution of the note. Patton *v.* Fox, 22 Pa. Super. Ct. 416; Franklin *v.* Browning, 54 C. C. A. 258, 117 Fed. Rep. 226; Clement *v.* Houck, 113 Iowa, 504, 85 N. W. Rep. 765; Bomar *v.* Rosser, 131 Ala. 215, 31 So. Rep. 430.

A promissory note, unconditional in its terms, for a valuable consideration, cannot be varied by a prior or contemporaneous verbal agreement. Barnard State Bk. *v.* Fesler, 89 Mo. App. 217; Central Savings Bk. *v.* O'Connor, 139 Mich. 82, 102 N. W. Rep. 280.

A contemporaneous parol contradiction of the express terms of a note is void and of no effect. Payne *v.* Mutual Life Ins. Co., 72 C. C. A. 487, 141 Fed. Rep. 339.

Parol evidence is not admissible to control, add to, vary or contradict the language of a promissory note or other valid written instrument when sued upon by the payee or obligee named in it. Dominion

Natl. Bk. *v.* Manning, 60 Kan. 729, 57 Pac. Rep. 949.

Under Civil Code, § 3675, a promissory note cannot be varied by evidence of a contemporaneous parol agreement. Stapleton *v.* Monroe, 111 Ga. 848, 36 S. E. Rep. 428.

An accommodation maker of a note cannot set up as a defense an oral understanding and agreement by the bank which discounted the note that it would only look to the person for whose accommodation it was given and not to the maker. Earle *v.* Enos, 130 Fed. Rep. 467.

Parol evidence is not admissible to show that a note was not to be payable according to its terms. St. Louis Third Natl. Bk. *v.* Reichert, 101 Mo. App. 242, 73 S. W. Rep. 893.

The maker cannot introduce oral evidence as to an understanding had with the payee that at maturity of the note certain discounts were to be allowed. Kelley *v.* Thompson, 175 Mass. 427, 56 N. E. Rep. 713.

An agent who in his own name draws a bill of exchange on his principal will be personally liable and he cannot introduce evidence of an oral understanding between all the parties to the bill that he was not to be held personally liable. Citizens' Bank *v.* Millett, 103 Ky. 1, 44 S. W. Rep. 366, 20 Ky. Law Rep. 5, 44 L. R. A. 664, 82 Am. St. Rep. 546.

Where a note is given in payment of certain goods to be delivered, evidence of an oral agreement that the note was to be paid only as the goods were delivered is not admissible. Beattyville Bk. *v.* Roberts, 117 Ky. 689, 25 Ky. Law Rep. 1796, 78 S. W. Rep. 901.

An oral agreement of rescission is not admissible in evidence in an action on a promissory note. Thisler *v.* Mackey, 65 Kan. 464, 70 Pac. Rep. 334.

A parol agreement to extend the time for payment of a note at maturity is inadmissible in evidence to vary the effect of the written contract. Homewood People's Bk. *v.* Heckert, 207 Pa. St. 231, 56 Atl. Rep. 431.

Where the defendant has executed his note and received a valuable consideration therefor, he will not be permitted to introduce evidence that there was an understanding and agreement at the time that payment should never be enforced or demanded. Western Carolina Bk. *v.* Moore, 138 N. C. 529, 51 S. E. Rep. 79.

A promissory note cannot be affected by a parol understanding that the maker was not to be held liable. Hemrich *v.* Wist, 19 Wash. 516, 53 Pac. Rep. 710.

Where a note is negotiable in form and by its terms payable on demand, evidence of a contemporaneous agreement making the time of payment dependent on an uncertain event is inadmissible. Aultman *v.* Hawk, 4 Neb. (Unof.) 582, 95 N. W. Rep. 695; Mallory *v.* Fitzgerald, 69 Neb. 312, 95 N. W. Rep. 601.

When a note is accompanied by a parol stipulation, purposely omitted, by which it is absolutely

cancelled, it is the parol agreement, and not the written one, that is void. First Natl. Bk. *v.* Dick, 22 Pa. Super. Ct. 445.

A promissory note given to an insurance company in payment of a premium cannot be varied by evidence of a parol agreement with an agent of the company. Union Central Life Ins. Co. *v.* Wynne, 123 Ga. 470, 51 S. E. Rep. 389; Thomas *v.* Bagley, 119 Ga. 778, 47 S. E. Rep. 177.

An order by a creditor on his debtor, being in writing and accepted by the debtor, is not subject to contradiction by parol contemporaneous agreements. Baylor *v.* Butterfass, 82 Minn. 21, 84 N. W. Rep. 640.

Parol evidence is not admissible to vary the consideration for a note as it is recited in a written contract. Blumer *v.* Schmidt, 164 Ia. 682, 146 N. W. Rep. 751.

Where preliminary negotiations are gone through and a deal is consummated by the giving of a note and the delivery of a deed, the note and deed constitute the written contract and oral testimoney as to the prior negotiations will not be admissible. Luckenbach *v.* Thomas, 166 S. W. Rep. (Tex. Civ. App.) 99.

While parol proof is admissible to show the consideration for a note it is not admissible to add a new term to the contract contradictory of the written terms. Feld *v.* Stewart, 78 Miss. 187, 28 So. Rep. 819.

In a suit between the original parties to a promissory note, parol evidence may be given to show what the consideration of the note was, that the consideration has failed, or that there was a parol agreement made contemporaneously with the note, and not inconsistent with it, by the fulfillment of which the note has been substantially paid. Such evidence does not contradict or vary the instrument. Parol evidence is not admissible to change the promise itself without proof of fraud or mistake. Appleby *v.* Berrett, 28 Pa. Super. Ct. 349.

Want of consideration, partial or total, may be shown; but it is not permissible for the maker of a note to prove that though he executed the paper, it was, at the time, agreed that he need not pay it. Bass *v.* Sanborn, 119 Mo. App. 103, 95 S. W. Rep. 955.

A plea which sets forth an oral understanding that a promissory note was not to be paid when due is demurrable. Johnson *v.* Cobb, 100 Ga. 139, 28 S. E. Rep. 72.

Proof of conversations had prior to the written acceptance of an order, tending to vary the terms of such acceptance, is not admissible. Kervan *v.* Townsend, 25 App. Div. 256, 49 N. Y. Supp. 137.

Parol evidence is not admissible to vary the terms of a due bill. Prosser *v.* Miller, 37 Misc. Rep. 841, 76 N. Y. Supp. 974.

An indorsement as follows: "Pay to the order of R. C. O. Cash, for account," is a restrictive indorsement constituting the indorsee merely an agent for collection, and parol evidence is

resort may be had to parol evidence.[78] If a memorandum appears upon the paper in such a position as not to be authenticated by the signature, either party may show parol facts as to its being affixed, and if it be shown that it was affixed before delivery, as a part of the contract, it is part of the note within the above rule.[79] And parol testimony is inadmissible for the purpose of showing an agreement between the drawer and payee of a bill of exchange whereby the payee was not to hold the drawer responsible for any default in its payment on the part of the drawee.[80] Evidence of a contemporaneous oral agreement to renew a bill of ex-

inadmissible to establish that there was an absolute transfer of title. U. S. Nat. Bank *v.* Greer, 55 Neb. 462, 75 N. W. Rep. 1088, 70 Am. St. Rep. 390.

A conditional delivery may be shown by parol as between the original parties and others having notice. Such evidence is not objectionable because varying or contradicting the written contract. Higgins *v.* Ridgway, 153 N. Y. 130, 47 N. E. Rep. 32. See Persons *v.* Hawkins, 41 App. Div. 171, 58 N. Y. Supp. 831.

[78] Cook *v.* Brown, 62 Mich. 473, 4 Am. St. Rep. 870, 29 N. W. Rep. 46.

Parol evidence is admissible to show the true relation of the parties to a note irrespective of what that relation appears to be on the note itself. Shepherd *v.* Mott, 166 S. W. Rep. (Tex. Civ. App.) 128.

Where a note is signed by several persons and nothing appears on the note as to the liability of such persons to each other, extrinsic evidence is admissible to show what that liability is. Hoyt *v.* Griggs, 164 Ia. 672, 146 N. W. Rep. 745.

[79] Heywood *v.* Perrin, 10 Pick. 228.

Where there is an oral agreement for the sale of stock in consideration of the execution and delivery of a note, coupled with the right to return the stock and take up the note, the note is executed and delivered as a result of the contract, not as itself the contract, and parol testimony as the agreement will be admitted in an action on the note. Germania Bk. *v.* Osborne, 81 Minn. 272, 83 N. W. Rep. 1084.

[80] Bryan *v.* Duff, 12 Wash. 233, 46 Pac. Rep. 936.

Where there is an oral agreement between the maker and payee of a note that they are to enter into a joint enterprise and that the note is to be paid out of the profits of such enterprise, and the payee breaks his agreement, the maker may set up such oral agreement as a defense, it having been part of the consideration for the note. Hansen *v.*

change is inadmissible on the ground that its effect would be to contradict the terms of the written instrument.[81] Where a note reads, "We promise to pay to the order of myself," and is signed by two obligors, parol evidence is admissible to show which of the two obligors was intended as the payee.[82]

37. Date.

If no date is expressed, the date of delivery may be proved by parol. A date expressed [83] is *prima facie* evidence of the time of delivery; [84] unless the admissibility of the instrument depends on its date.[85] If the date is referred to in the body of the contract, as fixing the time of payment, it cannot be varied by parol,[86] unless fraud, accident or mistake is shown; [87] and even then evidence of error may not be

Yturria, 48 S. W. Rep. (Tex. Civ. App.) 795.

[81] New London Credit Syndicate *v.* Neale (1898), 2 Q. B. D. 487.

Evidence that at the time of execution and delivery of the note the payee stated that he would not insist upon being paid at the due date but that he would allow the maker all the time he needed in which to pay, is not admissible. Pierce *v.* Avakian, 167 Cal. 330, 139 Pac. Rep. 799.

[82] Jenkins *v.* Bass, 88 Ky. 397, 21 Am. St. Rep. 344, 11 S. W. Rep. 293.

[83] Even if only on the stamp, for its cancellation. Holbrook *v.* N. J. Zinc Co., 57 N. Y. 616.

Where the execution of a note is proved and a date appears on the face of the note, the presumption is that the note was executed on that date. McQuillan *v.* Eckerson, 178 Mich. 281, 144 N. W. Rep. 510.

[84] 1 Pars. on Pr. N. & B. 41.

[85] Smith *v.* Shoemaker, 17 Wall. 637.

[86] Joseph *v.* Bigelow, 4 Cush. 82, 84. Shaw, Ch. J. This case, so far as it excludes the evidence in connection with proof of mistake or fraud, goes too far. See Barlow *v.* Buckingham, 68 Iowa, 169, 26 N. W. Rep. 58.

A parol agreement that if a certain contingency should happen the note would be extended for two years from the date when by its terms it would become due cannot be admitted in evidence, as a contemporaneous parol agreement cannot be introduced to vary a written instrument. Dorsey *v.* Armor, 10 Colo. App. 255, 50 Pac. Rep. 726.

[87] Breck *v.* Cole, 4 Sandf. 79; Germania Bank *v.* Distler, 4 Hun, 633.

A date is presumptive evidence of the time of execution. McQuillan *v.* Eckerson, 178 Mich. 281, 144 N. W. Rep. 510; a presumption,

competent for the purpose of showing, as against a *bona fide* holder, that the paper was illegal, as made on Sunday.[88]

38. Time of Payment.

If the time of payment is expressed,[89] or if not, and the note is therefore payable immediately,[90] parol evidence that another time of payment or presentment [90a] was agreed upon between the parties at or before delivery, is not competent. The time and mode cannot be varied by parol. Hence if payment by installments is specified, a parol agreement that the whole should be due, on default in one, cannot be proved.[90b] But an error in date for payment, obvious on the face of the paper, may be corrected by parol.[90c] A variance between the allegation and proof as to the time when payable, or the length of time to run, even if substantial, should be disregarded if defendant is not misled to his

however, which may be rebutted by parol. Drake *v.* Royers, 32 Me. 524; Brewster *v.* McCardell, 8 Wend. 478. See Neg. Instr. L., § 36, sub. 3.

[88] Knox *v.* Clifford, 38 Wisc. 651, s. c., 20 Am. Rep. 28.

Parol evidence is admissible to resolve a doubt as to the date of the instrument, e. g.; whether it should be considered as dated in June or January, the name of the month being illegibly written. In such a case the question is for the jury. Fenderson *v.* Owen, 54 Me. 372, 92 Am. D. 551.

[89] Walker *v.* Clay, 21 Ala. 797.

[90] Thompson *v.* Ketcham, 8 Johns, 190.

Where the payee agreed with the maker to let him have all the time he needed to pay the note, a reasonable time will be deemed to have been intended. Pierce *v.* Avakian, 167 Cal. 330, 139 Pac. Rep. 799.

[90a] Blakemore *v.* Wood, 3 Sneed (Tenn.), 470.

[90b] Brown *v.* Wiley, 20 How. U. S. 442. But the writing does not exclude oral evidence that it was falsely read over at the time of signing, and that the true agreement was different. Farmers' & Manufacturers' Bank *v.* Whinfield, 24 Wend. 419. If there is an ambiguous character in the instrument, evidence of how it was read to the signer at the time of signing is competent (subject, however, to the rules as to *bona fide* holders stated below); for in such a case the reading of the note to the maker is part of the *res gestæ*. Arthur *v.* Roberts, 60 Barb. 580.

[90c] Miller *v.* Crayton, 3 Supm. Ct. (T. & C.) 360, and see 13 Conn. 282, 285, n.

prejudice;[90d] and amendment should be allowed, if necessary, to identify the instrument. If the law allows grace, evidence of a usage to the contrary is not competent.[90e]

39. Amount.

The sum stated in the body *prima facie* governs;[90f] and if complete and unambiguous, cannot be varied by parol,[90g] even if the marginal figures are different.[91] The figures in the margin serve to aid and explain apparent defects in statements of the amount in the body, but if there is no state-

[90d] Chapman *v.* Carolin, 3 Bosw. 456; Page *v.* Bank of Alexandria, 7 Wheat. 35; Sebree *v.* Dorr, 9 Wheat. 558. *Contra*, at common law, Trowbridge *v.* Didier, 4 Duer, 448.

[90e] Woodruff *v.* Merchants' Bank, 25 Wend. 673, and see 16 N. Y. 395. But compare Renner *v.* Bank of Columbia, 9 Wheat. 581; Bank of Washington *v.* Triplett, 1 Pet. 32.

[90f] Norwich Bank *v.* Hyde, 13 Conn. 282. *Prima facie* a chose in action is worth what appears to be due upon it, and unless the presumption is rebutted by legal evidence, it is conclusive. Anderson *v.* First Nat. Bank, 6 N. D. 497, 72 N. W. Rep. 916. Neglect and refusal of a maker to pay his note at maturity tends to show his inability to pay, and affects the value of the note. Walley *v.* Deseret Natl. Bank, 14 Utah, 305, 47 Pac. Rep. 147. When promissory notes have a market value, it is competent to show what the cash market value was at the time of the making as bearing upon and tending to fix their actual value. This rule applies to promissory notes and choses in action having a market value, the same as to other personal property. Walley *v.* Deseret Natl. Bank, 14 Utah, 305, 47 Pac. Rep. 147.

[90g] Glazoway *v.* Moore, Harper (S. C.), 401; Hall *v.* Mott, Brayton (Vt.), 79.

As the note is the best evidence as to the amount for which it was made it is error to allow the plaintiff to testify as to the amount. Dale *v.* Christian, 140 Ga. 790, 79 S. E. Rep. 1127.

A parol agreement at the time the note was made that certain amounts due to the maker in the future were to be charged off against the face amount of the note and that the note was to remain in force for the balance is not admissible in evidence. Knight *v.* Walker Brick Co., 23 App. D. C. 519.

[91] Rosc. N. P. 353, citing Saunderson *v.* Piper, 5 N. C. 425; Wolfolk *v.* Bank, &c. 10 Bush (Ky.), 504.

"Where the sum payable is expressed in words and also in

ment in the body, marginal figures do not supply the blank,[92] but only limit the holder in filling it.[93] Mistake in the amount written, when available as a defense, must be pleaded.[94]

40. Medium.

For the purpose of showing the medium of payment, evidence of the place where the contract was made, and subject to the law of which it was to be performed, is competent; and if there are several currencies, oral evidence of which was intended is competent.[95] Otherwise, an unambiguous designation cannot be qualified by oral evidence that a different or depreciated medium was intended,[96] unless fraud or mistake is shown. Proof of the foreign law is not essential; but the value, unless established under the act of Congress,[97] may be shown, like the value of chattels in a distant market,

figures and there is a discrepancy between the two, the sum denoted by the words is the sum payable; but if the words are ambiguous or uncertain, references may be had to the figures to fix the amount." Neg. Instr. L., § 36, subd. 1.

[92] Norwich Bank *v.* Hyde (above).

[93] Boyd *v.* Brotherson, 10 Wend. 93.

If the amount is accurately stated but the payee is not designated with certainty, the note is not negotiable. Equitable Trust Co. *v.* Harger, 177 Ill. App. 106, aff'd 258 Ill. 615, 102 N. E. Rep. 209.

[94] See Seeley *v.* Engell, 13 N. Y. 542.

[95] Thus a contract made in the Confederate States, during the war of the rebellion, to pay "dollars," may be shown by parol evidence to mean Confederate currency. Thorington *v.* Smith, 8 Wall. 1; Donley *v.* Tindall, 32 Tex. 43, s. c., 5 Am. Rep. 234. But without such evidence the legal presumption is that lawful money of the United States was meant. Confederate Note Case, 19 Wall. 548. As to what kind of evidence of intention would suffice, see Id. p. 559.

[96] Baugh *v.* Ramsey, 4 T. B. Monr. 156; Bradley *v.* Anderson, 5 Vt. 152.

Testimony by the maker or the indorser that they had an agreement that the note was to be paid in another medium than shown on the face of it, is not admissible. Kerr *v.* Holder, 13 Ga. App. 9, 78 S. E. Rep. 682.

[97] U. S. Comp. Stat., §§ 6536, 6537. Compare McButt *v.* Hoge, 2 Hilt. 81; Stranaghan *v.* Youmans, 65 Barb. 392.

by the opinions of witnesses.[98] The court is not bound to take judicial notice of the value even of Canadian currency,[99] unless fixed by or under the act of Congress.[1]

41. Interest.

If the instrument fixes the time for paying interest,—either by specifying it, or by naming no time, and thus in legal effect making it payable only at maturity,—oral evidence that it was to be paid previously or periodically is not competent,[2] unless fraud or mistake is shown.

The court is not bound to take judicial notice of the rate of interest, even in a neighboring country,[3] but may do so. The rate in another State or nation is not presumed to have the same limits as here; but the foreign statute should be proved by the party relying on it.[4]

42. Place of Payment.

In the absence of anything on the paper to indicate or restrict the place of payment, the presumption of law is that

[98] Kermott *v.* Ayer, 11 Mich. 181; Comstock *v.* Smith, 20 Mich. 338; chapter XVI, paragraphs 20–23 of this vol.; Schmidt *v.* Herforth, 5 Robt. 124.

[99] Kermott *v.* Ayer (above).

[1] McButt *v.* Hodge, 2 Hilt. 81, U. S. Comp. Stat., §§ 6536, 6537.

[2] Koehring *v.* Muemminghoff, 61 Mo. 403, s. c., 21 Am. Rep. 402. As to vary the *rate* of interest by parol, compare Rohan *v.* Hanson, 11 Cush. 44; Shoop *v.* Clark, 4 Abb. Ct. App. Dec. 235. Where a promissory note fixes the rate of interest thereon, parol evidence is not admissible to show that subsequent to its execution a different rate of interest was agreed upon. Davis *v.* Stout, 126 Ind. 12, 22 Am. St. Rep. 565, 25 N. E. Rep. 862.

A parol agreement that the maker would not have to pay the interest for the first year is inadmissible. Tisdale *v.* Mallett, 73 Ark. 431, 84 S. W. Rep. 481.

"Where the instrument provides for the payment of interest, without specifying the date from which interest is to run, the interest runs from the date of the instrument, and if the instrument is undated, from the issue thereof." Neg. Instr. L., § 36, sub. 2.

[3] Kermott *v.* Ayer, 11 Mich. 181.

[4] Kermott *v.* Ayer, 11 Mich. 181. As to the mode, see p. 86 of this vol.

In an action brought in Alabama, involving the legal rate of interest of Missouri it was held that the Missouri rate may be shown by

it is payable where dated, if dated at any place; otherwise, where made or delivered. The designation on the note cannot be varied by a contemporaneous parol agreement fixing a different place; nor by evidence of a different residence of the parties.[5] A variance in designating the particular place of payment specified in the body of the note is to be disregarded, unless defendant has been misled.[6] Parol evidence of an agreement contemporaneous with the making of negotiable paper, that it should be payable at a specified place not expressed in it, is not competent.[7]

43. Defeasance.

Oral evidence that defendant delivered the instrument to plaintiff, on a present condition which he refused to perform, as distinguished from a future contingency, or the future

the table in the Alabama Session Acts. Haas *v.* Commerce Trust Co., 194 Ala. 672, 69 So. Rep. 894.

[5] 2 Pars. on Pr. N. & B. 333, 338. Prof. Parsons' six rules (2 Pars. on Pr. N. & B. 324) as to the law of place applicable to negotiable paper are:

I. If a bill or note be payable in a particular place, it is to be treated as if made there, without reference to the place at which it is written, or signed, or dated.

II. If by the express terms of a note or bill, or by legal construction of its terms, it is payable especially in any place, it is presumed that both parties know this fact.

III. It is presumed that both parties know the law of the place in which the paper is payable; and

IV. That both parties intend that this law shall govern the contract.

V. While this law governs the contract as to all the rights and obligations resting upon it, the law of the place in which such a note or bill is sued (the *lex fori*) governs the remedies upon the note or bill.

VI. The *lex loci contractus* depends not upon the place where the note or bill is made, drawn or dated, but upon the place where it is delivered from drawer to drawee, from promisor to payee, from indorser to indorsee. See 6 Abb. New Cas. 76.

[6] Rosc. N. P. 352; Comstock *v.* Savage, 27 Conn. 184.

[7] Specht *v.* Howard, 16 Wall. 565. *Contra*, Brent *v.* Bank of Metropolis, 1 Pet. 89, affi'g 2 Cranch C. Ct. 530. It is not essential that the place of payment be stated in a note. Holmes *v.* Bank of Ft. Gaines, 120 Ala. 493, 24 So. Rep. 959.

performance of a condition, is competent; [8] and so it may be shown that he made it as part of an entire verbal contract, as, for example, that it was given for the price of property sold, on a contemporaneous agreement that if the property fell below a given measurement, an abatement from the note should be made; and that, on measurement, it did so fall short; [8a] or that it was made and delivered as security only.[9] And a written agreement between the same parties, con-

[8] Shepard *v.* Hall, 1 Conn. 497; Calhoun *v.* Davis, 2 Ind. 532. Thus it may be proved that a note was delivered not as such, but as a mere memorandum of a cross note loaned to the maker (Seymour *v.* Cowing, 4 Abb. Ct. App. Dec. 200, 206); but not that it was given for anticipated services, on an agreement that it should not be payable if the services were not rendered. Dale *v.* Pope, 4 Litt. 166; West *v.* Kelly, 19 Ala. 353. Or for the price of goods to be returned if not satisfactory. Allen *v.* Furbish, 4 Gray, 504. *Contra*, Folger *v.* Donsman, 37 Wisc. 619. Nor even that it was given for a disputed demand on an agreement to surrender it, in case a receipt could not be found; Brown *v.* Hull, 1 Den. 400; or for a release, by the payee, of his interest in an estate, with an agreement that, if the interests of the other heirs could not be obtained, both the note and release should be void. Ely *v.* Kilborn, 5 Den. 514. Or that the signatures to an instrument in the form of a promissory note were obtained under a promise that the instrument should not be regarded as a binding obligation until certain other persons had signed it. Hodge *v.* Smith, 130 Wis. 326, 110 N. W. Rep. 192.

"In Westman *v.* Krumweide, 30 Minn. 313, 15 N. W. Rep. 255 (followed in subsequent cases) we held, in deference to the great weight of authority, that under this rule where an unsealed instrument is signed, and delivered to the proper party, parol evidence is admissible to show that notwithstanding such delivery the agreement of the parties was that such instrument should become operative as a contract only upon the happening of a future, contingent event." Smith *v.* Mussetter, 58 Minn. 159, 59 N. W. Rep. 995. See Higgins *v.* Ridgway, 153 N. Y. 130, 47 N. E. Rep. 32.

[8a] Carter *v.* Hamilton Seld. Notes No. 6, 80, rev'g 11 Barb. 147; Lewis *v.* Gray, 1 Mass. 297, 1 Greenl. Ev., § 284a, and cases cited. *Contra*, Miller *v.* White, 7 Blackf. 491.

[9] Agawam Bank *v.* Strever, 18 N. Y. 502; Moses *v.* Murgatroid, 1 Johns. Ch. 119. *Contra*, Walker *v.* Crawford, 56 Ill. 444, s. c., 8 Am. Rep. 701. See Robertson *v.* Rowell, 158 Mass. 94, 32 N. E. Rep. 898, 35 Am. St. Rep. 466.

temporaneous with the instrument, may be proved as part of the *res gestæ*, though it vary the legal effect of the instrument.[10] But, effectual delivery or indorsement [11] not being negatived, parol evidence of an agreement, contemporaneous with the instrument, that it should be void in a certain event, is inadmissible.[12] When, however, such an agreement has been executed by the return of the consideration to the payee, and his acceptance thereof, the evidence is competent as introductory to the latter facts.[13]

44. Particular Fund; Agreement to Set-off—to Renew.

Upon the same principle oral evidence is inadmissible to show that the paper was to be paid out of a particular fund only,[14] or only in the contingency of a fund being realized by the maker [15] or the payee; [16] or that before payment could be required certain collateral securities must be applied.[17] Nor is it competent to show a contemporaneous oral agreement, that a cross-demand should be applied in reduction of the note,[18] as distinguished from a reduction by a failure of consideration; [19] nor that the paper should be renewed, in whole[20] or in part,[21] at maturity.

45. Subsequent Modification.

A subsequent modification of the terms, founded on sufficient consideration, may be proved, as between the parties

[10] Rogers *v.* Broadnax, 27 Tex. 238.

[11] Skinner *v.* Church, 36 Iowa, 91.

[12] Payne *v.* Ladue, 1 Hill, 116.

[13] Bank of Lyons *v.* Demmon, Hill & D. Supp. 398, and cases cited.

[14] Gridley *v.* Dole, 4 N. Y. 486; Adams *v.* Wilson, 12 Metc. 138.

[15] Underwood *v.* Simmons, 12 Metc. 275.

[16] Currier *v.* Hale, 8 Allen, 47. As to the rule when the note refers to the fund, see Sears *v.* Wright, 24 Me. 278.

[17] Abrey *v.* Crux, L. R. 5 C. P. 37.

[18] Eaves *v.* Henderson, 17 Wend. 190; St. Louis Ins. Co. *v.* Homer, 9 Metc. 39.

[19] Smith *v.* Carter, 25 Wisc. 283.

[20] Burge *v.* Dishman, 5 Blackf. 272; Ockington *v.* Law, 66 Me. 551; Anspach *v.* Bast, 52 Penn. St. 356.

[21] Barton *v.* Wilkins, 1 Miss. 75; Dawson *v.* Bk. of Illinois, 5 Ill. 56. But an agreement to renew, in-

bound thereby, if alleged in pleading, otherwise not.[22] If in writing, parol evidence of qualifications of it is not competent.[23]

46. Indorsement.

The mode of proving indorsement is the same as that of other signatures. The use of initials or other writing or characters, may be shown by parol to have been made as an indorsement.[24] Indorsement in the hand of the maker may be sustained by parol authority from the payee,[25] or by recognition or holding out.[26] Evidence that a lost note was acquired by purchase or in payment for property, raises no presumption that it was indorsed by the transferrer.[27] There is a legal but not conclusive presumption that an undated indorsement was made before the paper became due;[28] which is allowed for the sake of the negotiable character of paper; but if the time is material to plaintiff, in any other respect than this, the burden of proof is on him to show the time.[29] The presumption may be rebutted by any compe-

dorsed, though unsigned, may be valid. Flynn *v.* Mudd, 27 Ill. 323.

[22] Newell *v.* Salmons, 22 Barb. 647.

[23] Alston *v.* Wingfield, 53 Geo. 18.

Where a note is signed in the presence of an attorney at law, statements are made in his presence as to the purpose of making the note and later the note is delivered by the maker to the payee, no witness being present, the attorney cannot testify that there was a parol agreement between the maker and the payee. In re Sutch, 201 Pa. St. 317, 50 Atl. Rep. 946.

[24] Merchants' Bank *v.* Spicer, 6 Wend. 443; Brown *v.* Butchers, &c. Bank, 6 Hill, 443; Brigham *v.* Peters, 1 Gray (Mass.), 139. Note indorsed in stencil. Hayes *v.* Carrollton Bank, 143 Ga. 522, 85 S. E. Rep. 699.

[25] Turnbull *v.* Trout, 1 Hall, 336.

[26] Weed *v.* Carpenter, 10 Wend. 403.

[27] Woods *v.* Gassett, 11 N. H. 442.

[28] Rosc. N. P. 381, 2 Pars. on Pr. N. &c. 10; Neg. Instr. L., § 75.

Under Oklahoma Comp. L. 1909, § 4480, an undated indorsement of a note is presumed to have been made before maturity of the note. Cedar Rapids Natl. Bk. *v.* Bashara, 39 Okl. 482, 135 Pac. Rep. 1051.

This presumption is not rebutted merely by evidence of the payee's declarations to the contrary. Hearson *v.* Graudine, 87 Ill. 115.

[29] Pars. on Pr. N. & B. 10; Solo-

tent evidence that the paper remained the property of the payee after its maturity;[30] but the declarations and admissions of the payee, indorser, or other holder, are not competent for this purpose against the subsequent holder,[31] unless part of the *res gestæ* of an act properly in evidence. Even where it appears that the indorsement was for accommodation, the transferee may rely on the *prima facie* presumption that it was made before negotiation to him.[32]

A valuable consideration for an indorsement is presumed; and it is incumbent upon the other party to show the real consideration, if inadequate.[33] If the indorsement is relied on merely as a transfer of title, evidence that there was no consideration is not, by itself, relevant.[34]

47. Oral Evidence to Vary an Indorsement.

The law recognizes five principal objects for which indorsement may be made, which are distinct from, and often inconsistent with, each other. These objects (the first two of which are often conjoined in one indorsement) are: 1. To show that the indorser transfers the legal title; 2. To show that he acknowledges his liability, in case of dishonor and notice, according to the law merchant; 3. To show that one who may have not had nor transferred title, lends his credit to the paper on the like condition; 4. To show that the indorser constitutes the transferee his agent for collection; 5. To show payment received. In the absence of extrinsic evidence, there is a legal presumption that an indorsement was intended for the first two purposes and those only. He who relies on either purpose alone or on either of the other two,

mon *v.* Holt, 3 E. D. Smith, 139.

[30] Id.

"Proof that the note was in the possession of the original holders a short while prior to maturity does not carry the burden resting on the defendant of showing that the undated indorsement was made after maturity." Baskins *v.* Valdosta Bank, 5 Ga. App. 600, 63 S. E. Rep. 648.

[31] Pages 50–53 of this vol. *Contra*, 2 Pars. on Pr. N. & B. 10.

[32] See Michigan Bank *v.* Eldred, 9 Wall. 544, and cases cited.

[33] Riddle *v.* Mandeville, 5 Cranch, 322.

[34] See Chapter 1. City Bank of

to characterize the act, must show that such was the object; and the question whether oral evidence is competent for this purpose is much contested. Two very different rules are invoked to exclude such evidence;—one that it is oral evidence to vary a writing,—the other that subsequent transferees in good faith, etc., have a right to rely on the legal presumptions of intent to transfer and become liable. The better opinion is that the rule against oral evidence to vary a writing, does not exclude such evidence for the purpose of showing what the object and consequent legal character of the contract was; [35] but when its legal character has

New Haven *v.* Perkins, 29 N. Y. 554, affi'g 4 Bosw. 420.

[35] The contract between indorser and indorsee does not consist exclusively of the writing popularly called an indorsement. The contract consists partly of the written indorsement, partly of the delivery of the bill to the indorsee, and may also consist partly of the mutual understanding and intention with which the delivery was made by the indorser and received by the indorsee. That intention may be collected from the words of the parties to the contract, either spoken or written, from the usage of the place, or of the trade from the course of dealing between the parties or from their relative situation. Bruce *v.* Wright, 5 Supm. Ct. (T. & C.) 81. See Fayetteville Fourth Nat. Bank *v.* Wilson, 168 N. C. 557, 84 S. E. Rep. 866; Heaton *v.* Dickson, 153 Mo. App. 312, 133 S. W. Rep. 159. Castrique *v.* Buttigieg, 10 Moore P. C. 94, and cases cited; Byles on B. 147; Ross *v.* Espy, 66 Penn. St. 481, s. c., 5 Am. Rep. 394, and cases cited; Rey *v.* Simpson, 22 How. U. S. 341. *Contra*, 1 Dan. on Neg. Inst. 532. A contract between the indorser and indorsee of a negotiable instrument is a written one, which merges all oral negotiations and cannot be varied or changed by parol evidence of a probable promise or agreement made at the time of or previous to the instrument; nor can it be varied by proof of any subsequent oral promise made without consideration. Citizens' Bank of Los Angeles *v.* Jones, 121 Cal. 30, 53 Pac. Rep. 354.

It is not competent by parol evidence to vary, limit or control the legal effect of a blank indorsement of a negotiable note before maturity. Smith *v.* Brabham, 48 S. C. 337, 26 S. E. Rep. 651.

Between the parties to a blank indorsement, parol evidence is admissible to show the precise terms of the contract. But it is not admissible against a *bona fide* holder. Whitney *v.* Spearman, 50 Neb. 617, 70 N. W. Rep. 240.

The contract of a blank indorsement is not expressed in writing, but rests in legal implications,

been ascertained, evidence of a contemporaneous oral agreement is not competent to vary the legal consequences or measure of its effect. Yet the rule protecting transferees in good faith, etc., does exclude all extrinsic evidence, whether oral or written, when offered to deprive them of the effect of the legal presumptions above stated.

Hence, except as against a transferee in good faith, etc.,[36]

which *prima facie* presumption of law may be overthrown as between the original parties to such indorsement, but not against a *bona fide* holder. United States Natl. Bk. *v.* Geer, 55 Neb. 462, 75 N. W. Rep. 1088, 70 Am. St. Rep. 390.

Where the payee of a promissory note sells it and at the same time writes his name under that of the maker, he cannot introduce a parol agreement that he was to be liable only as an indorser and not as a joint maker. Cook *v.* Brown, 62 Mich. 473, 29 N. W. Rep. 46, 4 Am. St. Rep. 870.

In South Carolina, where there are two indorsements in blank, parol evidence is admissible to show that the two indorsers agreed to be jointly liable instead of successively liable. Sloan *v.* Gibbes, 56 S. C. 480, 76 Am. St. Rep. 559, 35 S. E. Rep. 408.

Where a waiver of right to notice is stamped on the back of a promissory note when it is drawn and later the various indorsers sign under such waiver, each indorsement will be construed to have been made with the waiver, and parol evidence that it was made otherwise will not be admitted. Farmers' Exch. Bk. *v.* Altura Gold Mill, etc., Co., 129 Cal. 263, 61 Pac. Rep. 1077.

Where a check contains on its face the words "in payment of note" and is indorsed in blank by the payee, the latter will not be estopped from testifying as to the conditions under which she indorsed the check and that the check was received by her for a purpose other than the payment of the note. United States Wringer Co. *v.* Cooney, 214 Ill. 520, 73 N. E. Rep. 803.

[36] A blank indorsement of a negotiable instrument before due, transferred to a *bona fide* holder in the due course of business, establishes a liability which cannot be varied by parol evidence. Holmes *v.* First Natl. Bk., 38 Neb. 326, 41 Am. St. Rep. 733, 56 N. W. Rep. 1011; Smith *v.* Brabham, 48 S. C. 337, 26 S. E. Rep. 651; Corbett *v.* Fetzer, 47 Neb. 269, 66 N. W. Rep. 417; Alabama Natl. Bk. *v.* Rivers, 116 Ala. 1, 22 So. Rep. 580.

Unless there was fraud in obtaining an indorsement, the indorser will not be permitted to show by parol evidence that he did not intend to bind himself as an indorser, as against a *bona fide* holder. Halbach *v.* Trester, 102

oral evidence is admissible to show that the object was not to assume the liability of an indorser, but only to transfer title, on a sale of the note,[37] or upon a special trust, such as to enable the indorsee to collect it as agent for the indorser,[38] or to transfer it in payment of a debt,[39] or to show, as between successive indorsers, that they were sureties, and what was their relative liability to each other,[40] or whether

Wis. 530, 78 N. W. Rep. 759.

The legal effect of the indorsement cannot be varied by parol evidence of an agreement, contemporaneously made, that the indorser of a note or bill should not be made personally liable for its payment. Alabama Natl. Bk. *v.* Rivers, 116 Ala. 1, 22 So. 580, 67 Am. St. Rep. 95.

Parol evidence of what was said before the indorsement is inadmissible. When the indorsement is signed a contract arises from it, the terms of which are well settled. Bird *v.* Kay, 40 App. Div. 533, 58 N. Y. Supp. 170; Riverview Land Co. *v.* Dance, 98 Va. 239, 35 S. E. Rep. 720.

Where the indorsement makes the note payable to the indorsee for collection only, parol evidence will not be admitted to show that the indorsee owned two-sevenths of the note outright. Smith *v.* Bayer, 46 Ore. 143, 79 Pac. Rep. 497, 114 Am. St. Rep. 858.

[37] Bruce *v.* Wright (above); or as agent, Elwell *v.* Dodge, 33 Barb. 336.

In an action against indorsers oral evidence is admissible to show that the note was given as an accommodation. Franklin State Bk. *v.* Gettle, 96 Neb. 60, 146 N. W. Rep. 1017.

As between an indorser of a check and his immediate indorsee parol evidence is admissible to show that there was an agreement prior to the indorsement that the indorsee took title only for the purpose of collection. Dickinson *v.* Burke, 8 N. D. 118, 77 N. W. Rep. 279.

[38] Sweeny *v.* Easter, 1 Wall. 166.

[39] Davis *v.* Brown, 94 U. S. (4 Otto) 423.

[40] Philips *v.* Preston, 5 How. U. S. 278; Allen *v.* Chambers, 13 Wash. 327, 43 Pac. Rep. 57; and see chapter XIII, paragraph 9 of this vol.; George *v.* Bacon, 138 App. Div. 208, 123 N. Y. Supp. 103; Harris *v.* Jones, 23 N. D. 488, 136 N. W. Rep. 1080.

Oral evidence is admissible to show the relative liability regardless of the order in which the names appear. Shea *v.* Vahey, 215 Mass. 80, 102 N. W. Rep. 119.

Parol evidence is admissible to show that while one appears to be the maker of a note, he was in fact only a surety for the indorser. Bishop *v.* Georgia Natl. Bk., 13 Ga. App. 38, 78 S. E. Rep. 947.

An agreement between the parties to a negotiable instrument to

the words "without recourse" qualify the preceding or following name,[41] or to show that the indorsement was made only to be used as evidence of payment of the instrument.[42]

But even between the immediate parties to the indorsement, parol evidence is not admissible to show a contemporaneous agreement that in consideration of the indorser's omitting to qualify his indorsement with the words "without recourse" the plaintiff would hold him harmless from all liability,[43] nor that the indorser would be liable without

be equally liable instead of assuming a liability in succession according to the order of the indorsements, may be shown by parol. Noble *v.* Beeman-Spaulding-Woodward Co., 65 Or. 93, 131 Pac. Rep. 1006, 46 L. R. A. N. S. 162.

When a signature was obtained under a qualifying verbal agreement, proof of such agreement is admissible, on the ground that such proof relates only to the question as to whether the note ever had any legal force as a contract. Hodge *v.* Smith, 130 Wis. 326, 110 N. Y. 192.

[41] Fitchburg Bank *v.* Greenwood, 2 Allen, 434; Corbett *v.* Fetzer, 47 Neb. 269, 66 N. W. Rep. 417.

[42] Morris *v.* Faurot, 21 Ohio St. 155, s. c., 8 Am. Rep. 45. A general indorsement on commercial paper may, except as against a *bona fide* holder, be explained and the precise terms of the agreement shown by parol evidence. Whitney *v.* Spearman, 50 Neb. 617, 70 N. W. Rep. 240; United States Nat. Bank *v.* Geer, 53 Neb. 67, 73 N. W. Rep. 266; Bryan *v.* Windsor, 99 Ga. 176, 25 S. E. Rep. 268; Holmes *v.* First Natl. Bk., 38 Neb. 326, 41 Am. St. Rep. 733, 56 N. W. Rep. 1011; First Natl. Bk. *v.* Pegram, 118 N. C. 671, 24 S. E. Rep. 487. As between two indorsers in blank of a promissory note, one of whom has paid it and sued the other for contribution, it may be shown by oral evidence that they were accommodation indorsers and agreed, at the time, that as between themselves, each should be liable for one-half. Kiel *v.* Choate, 92 Wis. 517, 67 N. W. Rep. 431.

[43] Dale *v.* Year, 38 Ct. 15, s. c., 9 Am. Rep. 353. The indorsement of commercial paper, "without recourse," creates an express and complete contract, which cannot be varied or contradicted by parol evidence of a contemporaneous agreement by which the indorser undertook to be liable, as guarantor, for the payment of the instrument. Youngberg *v.* Nelson, 51 Minn. 172, 38 Am. St. Rep. 497, 53 N. W. Rep. 629.

The contract between the indorser and indorsee of a negotiable instrument is a written one and cannot be varied or changed by parol evidence of a verbal promise or agreement made at the time of

demand or notice.[44] The rule that to this extent an indorsement cannot be varied by parol, is a rule of evidence, and does not go to the validity of the contract. Hence the law of the forum applies.[45]

To establish joint liability of consecutive indorsers, there must be independent proof of contemporaneous execution,[46] unless, perhaps, where they are the partners in the firm to whose order the paper was payable.[47]

The qualifying agreement should be pleaded; [48] it may, however, be available under a denial of indorsing.[49]

48. Indorsement as a Transfer of Title.

The object of the statute[50] is that before an indorsee can recover, in his own name, the contents of an instrument pay-

the indorsement. Citizens' Bk. *v.* Jones, 121 Cal. 30, 53 Pac. Rep. 354.

Evidence of an agreement made at the time of the indorsement to the effect that the indorser should not incur any liability, is inadmissible as tending to vary a written instrument. Riverview Land Co. *v.* Dance, 98 Va. 239, 35 S. E. Rep. 720.

[44] Bank of Albion *v.* Smith, 27 Barb. 489; Tebbetts *v.* Pickering, 5 Cush. 83; Barry *v.* Morse, 3 N. H. 132. *Contra*, 1 Dan., § 717. But a subsequent waiver by parol may be shown. See paragraph 45; and perhaps an express authority to overwrite a guaranty might be shown. Cottrell *v.* Conklin, 4 Duer, 45.

[45] Downer *v.* Chesebrough, 36 Conn. 39, s. c., 4 Am. Rep. 29.

The signature upon a negotiable promissory note, made by a party thereto, imports a precise agreement which cannot be varied by parol evidence of any preceding or contemporaneous oral arrangement. Foley *v.* Emerald, etc., Brewing Co., 61 N. J. L. 428, 39 Atl. Rep. 650.

[46] Wetherwax *v.* Payne, 2 Mich. 555; Rothschild *v.* Grix, 31 Id. 150.

[47] Bell *v.* Massey, 14 La. Ann. 831.

[48] See Meador *v.* The Dollar Savings Bank, 56 Geo. 605.

[49] Marston *v.* Allen, 8 M. & W. 503, Rosc. N. P. 360; Denton *v.* Peters, L. R. 5 Q. B. 475.

Where the defendant sets up that the indorsement is a forgery it is competent for the plaintiff to give evidence of financial dealings had with the defendant to show the likelihood of the indorsement being genuine. Gluckman *v.* Darling, 85 N. J. L. 457, 89 Atl. Rep. 1016.

[50] 1 N. Y. R. S. 768, § 4, same stat. 3 & 4 Anne, c. 9. An indorsement "for collection and return," while not vesting the in-

able to order, he shall show that he has acquired a property in it, by a transfer from those who were the original payees.[51] The statute is satisfied by an indorsement by the real payees; and parol evidence is competent to show that an indorsement which, on its face does not appear to represent the payees, legally does so.[52]

The fact that two persons, not partners, are joint payees or indorsees, is no evidence of authority in one to indorse the name of the other.[53]

49. Demand.

Though the instrument be payable on demand, it is not necessary, except as against drawer or indorser, to prove a demand,[54] even though alleged.[55]

dorsee with the title, but merely constituting him an agent for collection, nevertheless entitles him to sue in his own name. But it is a good defense to a suit on the note by such an indorsee that the maker has paid the indorser. Smith *v.* Bayer, 46 Ore. 143, 79 Pac. Rep. 497, 114 Am. St. Rep. 858.

[51] Pease *v.* Dwight, 6 How. U. S. 198.

An assignee of a note is entitled to sue in his own name. Southard *v.* Latham, 18 N. M. 503, 138 Pac. Rep. 205, 50 L. R. A. N. S. 871.

Since an indorsement of a promissory note to a third person operates as an assignment of the indorser's rights therein, there is no variance between an allegation of an assignment in writing to plaintiff and the proof of a regular indorsement to him. Haas *v.* Commerce Trust Co., 194 Ala. 672, 69 So. Rep. 894.

[52] Id. Thus parol evidence is admissible to show that the apparent payee is dead, and that the indorser is his administrator (see 2 Pars. on Pr. N. & B. 5); that an individual name indorsed in place of a firm name of payees was the name habitually used by the firm for their indorsements. South Carolina Bank *v.* Case, 8 Barnw. & C. 436. That a name of a payee, whose indorsement is apparently necessary and is lacking, was put or left in as payee by mistake, so as to entitle an indorsee of the true payee to recover as indorsee, actually, though not apparently, of the whole interest. Pease *v.* Dwight (above).

[53] Wood *v.* Wood, 1 Harr. (N. J.) 428; 3 Pars. on Pr. N. &c. 4, and see chapter VII, paragraph 6 of this vol. *Contra*, Snelling *v.* Boyd, 5 Monr. 173.

[54] Fairchild *v.* Ogdensburg, Clayton & Rome R. R. Co., 15 N. Y. 337.

[55] Burnham *v.* Allen, 1 Gray, 496.

50. Non-payment.

Plaintiff's possession of the paper is sufficient *prima facie* evidence of breach by non-payment.[56]

51. Indorsements of Payment, &c.

The holder producing the instrument from his own custody, puts it in evidence subject to the disadvantage of whatever indorsements in reduction of it appear upon it.[56a] As against him such indorsements need no further proof than their appearance. They are not evidence in his favor, against others, without some evidence of handwriting, signature, or other assent. They are evidence against him, unless explained. Such an indorsement, if dated, is presumed (as against the holder who puts it in evidence) to have been made at the time of its date, and, unless otherwise expressed, will be understood to indicate a transaction had at that time. If not dated, it is not presumed to have been made at or before

Because a note is payable at a particular bank does not necessitate a demand for payment there. But where the answer alleges, and it is proved, that the money was there for payment, it is treated as a tender and stops the interest and costs. Bank, etc., Co. *v.* Smith, 89 Miss. 298, 42 So. Rep. 345.

[56] Howell *v.* Van Sicklen, 6 Hun, 115; Brennan *v.* Brennan, 122 Cal. 440, 55 Pac. Rep. 124, 68 Am. St. Rep. 46; Schwind *v.* Hall, 129 Cal. 40, 61 Pac. Rep. 573. It is often said that plaintiff need not prove non-payment; but this is because his possession raises a sufficient presumption of non-payment. In an action by the payee's administrator against the maker, the presumption of discharge arising from the maker's possession of the note is not rebutted by the mere fact of the payee's death. The question is for the jury. Larremore *v.* Wells, 29 Ohio St. 13. Compare Grey *v.* Grey, 47 N. Y. 552. In Powell *v.* Swan, 5 Dana, 1, it was held, in a peculiar case, that the fact that a note, with the signature of the promisor torn off, remains in the possession of the promisee, repels the presumption of payment.

Possession of a note by an indorsee where the indorser was a married woman whose husband has possession of the note after it was indorsed, is *prima facie* evidence of ownership of the note. Vann *v.* Edwards, 130 N. C. 70, 40 S. E. Rep. 853.

[56a] Morris *v.* Morris, 5 Mich. 171, 180; Thompson *v.* Blanchard, 2 Iowa, 44, 48; Greenough *v.* Taylor, 17 Ill. 602. *Contra*,

delivery, without extrinsic evidence to that effect. Such indorsements are not, however, conclusive.[57]

52. Competency of a Party to the Instrument to Impeach it. The New York Rule.

The better opinion is that parties to negotiable paper are equally competent as any other witnesses to testify to any facts impeaching its validity.[58]

53. — the United States' Court Rule.

In the Supreme Court of the United States, and in some of the State courts, it is held, on the contrary, that a person who has placed his name on a negotiable paper, as a party to it, is not afterward, in a suit on such security, competent as a witness to prove any fact existing at the time of his

of full payment, Ray *v.* Bell, 24 Ill. 444, not well considered. Even if the indorsements have been erased. Carson *v.* Duncan, 1 Greene (Iowa), 466; Graves *v.* Moore, 7 T. B. Monr. 341.

[57] Kingman *v.* Tirrell, 11 Allen, 97.

There is a presumption that an indorsement was made at or about the date of the note. Roach *v.* Sanborn Land Co., 135 Wis. 354, 115 N. W. Rep. 1102.

[58] This is the general rule administered now in England, Jordain *v.* Lashbrook, 7 T. R. 601, and in *Alabama*, Griffing *v.* Harris, 9 Port. 225; *Arkansas*, Tucker *v.* Wilamouicz, 8 Ark. 157; *Connecticut*, Jackson *v.* Packer, 13 Conn. 342; *Georgia*, Slack *v.* Moss, Dud. 161; *Indiana*, Prather *v.* Lentz, 6 Blackf. 244; *Iowa*, Richards *v.* Marshman, 2 Greene, 217, compare Strang *v.* Wilson, Morris, 84; *Kentucky*, Gorham *v.* Carroll, 3 Litt. 221; *Maine* (in a very qualified form), Abbott *v.* Rose, 62 Me. 194, s. c., 16 Am. Rep. 427; compare Deering *v.* Sawtel, 4 Greenl. 191; *Maryland*, Ringgold *v.* Tyson, 3 Harr. & J. 172; *Michigan*, Orr *v.* Lacey, 2 Doug. 230; *Missouri*, Bank of Mo. *v.* Hull, 7 Mo. 273; St. John *v.* McConnell, 19 Id. 38; *New Hampshire*, Haines *v.* Dennett, 11 N. H. 180; *New Jersey*, Freeman *v.* Britton, 2 Harr. 191; *New York*, Williams *v.* Walbridge, 3 Wend. 415; *North Carolina*, Guy *v.* Hull, 3 Murph. 150; *South Carolina*, Knight *v.* Packard, 3 McCord, 71; *Tennessee*, Stump *v.* Napier, 2 Yerg. 35; Jones *v.* Matthews, 8 Lea, 84, 41 Am. Rep. 633; *Texas*, Parsons *v.* Phipps, 4 Tex. 341; *Vermont*, Pecker *v.* Sawyer, 24 Vt. 45; *Virginia*, Taylor *v.* Beck, 3 Rand, 316.

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accrediting the paper, which would tend to impeach or invalidate it.[59]

Where this rule is recognized, it is generally restricted so as not to apply except to negotiable paper indorsed and put into circulation in the usual course of business, before maturity or dishonor,[60] nor to apply between original parties or those affected with notice of their equities,[61] nor to ex-

[59] Sweeny *v.* Easter, 1 Wall. 166. The reason assigned for this rule sufficiently indicates its unsoundness, viz., that it is against good morals and public policy to permit a person who has thus aided in giving currency and circulation to such paper to testify to facts which would render such paper void, after he has thus imposed it upon the public as valid, with all the sanction which his name will give it. This is a good reason for holding him, as a party to the action, estopped from alleging or proving such a fact; but it is not a reason for silencing him as a witness, if the law allows the fact to be alleged and proved, and it rests within his knowledge. Nevertheless the rule has been recognized not only in earlier English cases now overruled, and in the *Supreme Court of the United States*, Sweeny *v.* Easter (above); but also in *Illinois*, Dewey *v.* Warriner, 71 Ill. 198, s. c., 22 Am. Rep. 91; *Louisiana*, Shamburgh *v.* Commagere, 5 Martin, 9; *Maine*, Deering *v.* Sawtel, 4 Greenl. 191; but compare Abbott *v.* Rose, 62 Me. 194, s. c., 16 Am. Rep. 427; *Massachusetts*, Thayer *v.* Crossman, 1 Metc. 416; *Mississippi*, Drake *v.* Henly, Walk. 541; *Pennsylvania*, Gaul *v.* Willis, 26 Penn. St. 259; Parke *v.* Smith, 4 Watts & S. 287; *Ohio*, Treon *v.* Brown, 14 Ohio, 482.

"Whether the rule disqualifying the witness has been nullified by the statutory abolition of the interest disqualification has, singularly enough, never been passed on by any court. The rule being founded, not on interest, but on supposed principles of public policy, it is difficult to see what effect the statutory changes referred to can have. In one jurisdiction it has been held that the rule has been abolished by a statute providing that no 'interest or policy of law' shall exclude a witness (State Bank *v.* Rhoads, 89 Pa. 353) and the same result would probably be reached in jurisdictions having similar statutes. It is believed, however, that in no jurisdiction at the present day would the rule be enforced." 8 C. J. 1044.

[60] Parke *v.* Smith, 4 Watts & S. 287; Rohrer *v.* Morningstar, 18 Ohio, 579; Thayer *v.* Crossman, 1 Metc. 416.

[61] Metropolitan Natl. Bank *v.* Jansen, 108 Fed. Rep. 572, 47 C. C. A. 497; Eastwood *v.* Creecy, 1 MacA. 232; Bubier *v.* Pulsifer, 4 Gray, 592. Thus the witness

clude testimony to a fact subsequent to the act by which the witness gave credit to the paper,[62] or to a fact not impairing the validity of the paper, but consistent with its terms,[63] nor to apply to one who indorsed "without recourse." [64]

54. Admissions and Declarations.

The admissions and declarations of a party sought to be charged are, in general, competent against himself,[65] whether made to the plaintiff or a stranger; but not competent in his own favor, unless connected with the party against whom they are adduced, or part of the *res gestæ* of an act properly in evidence.[66]

The admissions and declarations of a former holder of the instrument are not competent against a subsequent holder if made after he parted with his title to the instrument.[67] If made before that, they are not competent against

may testify to facts showing that the objector was not a *bona fide* holder. Id.

[62] Such as omission to give notice of dishonor to charge the indorser, Drake *v.* Henly, Walk. (Miss.) 541; or an alteration, Haines *v.* Dennett, 11 N. H. 180; Shamburgh *v.* Commagere, 5 Mart. (La.) 9.

[63] Sweeny *v.* Easter, 1 Wall. 174.

[64] 2 Pars. on Pr. N. & B. 470.

[65] As to admissions where there is a joint or a several liability, see chapter VII, paragraph 6 of this vol. The acts of a clerk of a bank in marking a promissory note as the property of the bank, and his entries entering it in a book purporting to be a list of property of the bank, are acts of ownership and are admissible to prove ownership in the bank. Produce Exch. Trust Co. *v.* Bieberbach, 176 Mass. 577, 58 N. E. Rep. 162.

[66] As to what constitutes part of the *res gestæ*, compare Osborn *v.* Robbins, 37 Barb. 482, rev'd in 36 N. Y. 365; Dexter *v.* Clemens, 17 Pick. 175.

[67] City Bank of Brooklyn *v.* McChesney, 20 N. Y. 240; Wooten *v.* Outlaw, 113 N. C. 281, 18 S. E. Rep. 252. But they may be made competent by showing that he acted as agent for the subsequent holder, see Lancey *v.* Clark, 3 Hun, 575, affi'd in 64 N. Y. 209.

Declarations of a former owner are not admissible against the holder or assignee. Mitchell *v.* Baldwin, 88 N. Y. App. Div. 265, 84 N. Y. Supp. 1043.

The former holder of a note who has transferred his interest to another cannot affect the rights of the

a transferee for value, even after dishonor,[67a] unless his interest is legally identical with that of the declarant,[67b] or he took with actual notice of the facts.[68] The fact that the declarant had possession of the instrument at the time of making declarations and admissions is not alone sufficient to render such statements competent against the one who was then the owner.[69]

owner by subsequent admissions. Wangner *v.* Grimm, 169 N. Y. 421, 62 N. E. Rep. 569.

Where a father gives his son some money and takes a promissory note for it, the father's subsequent declaration not in the presence of the son that he intended the money to be an advancement to the son, will not be admissible to convert the debt against the son into an advancement. Garner *v.* Taylor, 58 S. W. Rep. (Tenn. Ct.) 758.

Letters written by a former holder of a note after he had transferred it are not admissible against the subsequent holder who has not in any way sanctioned or authorized the writing of the letters. Ricker Natl. Bk. *v.* Brown (Tex.), 43 S. W. Rep. (Tex. Civ. App.) 909.

When the holder of a promissory note sells and transfers it to another the seller cannot thereafter defeat the purchaser's right to collect it by falsely representing to a third person that the note had been paid. Athens Natl. Bk. *v.* Exchange Bk., 110 Ga. 692, 36 S. E. Rep. 265.

If the court is unable to find from the evidence that the declarations of the holder of a promissory note were made before the transfer the declarations must be excluded. Ellis *v.* Watkins, 73 Vt. 371, 50 Atl. Rep. 1105. Citing text, Chap. I, paragraph 32.

The declarations of a holder of a promissory note while he held the note and before the transfer thereof, are admissible in evidence against one who is not a *bona fide* holder. Frick *v.* Reynolds, 6 Okla. 638, 52 Pac. Rep. 391.

[67a] Jermain *v.* Worth, 5 Den. 342, rev'd on another point in 6 N. Y. 276. Otherwise of actual transactions as distinguished from loose oral declarations. Id.

[67b] The rule stated in the text is the New York Rule. Paige *v.* Cagwin, 7 Hill, 361. For contrary rules, see pages 50–53 of this vol.

[68] Roe *v.* Jerome, 18 Conn. 138, 152.

Admissions by the payee of a promissory note, made while owner of the note, are admissible against his indorsee who takes after maturity. Sears *v.* Moore, 171 Mass. 514, 50 N. E. Rep. 1027.

[69] Scott *v.* Stevenson, 3 Hun, 352, s. c., 5 Supm. Ct. (T. & C.) 352.

When promissory notes are indorsed by the payee after they are overdue, admissions by the payee while owner of the notes are admissible in evidence against the

55. Foreign Law.

Matters bearing upon the execution, the interpretation, and the validity of the contract, are generally to be determined by the law of the place where it was made; [70] matters

indorsee in an action by him against the maker. Sears *v.* Moore, 171 Mass. 514, 50 N. E. Rep. 1027.

[70] Scudder *v.* Union National Bank, 91 U. S. (1 Otto) 406 (and see Tilden *v.* Blair, 21 Wall. 241; Wayne Co. Bank *v.* Low, 6 Abb. New Cas. 76, and cases cited), aff'd in 81 N. Y. 566, 37 Am. Rep. 533.

The law of the place of making and that of indorsing will govern the contract and fix the liability of the several parties. Studebaker Bros. Mfg. Co. *v.* Hinsey, 88 Ill. App. 234.

The law applicable to promissory notes executed in one state and payable in another having conflicting laws is as follows:

1. All matters bearing upon the execution, the interpretation and validity of the note, including the capacity of the parties to contract, are to be determined by the law of the place where the contract is made.

2. All matters connected with the payment, including presentation, notice, demand, protest and damages for non-payment, are to be regulated by the law of the place where, by its terms, the note is to be paid.

3. All matters respecting the remedy to be pursued, including the bringing of suits, service of process, and admissibility of evidence, depend upon the law of the place where the action is brought. Garrigue *v.* Kellar, 164 Ind. 676, 74 N. E. Rep. 523, 69 L. R. A. 870, 108 Am. St. Rep. 324.

Where the note was made in Canada and according to its terms is payable there, it is a contract governed by the law of that Dominion. Merchants' Bk. *v.* Brown, 86 App. Div. 599, 83 N. Y. Supp. 1037.

The validity of a promissory note dated in Ohio and payable there is governed by the law of Ohio. Colonial Natl. Bk. *v.* Duerr, 108 N. Y. App. Div. 215, 95 N. Y. Supp. 810.

A bill of exchange is regarded as made where it was drawn and is governed by the law of that place as to its form, nature and effect in regard to the payee or any subsequent holder. Amsinck *v.* Rogers, 189 N. Y. 252, 82 N. E. Rep. 134, 121 Am. St. Rep. 858, 12 L. R. A. N. S. 875, 12 Ann. Cas. 450, aff'g 103 App. Div. 428, 93 N. Y. S. 87.

Questions as to the capacity of the maker of a promissory note to contract must be determined by the law of the place where the note was executed, unless there was a distinct understanding and intention that the contract should be governed by the laws of another state. Union Natl. Bk. *v.* Chapman, 169 N. Y. 538, 62 N. E.

connected with its performance by the law of the place for performance;[71] and matters respecting the remedy, includ-

Rep. 672, 57 L. R. A. 513, 88 Am. St. Rep. 614.

In Indiana, if suit is brought on a note, nothing else appearing, the note will be presumed to have been executed in Indiana. Irose *v.* Balla, 181 Ind. 491, 104 N. E. Rep. 851.

Where on account of a wagering contract upon the price of stocks, a promissory note is executed in Rhode Island but delivered in Massachusetts and made payable in the latter state, and suit is brought on the note in Rhode Island where all wagering contracts are contrary to public policy, no recovery can be had in Rhode Island, and it does not matter whether the transaction was valid in Massachusetts or not. Winward *v.* Lincoln, 23 R. I. 476, 51 Atl. Rep. 106, 64 L. R. A. 160.

Where drafts are drawn in Germany and money is advanced on them in Germany although they are accepted in New York and made payable in New York, the question as to whether there was usury in the transaction will be controlled by the laws of Germany. Whitehead *v.* Heidenheimer, 57 N. Y. App. Div. 590, 68 N. Y. Supp. 704.

A note executed and delivered in Alabama and indorsed by the maker's wife as surety will be held void because under the laws of Alabama a wife cannot directly or indirectly become surety for her husband. Union Natl. Bk. *v.* Chapman, 169 N. Y. 538, 62 N. E. Rep. 672, 57 L. R. A. 513, 88 Am. St. Rep. 614.

If there is no rate of interest stated in the note the law of the place of performance governs. Simpson *v.* Hefter, 42 Misc. Rep. 482, 87 N. Y. Supp. 243.

Where nothing appears in the case to show what law the parties to a note intended should govern, the law of the place where the note was made governs. Smith *v.* Anderson, 70 Vt. 424, 41 Atl. Rep. 441.

[71] Id.

Where a place of performance is specified in a note the law of the place of performance governs on the questions of obligation and interpretation. Krantz *v.* Kazenstein, 22 Pa. Super. Ct. 275.

Where a note is payable in a foreign state the law of the place of payment must govern as to the allowance of days of grace. Pawcatuck Natl. Bk. *v.* Barber, 22 R. I. 73, 46 Atl. Rep. 1095.

Where a note made in Georgia is also payable there it will be governed in Alabama by the interest laws of Georgia, and unless the plaintiff makes proof as to the Georgia rate of interest he will not be entitled to recover any interest. Kraus *v.* Torry, 146 Ala. 548, 40 So. Rep. 956.

Where a promissory note executed in Ohio is made payable at a bank in Kentucky, it will be governed by the laws of the latter state

ing questions of the admissibility of evidence,[72] upon the law of the forum.[73]

The law merchant is presumed by the court, in the absence of evidence to the contrary, to be the same beyond as within its jurisdiction.[74] But that law cannot override the local laws and legalized commercial usages of any State which sees fit to alter it.[75] Such law of a foreign State, if different from our own, must be proved as any other fact, in the modes allowed by law.[76] The court need not notice the foreign local law judicially without such proof.[77]

II. ACTION BY PAYEE (OR ORIGINAL "BEARER," AGAINST MAKER

56. Plaintiff's Case.

In addition to general rules already stated, it is only necessary to add that a due bill,[78] or a draft drawn by one officer

which determines its validity, obligation and effect. Montana Coal, etc., Co. *v.* Cincinnati Coal, etc., Co., 69 Ohio St. 351, 69 N. E. Rep. 613.

[72] Downer *v.* Chesebrough, 36 Ct. 39.

[73] Scudder *v.* Union National Bank (above). See note 3 to paragraph 42 of this chapter.

Where a note sets forth in its terms, that if a suit is commenced on it a reasonable sum is to be allowed for attorney's fee and taxed with the costs, such condition will be enforced only if, under the law of the state in which the suit is brought, such a condition is lawful. Hallam *v.* Telleren, 55 Neb. 255, 75 N. W. Rep. 560.

Where a note made in Georgia contains the provision that in case suit is necessary for collection 10% shall be added for attorney fees, and suit is brought in North Carolina where such provisions in notes are held to be contrary to public policy, the laws of North Carolina will control. Exchange Bk. *v.* Apalachian Land, etc., Co., 128 N. C. 193, 38 S. E. Rep. 813.

[74] See Leavenworth *v.* Brockway, 2 Hill, 201; compare Dollfus *v.* Frosch, 1 Den. 367; Dubois *v.* Mason, 127 Mass. 37, 34 Am. Rep. 335.

[75] 2 Pars. on Pr. N. &c. 317.

Where a note is made in Colorado it is to be governed by the laws of that state instead of by the law merchant. Patent Title Co. *v.* Stratton, 89 Fed. Rep. 174.

[76] See pages 86–89 of this vol.

[77] Donegan *v.* Wood, 49 Ala. 242, s. c., 20 Am. Rep. 276.

[78] Kimball *v.* Huntington, 10 Wend. 675.

or agent on another officer or agent of the same principal,[79] is admissible under an allegation of a promissory note.

The payee need not prove indorsements on the back of the instrument. His possession of the instrument is *prima facie* (but not conclusive) evidence of his title,[80] even though it have his indorsement upon it.[81] But if there are suspicious circumstances, he may be put to further proof.[82] If it appear that he inserted his own name as payee, in a blank left in a note payable to order, he must adduce evidence that he was intended as payee, or authorized to insert his name.[83] If it appear that there are two persons of the payee's name, plaintiff's possession is some evidence that he is the one intended,[84] but it is best to be prepared with other evidence. Defendant's possession of the note,[85] even though it be cancelled,[86] is not conclusive evidence against plaintiff's right to recover. If it appear that plaintiff had at one time transferred the note to a third person, evidence of a re-assign-

[79] Fairchild *v.* Ogdensburgh, Clayton & Rome R. R. Co., 15 N. Y. 337.

[80] Milwaukee Trust Co. *v.* VanValkenburgh, 132 Wis. 638, 112 N. W. Rep. 1083. See Skittleharpe *v.* Skittleharpe, 130 N. C. 72, 40 S. E. Rep. 851; Haas *v.* Commerce Trust Co., 194 Ala. 672, 69 So. Rep. 894. For the rule in cases of partnership, see chapter IX, paragraph 42; and for evidence of transfers among them before suit, Whitlock *v.* McKecknie, 1 Bosw. 427.

[81] Mottram *v.* Mills, 1 Sandf. 37.

"If the payee or indorsee in the note, who has indorsed the note to some other person, brings an action upon the note, and offers the note in evidence to support a general allegation of ownership, his possession of the note will raise the presumption that there has been no delivery under his indorsement, and will be sufficient *prima facie* evidence to prove his ownership." Menzie *v.* Smith, 63 Nebr. 666, 668, 88 N. W. Rep. 855.

[82] Grant *v.* Vaughan, 3 Burr. 1627.

[83] Crutchly *v.* Mann, 5 Taunt. 529. But see paragraph 34.

The payee of a negotiable promissory note cannot become the agent of the maker for the purpose of signing the latter's name to the note. Penton *v.* Williams, 163 Ala. 603, 51 So. Rep. 35.

[84] Sweeting *v.* Fowler, 1 Stark. 106; Stebbing *v.* Spicer, 8 C. B. 827.

[85] Garlock *v.* Geortner, 7 Wend. 198.

[86] Grey *v.* Grey, 47 N. Y. 552, rev'g 2 Lans. 173.

ment,[87] or that the transfer was without consideration, and merely for a temporary purpose which had failed,—such as to enable him to bring an action, which has been discontinued,—is admissible.[88]

III. ACTION AGAINST ACCEPTOR

57. Acceptance.

Against the acceptor, his acceptance must be proved, if in issue; which is done by producing the bill, with evidence of his handwriting. This raises a presumption of acceptance within due time and according to the course of business.[89] If the words do not necessarily import acceptance, although such as to be sufficient if unexplained, parol evidence is competent to show the circumstances under which they were written, and accompanying declarations which are not necessarily inconsistent with the writing.[90] At common law, a parol acceptance may be proved either by a promise to pay or to accept an existing bill,[91] or by a promise to accept a future bill coupled with evidence that the bill was taken on the faith of the promise.[92]

Under the statute, a writing, signed, or at least signa-

[87] Smith *v.* Childress, 27 Ark. 328; s. p., Washoe *v.* Hibernia Fire Ins. Co., 7 Hun, 75.

[88] Hatters' Bank *v.* Phillips, 38 N. Y. 128.

[89] Rosc. N. P. 356, citing Roberts *v.* Bethell, 12 C. B. 778.

The burden is on plaintiff to prove the acceptances. Dillon *v.* Moratz, 97 Ill. App. 1.

[90] So held where the indorsement was: "I take notice of the above." Cook *v.* Baldwin, 120 Mass. 317, s. c., 21 Am. Rep. 517. When from the position of names in the paper it is uncertain which is drawer and which is acceptor, parol evidence may be given in an action by the payee to show the intention of the parties. Walton *v.* Williams, 44 Ala. N. S. 348; and see Druiff *v.* Lord Parker, L. R. 5 Eq. 131.

[91] Edson *v.* Fuller, 22 N. H. (3 Fost.) 189; Bank of Michigan *v.* Ely, 17 Wend. 511, per NELSON, Ch. J.; Bank of Laddonia *v.* Bright-Coy Commission Co., 139 Mo. App. 110, 120 S. W. Rep. 648.

[92] Ontario Bank *v.* Worthington, 12 Wend. 698.

Such a promise must be in writing under the statute. Neg. Instr. L., § 223.

ture,[93] must be shown,[94] in the case of any bill accepted and to be paid in this State.[95]

One suing on a conditional acceptance must show performance of the condition.[96]

58. Other Facts.

Acceptance being proved, the drawer's signature is thereby admitted and need not be proved; but the genuineness of an indorsement made by the drawer of a bill payable to his own order, though made at the time of drawing and before acceptance, is not admitted,[97] but must be proved. An acceptance[98] precludes the acceptor from proving that the drawers were legally incapable of contracting,[99] or that they were not a firm as indicated by the bill itself,[1] but not from proving alterations of the body of the instrument.[2] Due presentment for acceptance is proved by proof of acceptance.[3]

59. Promise to Accept.

An agreement or promise to accept, if equivalent in law to acceptance, may be proved under an allegation of accept-

[93] Spear *v.* Pratt, 2 Hill, 583. See Walker *v.* Bank of State of N. Y., 9 N. Y. 584.

[94] Blakiston *v.* Dudley, 5 Duer, 376. Otherwise of an order operating as an assignment. Morton *v.* Naylor, 1 Hill, 584; compare Luff *v.* Pope, 5 Id. 417; Neg. Instr. L., § 220.

[95] N. Y. &c. Bank *v.* Gibson, 5 Duer, 583.

[96] Read *v.* Wilkinson, 2 Wash. C. Ct. 514; Ford *v.* Angelrodt, 37 Mo. 50. Whether a qualification imports a condition is a question of law for the judge. Sprout *v.* Matthews, 1 T. R. 182, Rosc. N. P. 355; Barnsdall *v.* Waltemeyer, 142 Fed. Rep. 415, 73 C. C. A. 515; Gooding *v.* Underwood, 89 Mich. 187, 50 N. W. Rep. 818.

[97] 2 Pars. on Pr. N. & B. 483. And evidence of the genuineness of the latter having been given, the jury may compare the two. Id. A variance in stating the initial of first name of drawer will not sustain a general denial. Claflin *v.* Griffin, 8 Bosw. 689; Ruiz *v.* Renauld, 100 N. Y. 256, 3 N. E. Rep. 182.

[98] Even if for honor. Rosc. N. P. 380.

[99] Rosc. N. P. 358.

[1] 2 Pars. on Pr. N. & B. 484.

[2] White *v.* Continental Bank, 64 N. Y. 316.

[3] Edson *v.* Fuller, 22 N. H. (2 Fost.) 183, 186.

tance;[4] and no consideration need be shown.[5] Absolute written[6] authority to draw is equivalent to an unconditional promise to accept,[7] within the statute;[8] but authority to draw must point with certainty to the bills sued on.[9] A conditional authority or promise is not enough under the statute,[10] even if the condition be shown to have been performed.[11] In case of an acceptance on a separate paper, or a promise to accept a future bill, it is not essential to prove that the writing was shown to the person who took the bill; it is enough, if informed of it, that he took the bill on the faith of it.[12] To recover as *bona fide* holder, against an acceptor who would not be bound otherwise, it is not enough to show parting with value before the acceptance, even in reliance that the bill would be accepted as other like bills had been before.[13]

60. Several Parts, or Duplicates.

In an action against the drawer or indorser, of a bill of

[4] Ontario Bank *v.* Worthington, 12 Wend. 593. But it may be specially pleaded. Barney *v.* Worthington, 37 N. Y. 112; and should be if general. Boyce *v.* Edwards, 4 Pet. 111.

[5] Ontario Bank *v.* Worthington (above).

[6] So held of a telegram. Johnson *v.* Clark, 39 N. Y. 216.

[7] Ulster Co. Bank *v.* McFarlan, 5 Hill, 434.

[8] Neg. Instr. L., § 223.

[9] Boyce *v.* Edwards, 4 Pet. 121, and cases cited.

[10] Shaver *v.* Western Union Tel. Co., 57 N. Y. 459; Germania Nat'l Bank *v.* Laaks, 101 N. Y. 442, 5 N. E. 76. See Muller *v.* Kling, 149 App. Div. 176, 133 N. Y. S. 614.

[11] N. Y. & Virginia, &c. Bank *v.* Gibson, 5 Duer, 584; *contra, per* Dwight, C., dissenting in Shaver *v.* Western Union Tel. Co., 57 N. Y. 467; Palmer *v.* Rice, 36 Neb. 844, 55 N. W. Rep. 256.

[12] Bank of Mich. *v.* Ely, 17 Wend. 508.

With reference to an acceptance on a separate paper, this rule apparently has been changed by the Negotiable Instruments Law, § 222, which reads: "Where an acceptance is written on a paper other than the bill itself, it does not bind the acceptor except in favor of a person *to whom it is shown* and who, on the faith thereof, receives the bill for value." But in case of a promise to accept a future bill it is still the rule, that it is enough that the party took the bill upon the faith of the writing. Neg. Instr. L., § 223.

[13] Farmers', &c. Bk. *v.* Empire

exchange drawn in parts, plaintiff must produce at the trial the identical bill or number of the set that was protested, or account for its absence.[14] Extrinsic evidence is competent for the purpose of showing that the word "duplicate" written across the instrument, was affixed because it was given merely as a substitute for a lost original.[15]

IV. ACTION AGAINST DRAWER; OR NON-ACCEPTANCE

61. Refusal to Accept.

In an action against drawer or indorser, for the drawee's refusal to accept, presentment for acceptance must be alleged and proved; [16] and it is sufficient for the plaintiff to show that the drawee refused to accept in the terms of the bill.[17] On the question what was a reasonable time for presentment, the distances, the means of communication, the usages of trade, the fluctuations of exchange, and illness or inevitable accident, are relevant.[18] If presented to an agent, plaintiff must give some evidence of authority to accept or refuse,—but this may be circumstantial, as, for instance, that the person was the drawee's clerk, known to be accustomed to do this kind of business for him.[19]

Stone Dressing Co., 10 Abb. Pr. 47, s. c., 5 Bosw. 275.

[14] Wells *v.* Whitehead, 15 Wend. 527. As to effect of the words "second of exchange, first unpaid," see Bank of Pittsburgh *v.* Neal, 22 How. U. S. 96, and cases cited.

[15] Benton *v.* Martin, 40 N. Y. 345, qualifying result in 31 Id. 382.

[16] Mercer *v.* Southwell, 2 Show. 180, Rosc. N. P. 367; Zlotnick *v.* Greenfeld, et al., 90 N. Y. Supp. 1086; Knickerbocker Trust Co. *v.* Miller, 149 N. Y. App. Div. 685, 133 N. Y. Supp. 989.

[17] Boehm *v.* Garcias, 1 Camp. 425, n.; Rosc. N. P. 367.

[18] Pars. on Pr. N. & B. 342.

"Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his fault, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence." Neg. Instr. L., § 141.

[19] Pars. on Pr. N. & B. 349.

62. Excuse for Non-presentment.

Evidence that the drawer had no funds in the hands of the drawee, from the time the bill was drawn till the time it became due, dispenses with the necessity of presentment,[20] unless the drawer shows he had a reasonable expectation that it would be paid.[21] As against the drawer, his oral request to delay presentment is competent.[22]

Without proof of agency to speak for the drawer, the drawee's declarations, though made at the time of presentment, that he had no funds of the drawer in his hands, are not admissible against the drawer.[23]

Although the acceptance was expressed to be payable at a particular place, the *acceptor* is *prima facie* liable without allegation or proof of demand for payment there. It is for him to show readiness to pay if he rely on that.[24]

V. AGAINST DRAWER, &c.; ON NON-PAYMENT

63. Acceptance and Presentment.

If the acceptance specifies a place other than the acceptor's

[20] Kingsley *v.* Robinson, 21 Pick. 328. The presumption is that the drawee is in funds. Thurman *v.* Van Brunt, 19 Barb. 409; even though several places of payment are named. North Bank *v.* Abbot, 13 Pick. 465. Evidence of a refusal to pay the drawer's drafts a day or two before and after may be sufficient to rebut this presumption. Ramson *v.* Wheeler, 12 Abb. Pr. 139.

"Presentment for acceptance is excused and a bill may be treated as dishonored by non-acceptance in either of the following cases:

1. Where the drawee is dead, or has absconded, or is a fictitious person or a person not having capacity to contract by bill;

2. Where, after the exercise of reasonable diligence, presentment cannot be made;

3. Where, although presentment has been irregular, acceptance has been refused on some other ground."

Neg. Instr. L., § 245.

[21] Carle *v.* White, 9 Greenl. (Me.) 105. The allegation of no funds is disproved if it be shown that the drawer had effects on their way to the drawee, though they never reached him. Rosc. N. P. 378; Knickerbocker Life Ins. Co. *v.* Pendleton, 112 U. S. 696, 5 S. Ct. 314, 28 L. ed. 866.

[22] Sheldon *v.* Chapman, 31 N. Y. 644.

[23] Carle *v.* White, 9 Greenl.

[24] Green *v.* Goings, 7 Barb. 652; Terbell *v.* Downer, 28 Vt. (1 Will.) 511

residence as the place of payment, there must be evidence of the handwriting of the acceptor.[25] Evidence that the drawer, after the return of the bill to him for non-payment, and after inspection of the bill, promised to pay it, raises a presumption against him that the acceptance is genuine.[26] Evidence of presentment at the place specified is admissible, under a general allegation that the bill was duly presented.[27] And under an allegation that a bill drawn on one as of a specified address, and accepted generally, was presented to the drawee for payment, evidence that the holder went to the address, but found no one there, is admissible.[28]

Other rules as to dishonor are stated, below, in connection with those as to charging indorsers.

VI. ACTIONS AGAINST INDORSERS, &c.

64. Execution of the Instrument.

It is not necessary, as against an indorser, to prove the signature of the maker,[29] drawer,[30] or of prior indorsers.[31] Nor can the indorser question their capacity;[32] nor the

(Me.) 104. And the notary's statement of such declarations inserted in his protest is not evidence. Dumont *v.* Pope, 7 Blackf. 367; Dakin *v.* Graves, 43 N. H. 45.

[25] Rosc. N. P. 369.

[26] Mottram *v.* Mills, 1 Sandf. 37.

[27] Rosc. N. P. 369.

[28] Id. Where a note was payable at the maker's residence and the holder on the due date called the maker on the telephone and was told by him that he was unable to pay it, there was a sufficient presentment, demand and refusal to charge an indorser. Gilpin *v.* Savage, 60 Misc. 605, 112 N. Y. Supp. 802.

[29] Dalrymple *v.* Willenbrand, 62 N. Y. 5, affi'g 2 Hun, 488, s. c., 5 Supm. Ct. (T. & C.) 57.

[30] Rosc. N. P. 381, 399.

[31] Evidence of a misspelling of such a name is admissible to show that it was intended to make the paper payable to a fictitious person. Turnbull *v.* Bowyer, 40 N. Y. 456, affi'g 2 Robt. 406. The mere fact that a promissory note, when offered in evidence, had indorsed upon its back the name of the payee, does not establish the fact that the payee indorsed the same, in the absence of proof of actual indorsement. Vickery *v.* Burton, 6 N. D. 245, 69 N. W. Rep. 193.

[32] Id.; Erwin *v.* Downs, 15 N. Y. 575.

genuineness of the signatures.[33] Under a denial of indorsing, defendant may show that, without negligence on his part, his signature was fraudulently obtained, without any intention on his part to indorse.[34] The rules applicable to the mode of proving the defendant's indorsement,[35] and to oral evidence to vary it,[36] have been already stated.

As against an indorser, on non-payment of a bill by the drawee, evidence of a presentment for payment, at the place, if any, pointed out in the acceptance, is enough, without proving the acceptance itself.[37]

65. Pleading Facts to Charge Indorser.

An allegation of demand and notice of dishonor is essential; and its omission is not dispensed with by giving a copy of the instrument and alleging the sum due, and performance of conditions, etc., in the short form, allowed by Code of Procedure, for pleading instruments for the payment of money only.[38] Under an allegation of demand and notice,

[33] See Turner *v.* Keller, 66 N. Y. 66. An indorser guarantees the genuineness of the signature of a prior indorser and that the note is a valid and subsisting obligation. Packard *v.* Windholz, 180 N. Y. 549, 73 N. E. Rep. 1129, affirming 88 N. Y. App. Div. 365, 84 N. Y. Supp. 666.

[34] Foster *v.* Mackinnon, L. R., 4 C. P. 704, Rosc. N. P. 380.

The genuineness of an indorsement may be attacked under a general denial. Keyser *v.* Pickrell, 4 App. Cas. D. C. 198.

[35] Paragraphs 4 to 26 and 46.

[36] Paragraphs 26 and 47 and 48.

[37] Rosc. N. P. 381.

[38] Conkling *v.* Gandall, 1 Abb. Ct. App. Dec. 423. An allegation that the note was protested for non-payment is not sufficient. Sherman *v.* Ecker, 58 Misc. 456, 109 N. Y. Supp. 678. See Ewald *v.* Faulhaber Stable Co., 55 Misc. 275, 105 N. Y. Supp. 114.

"A contract of indorsement, when made, is neither a primary nor an absolute one. It is secondary and conditional. It is but an agreement for a future liability upon and after the happening of certain contingencies. These are nowhere described in the body of the instrument indorsed, but where, *ex lege*, in the contract created by the simple act of indorsement. They are (a) presentation for payment at the time and place designated by the parties or the law for that purpose; (b) refusal to pay by the party or parties primarily bound; (c) prompt notice of

the fact must be proved, and an excuse for failing to demand,[39] or to give notice,[40] is not admissible [41] without amendment; [42] but indirect evidence, such as a subsequent promise to pay, or an actual part payment, or an admission of liability, is admissible; [43] and evidence of an informal demand, with reasons justifying it, as distinguished from excuse for non-demand, is admissible.[44]

66. Cogency of the Evidence.

The evidence of demand and notice must be sufficiently

such refusal to the indorser, whose liability then, but not until then, becomes fixed. As a consequence he who seeks to recover on a contract of indorsement must aver the happening of each and every one of these essential facts or his statement will be demurrable. And, *per contra*, where a defendant denies, under oath, the existence of any one or more of the same facts, the affidavit is sufficient to put the plaintiff to his proofs before a jury." Link *v.* Bergdoll, 35 Pa. Super. 155.

[39] Garvey *v.* Fowler, 6 Duer, 587; Dolph *v.* Rice, 18 Wisc. 397; Shultz *v.* Depuy, 3 Abb. Pr. 252, Rosc. N. P. 377. The excuse is deemed one of the facts constituting the cause of action. Pier *v.* Heinnchoffen, 52 Mo. 333. *Contra* at common law, Williams *v.* Matthews, 3 Cow. 252, 2 Greenl. on Ev., § 197, approved by Daniel, vol. 2, p. 90, &c., § 1048. The variance ought to be freely amendable if it has not misled. An express written acknowledgment of demand, &c., is competent under an allegation of the demand, &c., although it be proved as matter of fact that there was none; if the acknowledgment was made with full knowledge of the facts. Camp *v.* Bates, 11 Conn. 487.

[40] Curtis *v.* State Bank, 6 Blackf. 312, Rosc. N. P. 377.

[41] Leeson *v.* Pigott, Bayley on Bills, 9th ed. 409.

[42] Rosc. N. P. 369, 377.

[43] Bank of United States *v.* Lyman, 1 Blatchf. 297, s. c., 20 Vt. 666, 679, affi'd 12 How. 225; Sherman *v.* Clark, 3 McLean, 91. Evidence that the drawees after maturity repeatedly promised to pay the bill is sufficient to sustain a finding that it was duly presented at maturity, although the drawees testify it was not so presented. Patterson *v.* Stettauer, 40 Super. Ct. (J. & S.) 54.

[44] Rosc. N. P. 369, 379; Jones *v.* Fales, 4 Mass. 245; City Bank *v.* Cutter, 3 Pick. 414. An allegation that defendant "had notice" admits proof of either actual or constructive notice. Hunt *v.* City of Dubuque, 96 Iowa, 314, 65 N. W. Rep. 319

clear. Mere probability of proof is not enough; [45] but direct and positive evidence is not essential.[46]

67. Time of Demand.

The court may take judicial notice of the law merchant which allows grace,[47] and of the occurrence of Sundays,[48] and other universally known festivals, such as Christmas.[49] Evidence of usage is not competent, in opposition to the established principles of law, as to shorten the time fixed by law.[50] Evidence that demand was made, at the proper place and on the proper day, is *prima facie* evidence that the act was done at a proper time of the day.[51] According to high authority, those who make paper payable at a bank are bound by the usage of the bank, whether they know it or not.[52] The court may take judicial notice of what are banking hours within their own local jurisdiction, but will not do so as to places beyond the State.[53]

[45] Martins *v.* Johnson, 1 Zabr. (N. J.) 239. But compare Kane *v.* Ins. Co., 20 Am. Rep. 409.

[46] Commercial Bank *v.* Strong, 28 Vt. 316.

[47] Renner *v.* Bank of Columbia, 9 Wheat. 581.

[48] Mechanics & Farmers' Bank *v.* Gibson, 7 Wend. 460; Wilson *v.* Van Leer, 127 Pa. St. 371, 14 Am. St. Rep. 854, 17 Atl. Rep. 1097.

[49] Sasscer *v.* Farmers' Bank, 4 Md. 409, 420.

[50] Randall *v.* Smith, 63 Me. 105, s. c., 18 Am. Rep. 200. Compare City Bank *v.* Cutter, 3 Pick. 414.

The fact that a note was not presented for payment within a reasonable time is a matter of defense to be pleaded and proved by defendant. German-American Bank *v.* Mills, 99 N. Y. App. Div. 312, 91 N. Y. S. 142.

[51] Wiseman *v.* Chiappella, 23 How. (U. S.) 368; De Wolf *v.* Murray, 2 Sandf. 166; Fleming *v.* Fulton, 7 Miss. (6 How.) 473; Archuleta *v.* Johnston, 53 Colo. 393, 127 Pac. Rep. 134.

Where the bank at which a note was payable was in the hands of a receiver, presentment at such bank "at a reasonable hour on a business day" is sufficient to charge an indorser, although the bank was closed at the time. Schlesinger *v.* Schultz, 110 N. Y. App. Div. 356, 96 N. Y. Supp. 383.

[52] Dan. Neg. Inst., § 662.

[53] See 1 Dan. Neg. Inst., § 601.

In the case of an instrument presented for payment in a foreign jurisdiction, the question as to what constitutes reasonable hours on a business day is a matter of proof. A notarial certificate, how-

68. Place of Demand.

If the paper specifies the place of payment, the evidence must show demand there; [54] if not, the place of date,[55] or, if undated, the place of making,[56] is presumptively the place for payment; but oral evidence not contradicting what is thus expressed, is competent.[57] If a specific address is not stated or shown by extrinsic evidence, the plaintiff, in order to rely on the fact that holder had the note at the place generally mentioned, on the day, ready to receive payment, must show that the maker had no ascertainable place of business or residence there.[58]

ever, may raise a presumption that the presentment was made at a proper time. Columbian Banking Co. *v.* Bowen, 134 Wis. 218, 114 N. W. Rep. 451.

[54] Meyer *v.* Hibsher, 47 N. Y. 270. But evidence of special agreement, or of usage equivalent thereto, is competent to show that notice to the maker what bank held the note was contemplated and was given, in lieu of literal demand. North Bank *v.* Abbott, 13 Pick. 464. A demand of the maker by telephone at his residence where the note was payable there, has been held sufficient to charge an indorser. Gilpin *v.* Savage, 60 Misc. 605, 112 N. Y. Supp. 802. Where the bank at which a note was payable had gone into the hands of a receiver and had suspended business, due presentment may nevertheless be made at the bank although closed, and it is not necessary that the note be presented to the receiver personally. Schlesinger *v.* Schultz, 110 N. Y. App. Div. 356, 96 N. Y. Supp. 383.

[55] Nailor *v.* Bowie, 3 Md. 251. "If a maker stipulates to pay at maturity at a specified plan, and the note is there presented for payment at its maturity, and payment refused or not made, the liability of the indorser is fixed after notice to him, although there was no personal demand made on the maker." Nelson *v.* Grondahl, 13 N. D. 363, 100 N. W. Rep. 1093.

[56] Id., Herrich *v.* Baldwin, 17 Minn. 209, s. c., 10 Am. Rep. 161. "The rule, briefly stated, is that where a bill of exchange is addressed to a drawee at a particular place, and the same is accepted generally by him, the address indicates the place where it is to be presented for payment, and a presentment there is sufficient." Weller *v.* Goslin, 32 Misc. 36, 65 N. Y. Supp. 232.

[57] Meyer *v.* Hibsher, 47 N. Y. 271. And see King *v.* Crowell, 61 Me. 244, s. c., 14 Am. Rep. 560.

[58] Meyer *v.* Hibsher (above). "As a general rule the demand must be made upon the maker of the note or the drawer of the bill

69. Authority to Demand.

The fact that the instrument was in the possession of the notary or other person making the demand, is *prima facie* evidence of his authority to demand payment.[59]

70. Identity of Maker or Drawee, or Authority of Agent or Servant.

To show that the demand was made on the proper person, indirect evidence is sufficient, and very slight evidence has often been accepted, in the absence of all evidence to the contrary. Answers made by a person applied to as the maker or drawee, on a demand of payment, admitting himself to be the person supposed, are admissible as part of the *res gestæ*, and are presumptive evidence that the person of whom the demand was made was the maker or drawee.[60] For this purpose, parol evidence is competent,[61] and very

of exchange, but there are exceptions to that rule, one of which is, that, where the instrument is made payable at a city, without naming any particular place in said city, and the maker or drawer does not reside nor have a place of business there at the time the note matures, the possession of the instrument on the day in that city by a notary public who is authorized by the holder to demand and receive payment of the maker or drawer thereof is a sufficient demand upon the maker, and if he fails to appear it may be protested as if demand had been made upon him personally." Williams *v.* Planters', etc., Nat. Bank, 91 Tex. 651, 45 S. W. Rep. 690.

[59] Bank of Utica *v.* Smith, 18 Johns. 239; Burbank *v.* Beach, 15 Barb. 331. "It is true . . . that a notary, entrusted by the owner of negotiable paper with its custody, is presumably authorized by his principal to demand payment, and to give notice and make protest, but that is a matter of presumption only, which like other such presumptions, may be rebutted by proof of the fact." Hofrichter *v.* Enyeart, 71 Neb. 771, 99 N. W. Rep. 658. The makers of a promissory note cannot, on their own behalf, give a valid notice of protest to the accommodation indorser; but they can do so, if acting as the agents of the holder. Traders' Nat. Bank *v.* Jones, 104 N. Y. App. Div. 433, 93 N. Y. Supp. 768.

[60] Hunt *v.* Maybee, 7 N. Y. 266; s. p., Howard *v.* Holbrook, 9 Bosw. 237, s. c., 23 How. Pr. 64.

[61] Staenbach *v.* Bank of Virginia, 11 Gratt. 260.

slight evidence may be enough. It is not sufficient to show that the bill was presented to some person on the premises of the maker or drawee without connecting them.[62]

A notarial certificate, competent to prove demand, is *prima facie* evidence of the identity of the person on whom the demand was made, or, equally, of the fact stated that he was a member of the firm[63] or agent for the maker or drawee.[64]

71. Production of the Instrument.

Visible production of the instrument need not be proved if the person making demand had it there in his possession, and there was an absolute refusal to pay.[65] The fact that the notary had the instrument with him, though not stated, may be presumed in aid of his certificate.[66] When the instrument is made payable at a bank, if the bill is the property of the bank, the presence of the instrument there need not be proved, as the presumption of law is, that the paper was in the bank, and the burden rests upon the defendant to show that the party liable called to pay it.[67] Even if not the property of the bank, plaintiff need not show that the in-

[62] Cheek *v.* Roper, 5 Esp. 175, Rosc. N. P. 367. To charge a person with notice given to another as his agent, it must be shown that it was within the alleged agent's authority to receive such notice. Robinson *v.* Aird, 43 Fla. 30, 29 So. Rep. 633.

[63] Elliott *v.* White, 6 Jones (N. C.) 98. But compare Otsego Co. Bank *v.* Warren, 18 Barb. 290.

Where the indorsement is in the name of the partnership notice of the dishonor of the note to one of the partners, under statute in Massachusetts, "is notice to the firm, even though there has been a dissolution." Feigenspan *v.* McDonnell, 201 Mass. 341, 87 N. E. Rep. 624.

[64] Dickerson *v.* Turner, 12 Ind. 223; Phillips *v.* Poindexter, 18 Ala. 579. *Contra*, Drumm *v.* Bradfute, 18 La. Ann. 680. The evidence is aided by the presumption of official regularity. See Gardner *v.* Bank of Tennessee, 2 Swan, 420.

[65] King *v.* Crowell, 61 Me. 244, s. c., 14 Am. Rep. 560; Etheridge *v.* Ladd, 44 Barb. 69.

[66] Ross *v.* Bedell, 5 Duer, 462; Union Bank *v.* Foulkes, 2 Sneed, 555.

[67] Chicopee Bank *v.* Philadelphia Bank, 8 Wall. 641, and cases cited.

strument was in the hands of the officer of the bank whose duty it was to receive payment; and the contrary would not be material, if the note was in the bank ready for payment,[68] and remained unpaid. If shown to have been in the bank, the presumption is that the proper officer could have obtained it. Evidence that it belonged to the bank, raises a *prima facie* presumption that it was there.[69]

72. Due Diligence in Demand.

On the question whether due diligence was used in making inquiry, the answers made by persons of whom inquiry was properly made, are competent as parts of the *res gestæ*, not as evidence of the facts stated, but as bearing on the question of diligence.[70] If the person making demand or inquiry is dead, his memoranda, made in the course of duty, of his acts in pursuance of inquiry are competent.[71] So where the law requires diligence to collect of maker and prior indorsers, the record of an action against them is competent.[72]

73. Official Protest as Evidence.

By the law merchant, demand, presentment and dishonor of a *foreign* negotiable bill of exchange (that is, of one payable without the State) [73] can be proved for the purpose of

[68] Otherwise if mislaid. Chicopee Bank *v.* Philadelphia Bank (above).

[69] 1 Pars. on Pr. N. & B. 437.

[70] Adams *v.* Leland, 30 N. Y. 309, affi'g 5 Bosw. 411.

[71] Halliday *v.* Martinet, 20 Johns. 168.

[72] Camden *v.* Doremus, 3 How. (U. S.) 515, 2 Whart., § 823.

[73] Whether protest is competent in case of a bill drawn without, and payable and protested within the State, see 2 Dan. Neg. Inst., § 969, and cases cited; Brain *v.* Preece, 11 Mees. & W. 775.

The provisions of the Neg. Instr. L., § 260, as to the necessity of protest, reads as follows: "Where a foreign bill appearing on its face to be such is dishonored by non-acceptance, it must be duly protested for non-acceptance and when such a bill which has not previously been dishonored by non-acceptance is dishonored by non-payment, it must be duly protested for non-payment. If it is not so protested, the drawer and indorsers are discharged. Where a bill does not appear on its face to be a foreign bill, protest thereof in case of dishonor is unnecessary." By § 189,

charging a drawer or indorser, only by protest;[74] and no part of these facts can be proved by extrinsic evidence. If the demand and notice were made by the clerk or partner of the notary whose certificate of the act is relied on, evidence of a local usage for the notary's clerk to make the demand, is competent and necessary;[75] and the usage must be shown to relate to the class of paper in question, foreign or domestic.[76]

In the case of *promissory notes*[77] and *inland bills*,[78] the

protest of promissory notes and inland bills is made optional.

Unless a foreign bill is protested, the drawer is discharged. Amsinck *v.* Rogers, 189 N. Y. 252, 82 N. E. 134, 121 Am. St. Rep. 858, 12 L. R. A. N. S. 875, 12 Ann. Cas. 450, affi'g 103 N. Y. App. Div. 428, 93 N. Y. Supp. 87.

[74] By notary's certificate or by proof that it was made at a place where there was no resident notary, and by a substantial person of the place. Chanoine *v.* Fowler, 3 Wend. 173; and see Burke *v.* McKay, 2 How. (U. S.) 66; Ocean Natl. Bank *v.* Williams, 102 Mass. 141.

"The protest must be annexed to the bill, or must contain a copy thereof and must be under the hand and seal of the notary making it, and must specify:

1. The time and place of presentment.

2. The fact that presentment was made and the manner thereof.

3. The cause or reason for protesting the bill.

4. The demand made and the answer given, if any, or the fact that the drawee or acceptor could not be found." Neg. Instr. L. § 261.

[75] Commercial Bank of Kentucky *v.* Varnum, 49 N. Y. 269, s. c., 11 Am. Law Reg. N. S. 307, rev'g 3 Lans. 86; Cribbs *v.* Adams, 13 Gray, 600.

By the common law the duties of a notary must be performed by him personally. In the absence of evidence as to the law of the state where a foreign bill is payable, the common law will be presumed to prevail in that state. Therefore if no evidence is adduced of any local usage of the foreign state permitting the particular class of paper in question to be protested by a notary's clerk or deputy, a protest so executed will be insufficient. Ocean Natl. Bank *v.* Williams, 102 Mass. 141.

[76] 1 Dan. Neg. Inst., § 587, 2 Dan. Neg. Inst. § 926; Ocean Natl. Bank *v.* Williams, 102 Mass. 141.

[77] Bond *v.* Bragg, 17 Ill. 69. *Con-*

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[78] Union Bank *v.* Hyde, 6 Wheat. 572; Nichols *v.* Webb, 18 Id. 326. By statute in Illinois inland bills are now the subject of protest. Ewen *v.* Wilbor, 208 Ill. 492, 70 N. E. Rep. 575.

competency of the notarial certificate depends entirely upon statute.[79] Where proof by certificate is, by statute, sub-

tra, in some States, as to notes payable in one State and indorsed by a resident of another State. Williams *v.* Putnam, 14 N. H. 540. So, too, evidence of usage may avail in some jurisdictions. See Townley *v.* Sumrall, 2 Pet. 170; Feigenspan *v.* McDonnell, 201 Mass. 341, 87 N. E. Rep. 624.

[79] See, for instance, Walker *v.* Turner, 2 Gratt. 534. The New York Statutes, as to notarial certificates, are as follows: "The certificate of a notary public of the State, under his hand and seal of office, of the presentment by him, for acceptance or payment, or of the protest, for non-acceptance or non-payment of a promissory note or bill of exchange, or of the service of notice thereof on a party to the note or bill; specifying the mode of giving the notice, the reputed place of residence of the party to whom it was given, and the post-office nearest thereto, is presumptive evidence of the facts certified, unless the party against whom it is offered has served upon the adverse party, with his pleading, within ten days after joinder of an issue of fact, an original affidavit, to the effect that he has not received notice of non-acceptance, or of non-payment of the note or bill. A verified answer is not sufficient as an affidavit, within the meaning of this section." Code Civ. Pro., § 923, from L. 1833, c. 271, § 8 (3 R. S. 6th ed. 445, § 36); and see 3 R. S. 6th ed. 1163. "In case of the death or insanity of a notary public of the State, or of his absence or removal, so that his personal attendance, or his testimony, cannot be procured, in any mode prescribed by law, his original protest, under his hand and official seal, the genuineness thereof being first duly proved, is presumptive evidence of a demand of acceptance, or of payment, therein stated; and a note or memorandum, personally made or signed by him, at the foot of a protest, or in a regular register of official acts, kept by him, is presumptive evidence that a notice of non-acceptance or non-payment was sent or delivered, at the time, and in the manner, stated in the note or memorandum." Code Civ. Pro., § 924, from 2 R. 283, 284, §§ 46, 47 (3 R. S. 6th ed. 444, 446). But in the absence of a statute similar to § 924 of the New York Code, it has been held that the affidavit of defendant that he has not received the notice excludes the admission of the notary's certificate as secondary evidence even after the notary is dead. Sexton *v.* Perrigo, 126 Mich. 542, 85 N. W. Rep. 1096. "Proof of the presentment, for acceptance or payment, of a promissory note or bill of exchange, payable in another State, or in a Territory, or foreign country, or of a protest of the note or bill, for non-acceptance, or non-payment, or of the service of notice thereof,

stituted for common-law evidence, all the forms directed by the statute, whether preliminary or substantial, must be strictly complied with.[80] A statute making the notarial

on a party to the note or bill, may be made, in any manner authorized by the laws of the State, Territory, or country, where it was payable." Code Civ. Pro., § 925, from L. 1865, c. 309 (2 R. S. 6th ed. 1164, § 32). See Persons *v.* Kruger, 45 N. Y. App. Div. 187, 60 N. Y. Supp. 1071. The act of 1833, above stated, has no application to the case of a certificate of a notary of this State to the presentment of a note drawn payable at a place in another State. Dutchess Co. Bank *v.* Ibbotson, 5 Den. 110; Kirtland *v.* Wanzer, 2 Duer, 278. Nor does it make a notary's certificate evidence of an excuse for not presenting—*e. g.*, that on due inquiry he had been unable to find the maker. Furniss *v.* Holland, 1 Edm. 470. Where the notarial certificate makes no mention of the service of notice of protest, a memorandum at the foot of the draft annexed to the certificate, is no evidence of such service. Bank of Vergennes *v.* Cameron, 7 Barb. 143. A certificate of protest of a note by a notary public of another State, attested by his seal, is *prima facie* evidence that the acts indicated were done by him. Fletcher *v.* Arkansas Nat. Bank, 62 Ark. 265, 35 S. W. Rep. 228. By statute in Missouri a notarial certificate of protest is evidence of only two things—demand and refusal to pay at the time and in the manner stated. Nelson *v.* Kastle, 105 Mo. App. 187, 79 S. W. Rep. 730. By statute in South Dakota, a notary's certificate of protest is *prima facie* evidence of the facts of presentment, demand, and dishonor, if such facts are set forth in the certificate. Ashe *v.* Beasley, 6 N. D. 191, 69 N. W. Rep. 188.

[80] Rogers *v.* Jackson, 19 Wend. 383. "The burden of proof is upon the plaintiff to show that all the steps which were necessary to charge the indorser were taken, and no steps are presumed to have been taken without evidence; and when the notarial certificate is the only evidence relied on to establish due presentment, demand and notice, it should contain averments sufficient to show that everything required has been done on the part of the holder to authorize demand upon the indorser. Hobbs *v.* Chemical Nat. Bank, 97 Ga. 524, 526–527, 25 S. E. Rep. 348. Where a note was payable in a certain city but at no particular place therein and neither the maker nor the indorser was in the city, a certificate of protest which alleges presentment and demand only on the indorser is insufficient to fix the indorser's liability, since it does not appear in the certificate itself that the official making the protest had in view a demand on the maker. Williams *v.* Planter's, etc., Nat. Bank, 91 Tex. 651, 45 S. W. Rep. 690.

certificate or record evidence on notes or inland bills; does not make it evidence in the courts of another State;[81] nor does a statute making it evidence of demand and disbonor, imply that it is to be received as evidence of notice in the courts of the same State.[82] If the statute declares the notarial certificate to be in evidence, the certificate must not purport to be a mere copy of a record from the notary's books. But it need not be made out and signed at the time of making the protest.[83] The official certificate is not rendered incompetent by the fact that it was drawn up,[84] or a mistake in it was corrected by the notary[85] after suit brought. If there is not annexed[86] to an answer denying notice of protest, an affidavit of denial of receipt of notice, as required by the act of 1833, the notary's certificate is presumptive evidence; and this presumption is not destroyed by defendant's testimony on the trial, that he did not receive the notice sent through the post-office.[87]

[81] Kirtland *v.* Wanzer, 2 Duer, 278; Brandon Bank *v.* Briggs, 70 Vt. 599, 41 Atl. Rep. 586.

[82] Curtis *v.* Buckley, 14 Kans. 449. Compare 2 Dan. Neg. Inst. 18. *Contra*, 2 Pars. on Pr. N. & B. 498.

A certificate of protest, where made so by statute, is evidence only of presentation, refusal and notice but not of any collateral or independent facts which may be stated therein. Nelson *v.* Kastle, 105 Mo. A. 187, 79 S. W. Rep. 730.

Thus a recital in the certificate that demand was made on "one of the administrators" of the acceptor does not establish the fact of the latter's death nor of the granting of letters of administration. Applegarth *v.* Abbott, 64 Cal. 459, 2 Pac. Rep. 43.

[83] Brandon *v.* Loftus, 4 How. 127; Kellam *v.* McKoon, 31 Hun, 519.

[84] Cayuga Co. Bank *v.* Hunt, 2 Hill, 635; Union Nat. Bank *v.* Williams Milling Co., 117 Mich. 535, 76 N. W. Rep. 1.

[85] Estep *v.* Cecil, 6 Ohio St. 536, and cases cited.

[86] Gawtry *v.* Doane, 51 N. Y. 89.

A verified answer is not sufficient as an affidavit for this purpose. Code Civ. Pro., § 923.

[87] Dunn *v.* Devlin, 2 Daly, 122; Kupferberg *v.* Horowitz, 52 Misc. 488, 102 N. Y. Supp. 502. Where the indorser of a promissory note, who has been sued thereon, fails to make an affidavit denying the receipt of notice of protest which would compel the production of common-law evidence to prove the service of such notice upon him, the courts are inclined to construe

In New York, a plaintiff relying on the act allowing protest in another State to be proved according to the law of that State, should produce the foreign certificate duly authenticated according to the law of the place where made, with evidence of the law of that place, sufficient to show that the facts stated in the certificate do, by that law, charge the party.[88] If the certificate does not state the facts, there should be other proof, or at least evidence that by the same law such a general certificate is sufficient.[89]

Where protest is competent, but not the only competent evidence, extrinsic evidence of necessary facts not sufficiently stated in it,[90] and not inconsistent with it, is competent. A protest, when exclusively relied on to prove the necessary facts, must contain sufficient averments that everything requisite has been done to authorize the demand upon the indorser;[91] but the court will make all reasonable presumptions of detail in aid of the certificate which are justified by

the notary's certificate of protest with great liberality, and in the absence of such an affidavit, the following memorandum at the foot of the notary's certificate, to wit, "Notice mailed to Dennis Ryan (an indorser) St. Paul, Minn.," is sufficient evidence that proper notice of protest was given to such indorser. McLean *v.* Ryan, 36 App. Div. (N. Y.) 281; Persons *v.* Kruger, 45 App. Div. 187, 60 N. Y. Supp. 1071.

As to the admissibility of such testimony on the part of the defendant, see Union Bank *v.* Deshel, 139 App. Div. 217, 123 N. Y. Supp. 585.

[88] Lawson *v.* Pinckney, 40 Super. Ct. (J. & S.) 187. See Brandon Bank *v.* Briggs (above).

[89] Id.

[90] Nailor *v.* Bowie, 3 Md. 251; Nelson *v.* Grondahl, 13 N. D. 363, 100 N. W. Rep. 1093.

Testimony of the notary is admissible to supply omissions in the protest as to demand and notice. Moody *v.* Looscan, 44 S. W. Rep. (Tex. Civ. App.) 621.

[91] People's Bank of Baltimore *v.* Brook, 31 Md. 7, s. c., 1 Am. Rep. 11.

A notarial certificate reciting the fact of protest for non-payment, but silent as to the service of notice on the indorser, is not *prima facie* evidence of such notice, within § 3829 of the Code, providing that all notarial acts regarding bills and notes which are required by the laws of Georgia, may be proved by the certificate of the notary. Hobbs *v.* Chemical Natl. Bank, 97 Ga. 524, 25 S. E. Rep. 348.

the language of its statements;[92] yet, should not, in general, presume a precedent act like demand, from a statement of a subsequent act like notice; nor matters of fact, like inquiries, from a mere legal conclusion, such as an allegation of due diligence. The protest, when admitted, is *prima facie* but not conclusive[93] evidence of the facts stated, and within the official power and duty of the notary. Any statement in it may be rebutted by any competent testimony.[94] If the certificate states what is necessary, the fact that the notary or clerk called as a witness has no recollection, does not impair its effect.

74. Sealed Certificate.

The notary's official seal is sufficient *prima facie* evidence of the authenticity of the certificate. The courts take judicial notice of the seal, and it proves itself by its appearance[95]

[92] See 2 Dan. Neg. Inst., § 962, 964.

[93] Nelson *v.* Fotterall, 8 Leigh, 118.

The certificate of a notary of notice of protest is *prima facie* evidence of the facts stated therein and that in the absence of contradictory proof it is conclusive. Scott *v.* Brown, 240 Pa. 328, 331, 87 Atl. Rep. 431.

By statute in the following states a notary's certificate of protest is *prima facie* evidence of the facts of presentment, demand and dishonor if such facts are set forth in the certificate. Ashe *v.* Beasley, 6 N. D. 191, 69 N. W. Rep. 188; Scott *v.* Brown (above); Brandon Bank *v.* Briggs, 70 Vt. 594, 41 Atl. Rep. 580.

In Missouri there are two apparently conflicting cases upon this point. In the earlier case of Rolla State Bank *v.* Pezoldt, 95 Mo. App. 404, 69 S. W. Rep. 51, it was held under R. S. 1899, § 3134, that the sworn certificate of protest was "prima facie evidence of the facts it recited touching notice of dishonor to the parties to the note, as well as of demand, refusal of payment and protest thereof." In Nelson *v.* Kastle, 105 Mo. App. 187, 79 S. W. Rep. 730, the court held, under R. S. 1899, § 463, that "the statute only makes such protest evidence of two things, viz: demand and refusal to pay at the time and in the manner stated."

[94] 2 Dan. Neg. Inst., § 959.

[95] United States *v.* Libby, 1 Woodb. & M. 221, and cases cited; 2 Dan. Neg. Inst., § 945. *Contra*, as to foreign notaries, 1 Whart. Ev. 286, § 320, not sound here.

in any part of the certificate.[96] But it may be controverted as fictitious or improperly affixed.[97] A seal printed,[98] or scrawled,[99] is not enough at common law; but an impression in the paper is *prima facie* sufficient; and it will be presumed to have been affixed according to the law of the country where the dishonor occurred, until there is something to impeach it.[1]

75. Unsealed Certificate.

If the certificate is not under the notary's seal, or not made by the notary in person, it does not prove itself, and there must be extraneous evidence to show that it was duly made by the person officiating, and that by the law of the country where it was made, it is sufficient without a seal.[2]

76. Copy.

A duly authenticated duplicate protest,[3] or a verified

[96] Olcott *v.* Tioga R. R. Co., 27 N. Y. 546, affi'g 40 Barb. 179.

In the absence of a seal the certificate of protest of a foreign bill of exchange is not proof of the drawer's refusal to accept or pay the bill. London, etc., Plate Bank *v.* Carr, 54 Misc. 94, 105 N. Y. Supp. 679.

[97] 2 Dan. Neg. Inst., § 945.

[98] Richard *v.* Boller, 6 Daly, 460. But N. Y. General Construction Law, §§ 43–45.

[99] Ross *v.* Bedell, 5 Duer, 462, and cases cited.

[1] 2 Dan. Neg. Inst., § 947. As to defective seal, see Re Phillips, 14 Nat. Bkcy. Reg. 219, and cases cited; Donegan *v.* Wood, 49 Ala. 242, s. c., 20 Am. Rep. 280.

"Looking at the original protest, brought here to be inspected in this cause, seventeen years after it was made, we find upon it a distinct circular outline impression of a seal, with an idented inner edge, or rim, and within this a number of stars in a circular row, and between them and the edge the legend 'Notary Public, New Orleans, La.' This, with the signatures, we think sufficient to establish the authenticity of the protest, in the absence of all evidence to create any suspicion of its genuineness. The certificate on the other page of the protest, on the same leaf, is authenticated in the same manner and the circuit judge did not err in permitting them to come in as evidence." Bradley *v.* Northern Bank of Alabama, 60 Ala. 252.

[2] 2 Dan. Neg. Inst., §§ 946, 948.

[3] Geralspulo *v.* Wieler, 10 C. B. 690, 715, s. c., 20 L. J. C. P. 105;

copy,[4] drawn up from the notary's book, is admissible secondary evidence in lieu of the original sent abroad. If the statute makes a certified copy of the record admissible evidence, it is not necessary to account for the nonproduction of the original.[5] Testimony as to the form of notice the notary was accustomed to use, and a copy of his blank, are competent secondary evidence in connection with evidence that he sent the usual notice.

77. Secondary Evidence of Statutory Certificate.

But where the competency of the certificate depends on the statute, the necessary facts cannot be proved by showing that a notary's certificate of those facts, once existed, and has been lost, and then proving its contents. The statute makes the certificate evidence; which is an innovation on the common law. If the certificate itself is not produced, the statute is not complied with, and common-law evidence of the presentment, etc., must be given.[6]

78. Memoranda to Refresh Memory.

Under the rule already stated,[7] the person who did any act to charge the indorser, may refresh his memory by reading his contemporaneous entry; but to render his testimony sufficient, either the fact must appear stated in the entry, or he must be able to remember it. His argumentative belief that a fact not stated must have existed, because he would not have entered other facts if it had not, is not enough.[8]

Phillips *v.* Poindexter, 18 Ala. 579.

[4] Halliday *v.* McDougall, 20 Wend. 81; Mauri *v.* Heffernan, 13 Johns. 58.

[5] McAfee *v.* Doremus, 5 How. 53. Irrespective of statute it seems that where a certificate of protest has been lost a second certificate may be made by the notary at any time before trial and the same may be introduced in evidence with the same force and effect as the original. Kellam *v.* McKoon, 31 Hun, 519.

[6] Dutchess County Bank *v.* Ibbotson, 5 Den. 110.

[7] Chapter XVI, paragraph 37 of this vol. Sasscer *v.* Farmers' Bank, 4 Md. 409.

[8] Gaylor *v.* Stringer, 1 Hilt. 337. Compare Bank of Columbia *v.*

79. Memoranda of Deceased Person.

In cases where production of protest is not essential, the entries and memoranda, whether in his book or on the instrument,[9] made by the notary or his clerk, or a bank officer,[10] or messenger,[11] since deceased, whose obligation it was to do the act, and who made the memorandum contemporaneously in the course of his duty, are competent as memoranda in the usual course of business,[12] or to refresh memory,[13] to prove facts so done. It is no objection that the person was a notary,[14] and *notarial* protest was unnecessary or not effectually accomplished.[15] Hence a protest of an inland bill or note, even if not admissible by statute as primary evidence, is, after the notary's death, competent secondary evidence, as a memorandum made in the usual course of business.[16] If the person who made the entry is living his testimony must be adduced.[17] The entry can prove no more than what it states; and if it omits to state the residence of

McKenney, 3 Cranch C. C. 361. Evidence of a notary who had made a certificate of protest of a promissory note that, while he did not recollect mailing notice of dishonor to the indorser, he has no doubt, from the fact that it was his habit to mail such notice upon protesting a note, that he did so upon the occasion in question, as recited in his certificate, is competent as tending to show notice of dishonor. Martin *v.* Smith, 108 Mich. 278, 66 N. W. Rep. 61.

Where the notary's certificate fails to show the place of presentment and the notary has no recollection of the facts, his testimony that he invariably presented notes at the places where they were payable is competent to establish the place of presentment. Nelson *v.* Grondahl, 13 N. D. 363, 100 N. W. Rep. 1093.

[9] Hart *v.* Wilson, 2 Wend. 513. See N. Y. Code Civ. Pro., § 924.

[10] Nichols *v.* Goldsmith, 7 Wend. 160, and cases cited.

[11] Welsh *v.* Barrett, 15 Mass. 380.

[12] Nicholls *v.* Webb, 8 Wheat. 326; Halliday *v.* McDougall, 20 Wend. 85.

[13] Cole *v.* Jessup, 10 N. Y. 100. See the rules as to such mem., chapter XVI, paragraphs 37 and 38 of this vol. and Lewis *v.* Kramer, 3 Md. 265.

[14] Gawtry *v.* Doane, 51 N. Y. 84, affi'g 48 Barb. 148.

[15] Cole *v.* Jessup (above).

[16] Porter *v.* Judson, 1 Gray, 175, Shaw, Ch. J.

[17] Wilbur *v.* Selden, 6 Cow. 162.

the indorser, the post-office to which notice was addressed, or any other material fact, it cannot be inferred.[18]

Experts may be called to decipher abbreviated and elliptical entries in the book of a notary who is deceased,[19] as distinguished from testifying what the construction is.[20]

80. Legal Notice to Charge Indorser.

Notice may be shown, either directly, by evidence of actual notice seasonably received by defendant;[21] or by evidence of due diligence by the holder in sending notice;[22] or indirectly, by evidence that defendant has expressly or impliedly admitted that he had due notice.[23]

81. Identity of Person Served.

The same rules as to the evidence of the identity of the person served apply as in case of the person on whom demand is made,[24] and, if anything, more freely, because the defendant charged can the better rebut the evidence.

82. Executors and Administrators.

To charge the estate of a deceased person on his indorse-

[18] 2 Dan. Neg. Inst., § 1057, and cases cited. Paragraphs 73 and 78 (above).

[19] Sheldon *v.* Benham, 4 Hill, 129.

[20] Compare Duncan *v.* Watson, 10 Miss. 121.

[21] Paragraph 84. By statute in South Dakota an agent or subagent of the owner may give notice of dishonor. Ashe *v.* Beasley, 6 N. D. 191, 69 N. W. Rep. 188. A verbal notice of dishonor given to the agent of the indorser is sufficient to fix the indorser's liability. Scarbrough *v.* City Natl. Bank, 157 Ala. 577, 48 So. Rep. 62, 131 Am. S. R. 71.

[22] Paragraphs 85–90. Under the Pennsylvania Statute notice of dishonor may be given either verbally or in writing. Under § 105 of the Negotiable Instruments Law, due notice of dishonor is deemed to have been given when it is shown that the notice is properly addressed and deposited in the post office, whether it has been received or not. Zollner *v.* Moffitt, 222 Pa. St. 644, 72 Atl. Rep. 285. The indorsee of a promissory note is not excused from giving notice of dishonor to the indorser because of the insolvency of the maker. Grimes *v.* Tait, 21 Okl. 361, 99 Pac. Rep. 810.

[23] Hyde *v.* Stone, 20 How. U. S. 170; 2 Dan. Neg. Inst., § 1050.

[24] See paragraph 70. Hunt *v.* Maybee, 7 N. Y. 266.

ment, matured after his death, the holder must show service of the notice at the last residence, or last place of business of the deceased, or on the executor named in the will, if any; or on one who actually at the time is administrator, or special administrator. Service on one who was named executor in the will, and who had been removed or renounced, is not sufficient, if it appear that, with reasonable diligence, the holder might have ascertained the existence of a special administrator, who was the proper person to receive the notice.[25]

83. Time of Service.

If plaintiff relies on direct evidence of notice, whether actual or constructive, he must distinctly show that it was given on the proper day.[26] It will not suffice to show that

[25] Goodnow *v.* Warren, 122 Mass. 79, s. c., 23 Am. Rep. 289, and cases cited. Compare Maspero *v.* Pedesclaux, 22 La. Ann. 227, s. c., 2 Am. Rep. 727.

The Negotiable Instruments Law, § 169, reads: "Where any party is dead and his death is known to the party giving notice, the notice must be given to a personal representation, if there be one, and if, with reasonable diligence, he can be found. If there be no personal representation, notice may be sent to the last residence or last place of business of the deceased." See Deininger *v.* Miller, 7 N. Y. App. Div. 409, 40 N. Y. Supp. 195.

A notice mailed to an indorser who is known to be dead, directed to a post office at which he did not, as was known, receive his mail while living is insufficient to charge the estate. Merchants' Bank of Canada *v.* Brown, 86 N. Y. App. Div. 599, 83 N. Y. Supp. 1037.

[26] Friend *v.* Wilkinson, 9 Gratt. 31.

"The time within which notice must be given, where the indorser resides in the town where the default occurs, it, at latest, the day following that of the protest." Rolla State Bank *v.* Pezoldt, 95 Mo. App. 404, 410, 69 S. W. 51.

The provisions of the Negotiable Instruments Law regarding the time of service are as follows:

"§ 173. Notice may be given as soon as the instrument is dishonored; and unless delay is excused as hereinafter provided, must be given within the times fixed by the Chapter."

"§ 174. Where the person giving and the person to receive notice reside in the same place, notice must be given within the following time:

" 1. If given at the place of busi-

it was given on one of two days, if the latter would be too late.[27]

84. Actual Notice.

To show actual notice an oral communication may be proved;[28] but evidence of mere knowledge,[29] or of notice from a stranger,[30] is not enough.

If a number of parties were entitled to notice, it is sufficient to charge any one, to show that notice actually reached

ness of the person to receive notice, it must be given before the close of business hours on the day following;

"2. If given at his residence it must be given before the usual hours of rest on the day following;

"3. If sent by mail, it must be deposited in the post office in time to reach him in usual course on the day following."

"§ 175. Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

"1. If sent by mail, it must be deposited in the post office in time to go by mail the day following the day of dishonor, or if there be no mail at a convenient hour on that day, by the next mail thereafter.

"2. If given otherwise than through the post office, then within the time that notice would have been received in due course of mail, if it had been deposited in the post-office within the time specified in the last subdivision."

[27] 2 Dan. Neg. Inst., § 1051.

"The note fell due for payment on Friday. This was the 4th of July. Payment on Saturday, the next day would have been in time. The plaintiff then had until the next day to give notice. The 'next day,' in law, is the next business day. This rule gave the notary until Monday the 7th to give notice. The testimony of plaintiff is that he received notice of non-payment *about* the 8th of July. *About* is very indefinite and unsatisfactory. The law is very exacting as to the duty of the holder of paper in giving notice of protest to drawer and indorser. We cannot say even from this phase of the evidence that notice was mailed to the indorser within the time required by law." German Security Bank *v.* McGarry, 106 Ala. 633, 17 So. Rep. 704.

[28] Woodin *v.* Foster, 16 Barb. 146; Cuyler *v.* Stevens, 4 Wend. 566.

When, as in Missouri, the notice is required to be served on the defendant personally, timely service in any other way is sufficient if it can be shown that the defendant actually received the notice. Rolla State Bank *v.* Pezoldt (above).

[29] Rosc. N. P. 371.

[30] Walmsley *v.* Acton, 44 Barb. 312, 2 Dan. Neg. Inst., § 988.

him in such a time as would be required for the intermediate parties to transmit it to him in the usual course of the mail, allowing each one his day.[31] But the courts need not take judicial cognizance of the course of the mails.[32] That should be shown by the party relying on it. It would be better for plaintiff to show also that he gave notice in due season to his immediate indorser. When he has shown that notice reached the remote party within the time which would regularly be consumed, it will be for the latter to show a defective link in the chain of notices, if any there be.[33]

A denial of receiving notice may be sustained by testimony of a clerk or cashier, leaving it to cross-examination to inquire into his means of knowledge.[34]

85. Due Diligence by the Holder.

If it be shown that due and legal diligence was used by the holder in sending notice, a conclusive legal presumption of notice attaches, or, in other words, the fact that the notice was never received becomes immaterial.[35]

86. Place of Directing Notice.

The place of date of the instrument is *prima facie* but not conclusive evidence, for the purpose of notice, that the maker

[31] 2 Dan. Neg. Inst., § 1053. Compare Sheldon *v.* Benham, 4 Hill, 429, and Van Brunt *v.* Vaughn, 7 Reporter, 397, s. c., 47 Iowa, 145.

Notice to any one of a number of partners is notice to the firm even after dissolution, Neg. Inst. L., § 170. But notice to persons *jointly* liable must be given to each one separately. § 171. Where the defendant is a bankrupt, notice may be given to him or to his trust may be given to him or to his trustee or receiver, § 172.

[32] See Early *v.* Preston, 1 Patt. & H. (Va.) 228.

[33] 2 Dan. Neg. Inst., § 1053.

[34] Union National Bank *v.* Sixth National Bank, 1 Lans. 13, 43 N. Y. 452.

[35] Dickens *v.* Beal, 10 Pet. 572, 582; Archuleta *v.* Johnston, 53 Colo. 393, 127 Pac. Rep. 134.

The Negotiable Instruments Law, § 183, reads: "Notice of dishonor is dispensed with when, after exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged."

As to what amounts to "reasonable diligence" see Port Jefferson

or drawer resides there.[36] And coupled with other circumstances, it may be evidence of the residence of the indorser. Such circumstances should, however, be strong and persuasive, for there is no *prima facie* presumption that an indorser resides at the place of date, or at the place of payment.[37] A certificate of service, specifying the reputed residence to which the notice was sent, is *prima facie* evidence of the reputed place of residence of the party notified.[38] But the place of residence or business is not sufficiently shown by the notary's certificate, merely that he mailed the notice addressed to the indorser at, etc.[39]

The better opinion is, that in all cases, no matter how long the paper had to run, notice addressed to the indorser at the place where he resided when he made the indorsement is sufficient to charge him, although he may have changed his residence, unless it be shown that the holder had received information of the change of residence.[40]

Bank *v.* Darling, 91 Hun, 236, 36 N. Y. Supp. 153; Brewster *v.* Shrader, 26 Misc. 480, 486, 57 N. Y. Supp. 606.

[36] 2 Dan. Neg. Inst., § 1030. It is a slight presumption. Lowery *v.* Scott, 24 Wend. 358.

The Negotiable Instruments Law, § 179, reads: "Where a party has added an address to his signature, notice of dishonor must be sent to that address, but if he has not given such address, then the notice must be sent as follows:

"1. Either to the post-office nearest to his place of residence or to the post-office where he is accustomed to receive his letters; or

"2. If he live in one place, and have his place of business in another, notice may be sent to either place; or

"3. If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

"But where the notice is actually received by the party within the time specified in this chapter, it will be sufficient, though not sent in accordance with the requirements of this section."

[37] Id., § 1031.

[38] Bell *v.* Lent, 24 Wend. 230, Nelson, Ch. J.

[39] Bradshaw *v.* Hedge, 10 Iowa, 402; Raine *v.* Rice, 2 Patt. & H. (Va.) 529; Turner *v.* Rogers, 8 Ind. 139; U. S. Bank *v.* Smith, 11 Wheat. 171. But a certificate that he notified the indorser by mailing a notice *to him* addressed at, &c., has been held sufficient, within the rule stated in the text. Wamsley *v.* Rivers, 34 Iowa, 463.

[40] Requa *v.* Collins, 51 N. Y.

An erroneous address may be sustained by evidence that the party held himself out as resident there,[41] or directly caused the mistake by the manner of his own writing,[42] so as to be estopped from objecting.

87. Due Diligence in Inquiry.

The parties through whose hands negotiable paper has passed, are presumed to know the residence of the parties from whom they received it, and of the prior parties; and therefore evidence that they were properly applied to for information, and assumed to know, justifies acts done upon information given by them.[43] Diligence is not shown by merely consulting the directory, when other sources of accurate information may be within the convenient reach of the person whose duty it may be to secure it, through which it can be obtained.[44]

The notary's testimony that he made diligent inquiry and

144, 148, approved in 2 Dan. Neg. Inst., § 1032.

The notice was mailed to the defendant at Florence, Alabama, which place the party sending the notice understood to be the post office address of the defendant but no evidence whatever was offered to show that "the defendant's post office address was Florence or that he resided in Florence, Alabama, or that any inquiry was made to ascertain his place of residence or post office address. Upon the issue joined the burden was on the plaintiff to prove that notice of the dishonor of the note was duly given to the indorser. There was not sufficient evidence upon the issue of notice to submit the question to the jury, and the court did not err in giving the affirmative charge for the defendant." German Security Bank *v.* McGarry, 106 Ala. 633, 17 So. Rep. 704.

[41] 2 Dan. Neg. Inst., § 1029.

[42] Manuf. etc. Bank *v.* Hazard, 30 N. Y. 226.

Illegibility of an indorsement excuses notice of protest. Sublette Exchange Bank *v.* Fitzgerald, 168 Ill. App. 240.

[43] Beale *v.* Parrish, 20 N. Y. 407, rev'g 24 Barb. 243; Lawrence *v.* Miller, 16 N. Y. 235.

[44] Greenwich Bank *v.* De Groot, 7 Hun, 213.

It appeared in this case that "the indorser lived in the town of Hopewell, and his post office address was at Chapinville in that town. He had resided in the same place for nineteen years, and at the time of the maturity of the note was supervisor of his town, which adjoined the village of Canandaigua and had held that office for two

ascertained the reputed residence, etc., is sufficient to go to the jury, if not objected to as too general.[45] Details may be called out on cross-examination.

88. Evidence of the Contents of the Notice.

The fact that notice was given in writing does not preclude oral or other evidence of the giving of due notice (either by direct testimony [46] or by putting in evidence a duplicate); [47] and producing or giving notice to produce the original is not necessary. But there should be sufficient evidence of the contents of the written notice relied on to show that it was due notice.[48] But it is not essential to prove in detail the exact contents of the notice; general testimony, especially from the notary, may be enough.[49]

89. Extrinsic Evidence as to Imperfect Notice.

Where the notice served is erroneous in some particulars, rendering it ambiguous on its face, evidence is admissible to

years. His home was four miles east of the east line of the village, and the notary who served the notice had been at his house and consequently knew of its location. . . . Inquiry of the maker of the note; at the post-office in Canandaigua; or of business men in that village; would have disclosed the residence of the indorser easily and correctly. . . . But his (the notary's) only effort to solve the doubt was to look into a directory of Canandaigua, to ascertain the truth. . . . Merely looking into a directory is not enough. The sources of error in that process are too many and too great. Such books are accurate enough in a general way, and convenient as an aid or assistance, but they are private ventures, created by irresponsible parties and depending upon information gathered as cheaply as possible and by unknown agents." Bacon *v.* Hanna, 137 N. Y. 379, 33 N. E. Rep. 303, 20 L. R. A. 495.

[45] Carroll *v.* Upton, 3 N. Y. (3 Comst.) 272.

[46] Lindenberger *v.* Beall, 6 Wheat. 104; Rosc. N. P. 376, Johnson *v.* Haight, 13 Johns. 470. This is so whether the notice is given by a notary public or a private person. Scott *v.* Betts, Hill & D. Supp. 363.

Oral evidence of facts occurring on presentment, which are not stated in the certificate, is admissible. Nelson *v.* Grandahl, 13 N. D. 363, 100 N. W. Rep. 1093.

[47] 2 Dan. Neg. Inst., § 1051.

[48] Id; Smith *v.* Hill, 6 Wis. 154.

[49] Dickens *v.* Beal, 10 Pet. 572;

show that there was only one note or bill to which it could possibly have applied.[50] Evidence of defendant's knowledge of the circumstances, is competent, for the purpose of showing that he could not have been misled.[51] Even when the notice is defective, it may be shown by extrinsic evidence that the indorser was not misled as to the identity of the dishonored note;[52] and if the notice be correct and sufficient in view of the note or bill which it describes, it cannot be rendered invalid by showing *aliunde* that notes, similar in parties, date, amount, and time and place of payment, were outstanding, and were only distinguishable from each other by their numbering.[53]

90. Mailing.

Where the holder[54] and the party to be charged by the notice, reside in different places, or the party entitled to notice resides at a place other than the particular place at which the bill or note is payable, or, after diligent inquiry was supposed, though erroneously, to so reside,[55] it is in general, sufficient to prove notice of dishonor duly addressed, and mailed within the proper time. This done, the fact that the notice was not received, is irrelevant.[56] The usage of a

and see Lindenberger *v.* Beall, 6 Wheat. 104.

[50] Cayuga County Bank *v.* Warden, 6 N. Y. 19, reaffi'g 1 Id. 413. Compare Pars. on Pr. N. 474.

[51] Cook *v.* Litchfield, 9 N. Y. 279.

"A written notice need not be signed and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby." Neg. Instr. L., § 166.

[52] Hodges *v.* Shuler, 22 N. Y. 114, affi'g 24 Barb. 68.

A misdescription of the instrument does not invalidate it unless the party is actually misled. Second Natl. Bank *v.* Smith, 118 Wis. 18, 27, 94 N. W. Rep. 664.

[53] Id.

[54] See Bowling *v.* Harrison, 6 How. (U. S.) 259.

[55] Saco Nat. Bank *v.* Sanborn, 63 Me. 340, s. c., 18 Am. Rep. 224.

[56] Bussard *v.* Levering, 6 Wheat. 102, Rosc. N. P. 374. Where notice of dishonor is mailed by the holder of a promissory note to the indorser, there is a presumption that it was received, but this presumption can be rebutted. Jensen

bank, if relied on to sustain service by mail on persons residing in the same place should be proved by clear and satisfactory evidence, so that it may be presumed that the parties had reference to it in contracting.[57]

In addition to rules already stated as to communications by mail,[58] it may be observed that when one relies on mailing he must show the mailing to have been in time to be timely received according to the ordinary course.[59] The

v. McCorkell, 154 Pa. St. 323, 26 Atl. Rep. 366, 35 Am. St. 843. See also Zollner *v.* Moffitt, 222 Pa. St. 644, 72 Atl. Rep. 285.

[57] Bowling *v.* Harrison, 6 How. (U. S.) 259, 2 Dan. Neg. Inst., § 1013.

Evidence of the custom of a bank as to the nature and time of sending their notices is admissible. Fayetteville Fourth Nat. Bank *v.* Wilson, 168 N. C. 557, 84 S. E. Rep. 866.

[58] Chapter XVI, paragraph 6 of this vol. Proof of the mailing of notices, properly addressed, is *prima facie* evidence of their having been received by the party addressed. Bickerdike *v.* Allen, 157 Ill. 95, 103, 41 N. E. Rep. 740. A notice of protest and dishonor of a promissory note inclosed in a prepaid envelope requesting its return if not delivered, properly addressed, to the indorser at the place where he regularly receives his mail matter, and deposited in the post-office, is, in the absence of its return undelivered, *prima facie* evidence of its receipt by him, sufficient to charge him as an indorser. Jensen *v.* McCorkell, 154 Pa. St. 323, 35 Am. St. Rep. 843, 62 Atl. Rep. 366. "It is true that where a disinterested witness, a notary public, testifies that such notice was properly mailed, or when a properly executed certificate of such a notary public showing such mailing is introduced in evidence, testimony of non receipt of the note has been held immaterial." But where the notary presenting the note for payment and protesting the same is the cashier of the plaintiff, he is not a disinterested witness and his testimony that he personally carried the notice to the post-office and there deposited it, raises a question of fact for the jury as to whether the notice was actually mailed. Manister First Nat'l Bank *v.* Star Watch Case Co., 187 Mich. 224, 153 N. W. Rep. 722. The Negotiable Instruments Law provides that "Where notice of dishonor is duly addressed and deposited in the post-office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails." (Sec. 176.)

[59] The presumption that notice of protest, &c., sent by mail, reached the person addressed, ends when the mode of conveyance is irregular and illegal, and the mail may not be carried at all, and when

court is not bound to take judicial notice of the course of the mails, nor of the time required for a letter to go from one post-office to another.[60] In support of mailing, as due diligence, plaintiff may give evidence of the usual course of the mails, and the knowledge of the post-office authorities and other circumstances throwing light on the question whether the notice, as addressed and mailed, was reasonably diligent, within the rule,[61] or even for the purpose of raising a presumption that the notice was actually received, although due diligence was not used.[62]

A notary's certificate that notice was mailed, if competent, raises a presumption that the postage was paid.[63] Such a certificate that it was "mailed for" the indorser raises a presumption that it was directed to him.[64]

91. Inference of Delivery or Mailing, from Ordinary Course of Business.

It is not necessary to show, by direct evidence, that the particular letter containing the notice was put into the mail. It may be inferred from indirect evidence, such as that it was put with letters for the post-office by one clerk, and that the letters of that day were deposited by another clerk; or that it was put with letters customarily made up in the usual course of business for the postman, and that he invariably carried all the letters found upon the table.[65] Where service is thus proved by presumption from the ordinary course of business, the testimony of each person through whose hands in ordinary course the letter would have passed to the mail

it is known that the regular mail has been indefinitely suspended. Donegan *v.* Wood, 49 Ala. 242, s. c., 20 Am. Rep. 279, and cases cited; Apple *v.* Lesser, 93 Ga. 749, 21 S. E. Rep. 171.

[60] Early *v.* Preston, 1 Patt. & H. (Va.) 228.

[61] Dickens *v.* Beal, 10 Pet. 579.

[62] Id.

[63] Brooks *v.* Day, 11 Iowa, 46. The word "mailed" used in the certificate implies that the requisite postage was prepaid. Rolla State Bank *v.* Pezoldt, 95 Mo. App. 404, 69 S. W. Rep. 51.

[64] Smith *v.* Janes, 20 Wend. 192; and see Dunn *v.* Devlin, 2 Daly, 122.

[65] 2 Dan. Neg. Inst., § 1054; Persons *v.* Kruger, 45 N. Y. App. Div. 187, 60 N. Y. Supp. 1071.

or to the custody of the postman, should be adduced,[66] but it is not essential that each remember the particular letter, and be able to negative its loss, etc.[67]

92. Admissions of Demand Made and Notice Received.

The protest may be proved by the express admission of the party sought to be charged, without producing the notary or his certificate.[68] Such an admission, though strong evidence, is not conclusive, even if written, but he may show that the paper was signed under mistake,[69] unless another person has been induced to alter his condition thereby.[70] An admission of liability, whether express[71] or implied,[72] or by a promise, made to the holder, or to a third person,[73] if shown to have been made subsequent to the dishonor, is competent evidence from which to infer due demand, presentment and notice.[74] Part payment after maturity, by the drawer or indorser, is an acknowledgment of liability; and if unexplained is presumptive evidence against him of demand and notice. And if it be shown that such part payment was made with knowledge of laches of the holder, it constitutes a waiver.[75]

The burden of proof is upon the plaintiff to show clearly and distinctly the acknowledgment of liability or promise to pay; but it matters not what particular phrase was used,

[66] See Hawkes *v.* Salter, 4 Bing. 715.

[67] Commercial Bank *v.* Strong, 28 Vt. 316; Hetherington *v.* Kemp, 4 Campb. 193. Compare Bradley *v.* Davis, 25 Me. 49.

[68] Derrickson *v.* Whitney, 6 Gray 248.

[69] Commercial Bank of Albany *v.* Clark, 28 Vt. 325.

[70] Heane *v.* Rogers, 9 Barn. & Cress. 577.

[71] Rosc. N. P. 374.

[72] As, for instance, by including the bill in the indorser's schedule of debts in insolvency, (Hyde *v.* Stone, 20 How. (U. S.) 170); or in an account stated (Bank of U. S. *v.* Lyman, 20 Vt. 666); or allowing judgment to go by default in an action brought by a former holder of the same bill. Rabey *v.* Gilbert, 6 H. & N. 536, L. J. 30 Ex. 170, cited in Rosc. N. P. 382.

[73] Potter *v.* Rayworth, 73 East, 417, Rosc. N. P. 382.

[74] Lewis *v.* Brehme, 33 Md. 412, s. c., 3 Am. Rep. 190.

[75] 2 Dan. Neg. Inst., § 1165.

if it amounted to such acknowledgment or promise. If the promise was qualified by a condition, evidence of its acceptance, or of performance of the condition, is necessary to make it available as a waiver;[76] but without such evidence, it is competent in connection with other circumstances, as tending to show that due demand was made and notice given.[77]

When the admission or promise is adduced as evidence that notice was received, and not as evidence of a contract or waiver, dispensing with the right to notice,[78] the burden is on the party whose admission or promise is adduced, to show that he made it without knowledge of the facts, and that the facts were not sufficient to charge him.[79]

93. Indirect Evidence of Notice.

Evidence of any acts and declarations of the party sought to be charged, which tend to show that he had received notice is competent in aid of direct evidence of actual notice or due diligence, such, for instance, as the fact that he has taken back the original consideration of the dishonored note;[80] or has taken indemnity;[81] or has objected to paying solely on other grounds,[82] and the like.

94. Waiver of Demand or Notice.

If the holder has any legal excuse for not having actually made demand and given notice, it lies on him to prove it.[83] But such evidence is not strictly admissible under an allegation of demand or notice.[84]

[76] Id., § 1162.

[77] Id., § 1164.

[78] See Rosc. N. P. 374.

[79] Lewis *v.* Brehme (above); Tebbetts *v.* Dowd, 23 Wend. 379.

[80] Andrews *v.* Boyd, 3 Metc. 434.

[81] Ross *v.* Planters' Bank, 5 Humph. 335.

[82] Curlewis *v.* Corfield, 1 Q. B. 814, s. c., 6 Jur. 259, 1 G. & D. 489.

[83] United States *v.* Barker, 4 Wash. C. Ct. 464. A printed waiver of demand, notice and protest stamped on the back of the note is deemed a part of the note and binding upon all the indorsers. Farmers' Exch. Bank *v.* Altura Gold Mill, etc. Co., 129 Cal. 263, 61 Pac. Rep. 1077.

[84] Paragraph 65. *Contra*, in some States. Harrison *v.* Bailey, 99 Mass. 620; Manning *v.* Maroney,

The waiver may be proved by, 1, an express previous assent to omission; or 2, by subsequent promise with full knowledge; or 3, by evidence that defendant gave the holder notice that the paper would not be paid, and promised to make it good, even though such notice did not reach the holder so as to influence his action as to demand, etc.[85]

Evidence that the indorser, with full knowledge of the laches, unequivocally assented to continue his liability, or to be responsible as though protest had been made, establishes a waiver of omission to demand and give notice.[86] The assent must be clearly established, and will not be inferred from doubtful or equivocal acts or language.[87] An express promise to pay, made after discharge, and with full knowledge, is enough. But it is not necessary to prove an express promise. Any transaction between him and the holder is enough, which clearly indicates this intention.[88]

87 Ala. 563; 13 Am. St. Rep. 67, 6 So. Rep. 343, and approved by 2 Dan. Neg. Inst., § 1049, and see 14 Wall. 374.

[85] Yeager *v.* Farwell, 13 Wall. 13. Where by the terms of a note "presentment for payment, protest, notice of protest, and non-payment" are waived, such waiver prevents an indorser's raising the objection of failure to protest. German Amer. Sav. Bank *v.* Hanna, 124 Iowa, 374, 100 N. W. Rep. 57.

[86] Ross *v.* Hurd, 71 N. Y. 18. The remarks of the indorser at the time of the indorsement are inadmissible to prove a waiver of presentation for payment and notice of dishonor. Kimmerl *v.* Weil, 95 Ill. App. 15.

Evidence of a telephone conversation with the defendant in which the latter requested plaintiff not to protest and promised to get the parties liable on the note to pay it is admissible on the question of waiver. Johnson *v.* Hernig, 48 Pa. Super. 484.

[87] Ross *v.* Hurd (above).

When an indorser, after the time for making demand had expired, signs on the note a waiver of "demand, notice and protest," with knowledge of the facts but in ignorance of their legal effect, such waiver, in the absence of fraud, is sufficient to bind him. Toole *v.* Crafts, 193 Mass. 110, 78 N. E. Rep. 775, 118 Am. St. Rep. 455.

[88] Ross *v.* Hurd (above); such as saying, "I will waive protest." Id. Or agreeing to consider the demand and notice as made in due time, and himself liable as indorser. Duryea *v.* Dennison, 5 Johns. 248.

The mere payment of interest on the note, of itself, does not give rise to an implication of waiver of notice. Porter *v.* Thorn, 30 N. Y.

Where a subsequent admission or promise is adduced as evidence of a waiver of omission, as distinguished from using it as evidence, that there was no omission, plaintiff must show that it was made with full knowledge of the omission.[89] The weight of authority is that in order to sustain a waiver by subsequent promise, defendant's knowledge that he had not received regular notice may be inferred, as a fact, from the promise under the attending circumstances without requiring clear and affirmative proof of knowledge.[90] Evidence of a consideration for waiver is not necessary.[91] Even a previous written waiver may be explained by parol,[92] within the limits elsewhere stated.[93] Where there is on the face of the instrument a written waiver of either act—demand or notice—oral evidence is competent to show that there was also a verbal waiver of the other act.[94]

95. Want of Funds as an Excuse.

If a holder seeks to rely on want of funds as an excuse for omission to demand and give notice, the burden of proof is

App. Div. 363, 51 N. Y. Supp. 974.

But where the drawer of the note who is the treasurer of the drawee, a corporation, several years after the note was made, makes a partial payment and promises to pay the balance due thereon, he is deemed to waive the notice. Linthicum *v.* Caswell, 19 N. Y. App. Div. 541, 46 N. Y. Supp. 610.

[89] Tebbetts *v.* Dowd, 23 Wend. 379; Walker *v.* Rogers, 40 Ill. 278. *Contra*, Loose *v.* Loose, 36 Penn. St. 538, compare Wade on Notice, 429, and 2 Dan. Neg. Inst., §§ 1152 and 1157. Knowledge of the law or the legal ability, as distinguished from the fact, need not be shown. Matthews *v.* Allen, 16 Gray, 594.

The burden of proof is on plaintiff to show knowledge. State Bank of St. Johns *v.* McCabe, 135 Mich. 479, 98 N. W. Rep. 20.

[90] Tebbetts *v.* Dowd, 23 Wend. 379, and cases cited; State Bank of St. Johns *v.* McCabe (above).

[91] 2 Dan. Neg. Inst., § 1147. The contrary opinion is urged in 4 So. L. Rev. 426, as to cases where the defendant shows that he was in fact injured by the omission.

[92] Union Bank *v.* Hyde, 6 Wheat. 572; Porter *v.* Kimball, 53 Barb. 467, compare Ayrault *v.* Pacific Bank, 47 N. Y. 570.

[93] Buckley *v.* Bentley, 48 Barb. 283; S. P., in a previous decision, 42 Id. 646, chapter XVI, paragraph 8 and chapter XXI, paragraph 36 of this vol.

[94] 2 Dan. Neg. Inst., § 1098.

on him to show that there were no funds in the hands of the drawee to meet the bill; and this he must do by affirmative proof, as it will be presumed that there were funds, although the bill was dishonored. Having shown that there were no funds, a *prima facie* excuse is made out; and if there were qualifying circumstances entitling the drawer to require strict presentment and notice—such as his being an accommodation drawer, or keeping an open account, and the like—he must show them, for they lie peculiarly within his own knowledge.[95] Evidence that an indorser had funds which he might lawfully have applied to payment, but did not receive or hold solely for the purpose, is not necessarily an excuse for omission to give him notice; but is enough to go to the jury.[96]

VII. IRREGULAR INDORSEMENT

96. Payee against Irregular Indorser: New York Doctrine.

Evidence that defendant wrote his name on the back of the note before its delivery to the payee without any extrinsic evidence of intention in so doing, raises a legal but not conclusive presumption that he did so for the payee's accommodation, intending to become indorser subsequent to the payee; that he knew the indorsement of the payee must be given before the note could become operative, and indorsed the note on that understanding.[97] On the face of

[95] 2 Dan. Neg. Inst., § 1084.

[96] Ray *v.* Smith, 17 Wall. 411.

[97] This was the former New York Rule, 1 Abb. N. Y. Dig. new ed. 492, n.; Coulter *v.* Richmond, 59 N. Y. 478. It is applied also in *Indiana*, (Dale *v.* Moffitt, 22 Ind. 114); *Iowa*, (Frear *v.* Dunlap, 1 Iowa, 335, now otherwise by statute of 1851; Knight *v.* Dunsmore, 12 Iowa, 35); *Minnesota*, (Marienthal *v.* Taylor, 2 Minn. 147; McComb *v.* Thompson, 2 Id. 139); *Mississippi*, (Jennings *v.* Thomas, 13 Smedes & M. 617); *Pennsylvania*, (Fegenbush *v.* Lang, 28 Penn. St. 193; Eilbert *v.* Finkbeiner, 68 Penn. St. 243, s. c., 8 Am. Rep. 176); and *Wisconsin*, (Cady *v.* Shepard, 12 Wis. 642, followed in 13 Id. 229, 18 Id. 554). The subject is now governed by the Negotiable Instruments Law, § 114.

"In point of law the sale of accommodation paper is merely a loan of money, the purchaser

being the lender and the seller the borrower." Strickland *v.* Henry, 66 App. Div. 23, 73 N. Y. Supp. 12. Where the defendant was an accommodation indorser on a note for $300, upon which the payee advanced $100, but refused to advance the other $200 until another indorser was procured and gave back the note to the holder for the procuring of such additional indorser, the defendant is liable for $100 on the note and the contention that the holder had not accepted the note is unsound. Westheimer *v.* Helmbolf, 109 N. Y. App. Div. 854, 96 N. Y. Supp. 830.

"There has always been conflict among the courts of the several states both in asserting the principles upon which irregular indorsers upon commercial paper are to be held and in the conclusion arrived at in particular cases litigated. The number of cases in so great, and the possibility of even a partial reconciliation of them so remote, that we will confine our citation of authorities wholly to those in this state.

"It was well settled in this state for many years prior to the enactment of the Negotiable Instruments Law that a person who puts his name on the back of a bill or note before its delivery, is presumably a second indorser and not liable to the payee, but the presumption could be rebutted by parol evidence to show that the intention of the indorser was to become surety for some prior party to the instrument. . . .

"The Negotiable Instruments Law was first enacted in this State in 1897 (Laws 1897, Chapter 612). Section 113 of the said laws provides: 'A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.'

"Section 114 of the said law provides: 'Where a person not otherwise a party to an instrument, places thereon his signature in blank before delivery, he is liable as indorser in accordance with the following rules:

"'1. If the instrument is payable to the order of a third person, he is liable to the payee and all subsequent parties.

"'2. If the instrument is payable to the order of the maker or drawer, or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

"'3. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee.'

"By this section of said law the presumption as established by the courts in this State was changed, and an irregular indorser is now presumed to be liable in accordance with the express language of the statute. Questions relating to the sufficiency of the pleadings are settled by the statute. A complaint upon a note or bill without alleging a collateral agreement between the parties whose

the paper, therefore, without extrinsic evidence,[98] he cannot be held liable at suit of the payee, or of any one suing in behalf of the payee, or who has taken title from the payee after maturity,[99] or with knowledge of the facts.[1]

As between the parties and those subject to their equities, oral evidence is competent to rebut this presumption by showing [2] that the indorsement was made to give the maker credit with the payee,[3] and that the payee parted with value on the faith of it.[4] For this purpose oral evidence is admissible to show the circumstances under which the note was made and indorsed,[5] the consideration on which it was

names are on the instrument seeking to recover against a person except as provided by the statute, would clearly be demurrable." Haddock *v.* Haddock, 192 N. Y. 499, 85 N. E. Rep. 682, 19 L. R. A. N. S. 136.

Also construing the Neg. Instr. Law: Pharr *v.* Stevens, 124 Tenn. 669, 139 S. W. Rep. 730; Lyons Lumber Co. *v.* Stewart, 147 Ky. 653, 145 S. W. Rep. 376; Bank of Montpelier *v.* Montpelier Lumber Co., 16 Idaho, 730, 102 Pac. Rep. 685; American Trust Co. *v.* Canevin, 184 Fed. Rep. 657, 107 C. C. A. 543; Louisville First Natl. Bank *v.* Bickel, 154 Ky. 11, 156 S. W. Rep. 856; Noble *v.* Beeman-Spaulding-Woodward Co., 65 Or. 93, 131 Pac. Rep. 1006, 46 L. R. A. N. S. 162.

[98] Lester *v.* Paine, 37 Barb. 617, 620. In New Jersey there is no presumption either way without extrinsic evidence. Chaddock *v.* Van Ness, 35 N. J. L. 517, s. c., 10 Am. Rep. 256. Compare Laubach *v.* Pursell, 35 N. J. L. 434.

Indorsement of a note by the payee does not make the latter the first indorser where the note already bore an indorsement when delivered to the payee. Reed *v.* Bacon, 175 Mass. 407, 56 N. E. Rep. 716.

[99] Bacon *v.* Burnham, 37 N. Y. 614.

[1] Phelps *v.* Vischer, 50 Id. 74.

[2] Under proper allegation. Meyer *v.* Hibsher, 47 N. Y. 265; Gfroehner *v.* McCarty, 2 Abb. New Cas. 76; Draper *v.* Chase Mfg. Co., Id. 79; Smith *v.* Smith, 37 Super. Ct. (J. & S.) 203.

[3] Coulter *v.* Richmond, 59 N. Y. 481.

By statute in Iowa the blank indorsement of a promissory note by a party who is neither a payee, indorsee nor assignee is a guaranty of the payment of the note and hence a note so indorsed is notice to one discounting it that the indorsement was an accommodation one but the presumption to this effect may be rebutted. Lyon *v.* Sioux City First Nat. Bank, 29 C. C. A. 45, 85 Fed. Rep. 120.

[4] Id., or at least that the payee gave credit or forbearance on the face of it.

[5] The party may be asked, as a

given,[6] the course of transactions between the parties,[7] that the indorser placed his name on the note at its inception, and before it passed to the plaintiff,[8] &c., and the form of the paper itself may aid the presumption.[9] Evidence of the indorser's privity with the negotiation and its result is competent,[10] although it be not shown that he knew the precise nature of the credit to be procured.[11] Showing that he indorsed with knowledge that it was required as a condition of credit to be given the maker, is enough.[12]

The burden is on plaintiff to show that the true relations of the parties were not those apparent on the instrument.[13]

If it appear by extrinsic evidence that the indorsement was given with intent to give the maker of the note credit with the payee, the payee may sustain his action against

witness, to state the circumstances under which the note was made. Smith *v.* Smith, 37 Super. Ct. (5 J. & S.) 203.

"There is nothing in the Negotiable Instruments Law to indicate an intention on the part of the legislature to change the rule as established in this state relating to the receipt of parol evidence to determine the primary liability as between the persons whose names appear upon the instrument or as between those secondarily liable thereon." Haddock *v.* Haddock, 192 N. Y. 499, 85 N. E. Rep. 682, 19 L. R. A. N. S. 136.

[6] As, for instance, to enable the maker to buy goods of the payee, Moore *v.* Cross, 19 N. Y. 227; or to give the payee a security for a pre-existing debt. Clothier *v.* Adriance, 51 N. Y. 322.

[7] Coulter *v.* Richmond, 59 N. Y. 478.

[8] Rey *v.* Simpson, 22 How. (U. S.) 341. And an erasure of plaintiff's own indorsement may be explained. Austin *v.* Boyd, 24 Pick. 64.

[9] As, for instance, where it was made payable at the payee's house. Coulter *v.* Richmond (above).

[10] Meyer *v.* Hibsher, 47 N. Y. 268.

[11] Coulter *v.* Richmond, 59 N. Y. 483.

[12] Meyer *v.* Hibsher (above); Luft *v.* Graham, 13 Abb. Pr. N. S. 175, 178.

[13] Hull *v.* Marvin, 2 Supm. Ct. 420, 422. It is a general rule that the presumption is that the liabilities, &c., of parties to negotiable paper are those indicated on face of the paper. Central Bank *v.* Hammett, 50 N. Y. 158. But an indorsee, who is also a prior indorser, can, nevertheless, recover of the one who indorsed to him where it was the intention of the parties that the intermediate indorser should be liable to him. Hubbard *v.* Matthews, 54 N. Y. 43, 48.

the indorser as such.[14] The defendant can only be charged as indorser by dishonor and notice or waiver, as in other cases.[15] It is not necessary that the payee actually exercise his implied right to overwrite the indorsement with his own indorsement "without recourse." [16]

97. Defenses.

If it be shown that the payees were *bona fide* holders for value without notice, they cannot be affected by fraud or other equities between the maker and the irregular indorser.[17]

98. — Subsequent Transferee against Irregular Indorsee.

If it appear that the transferee knew that the note was indorsed by defendant before the payee overwrote his indorsement without recourse, the transferee cannot recover of the irregular indorser without the same extrinsic evidence which the payee would have to give.[18]

99. The United States Court Doctrine.

In the Supreme Court of the United States, the irregular indorser is held to be an original promisor, a guarantor, or an indorser, according to the nature of the transaction and the understanding of the parties at the time it took place; [19] under the following rules: 1. If he put his name in blank on the back of the note at the time it was made, and before it was indorsed by the payee, to give the maker credit with the payee, or if he participated in the consideration of the note, he must be considered as a joint maker of the note.[20]

[14] 1 Abb. N. Y. Dig. new ed. 492, n.

[15] Id., and cases above cited. Griswold *v.* Stoughton, 2 Oreg. 61. *Contra,* Drake *v.* Markle, 21 Ind. 434.

[16] Moore *v.* Cross, 19 N. Y. 227; Chaddock *v.* Van Ness, 35 N. J. 517, s. c., 10 Am. Rep. 256.

[17] Clothier *v.* Adriance, 51 N. Y. 326.

But an indorsee of an accommodation note who has discounted it at a usurious rate cannot enforce it. Strickland *v.* Henry, 66 App. Div. 23, 73 N. Y. Supp. 12.

[18] Phelps *v.* Vischer, 50 N. Y. 74.

[19] Good *v.* Martin, 95 U. S. (5 Otto) 90, 94, affi'g 1 Col. 165, 2 Id. 218.

[20] Id., citing Schneider *v.* Schiff-

2. If his indorsement was subsequent to the making of the note and to the delivery of the same to take effect, and he put his name there at the request of the maker, pursuant to the contract of the maker with the payee for further indulgence or forbearance, he can only be held as guarantor, which can only be done where there is legal proof of consideration for the promise, unless it be shown that he was connected with the inception of the note.[21] 3. But if the note was intended for discount, and he put his name on the back of the note with the understanding of all the parties that his indorsement would be inoperative until the instrument was indorsed by the payee, he is liable only as a second indorser in the commercial sense, and as such is entitled to the privileges which belong to such an indorser.[22]

Oral evidence is competent to show whether the indorsement was made before the indorsement of the payee and before the instrument was delivered to take effect, or after the payee had become the holder of the same.[23] In the absence of evidence on this point, an undated indorsement will be presumed to have been made at the inception of the note.[24]

man, 20 Mo. 571; Irish *v.* Cutler, 31 Me. 536. But see note 7 below.

One who indorses a note before its delivery to the payee is liable as a maker and not as an indorser and cannot plead as a defense when sued thereon that he had no notice of non-payment. McFetrich *v.* Woodrow, 67 N. H. 174, 38 Atl. Rep. 18; Scanland *v.* Porter, 64 Ark. 470, 42 S. W. 897.

Where one not a party to a note puts his name on the back of it in blank, at its inception and before negotiation, he is a joint and several promisor. Merchants' Trust, etc., Co. *v.* Jones, 95 Me. 335, 50 Atl. Rep. 48, 85 Am. St. Rep. 412.

[21] Good *v.* Martin, 95 U. S. (5 Otto) 90, 94, affi'g 1 Col. 165, 2 Id. 218. See Bates *v.* Worthington, 163 Ill. App. 75.

[22] Id.

[23] Id., Badger *v.* Barnabee, 17 N. H. 120; Bank of Jamaica *v.* Jefferson, 92 Tenn. 537, 36 Am. St. Rep. 100, 22 S. W. Rep. 211. But he may be also co-surety with payee. Carrier *v.* Fellows, 27 N. H. 369.

[24] Good *v.* Martin (above), p. 94, and cases cited; Martin *v.* Boyd, 11 N. H. 385, 387; Parkhurst *v.* Vail, 73 Ill. 343; Childs *v.* Wyman, 44 Me. 441; Gilpin *v.* Marley, 4 Houst. (Del.) 284; Massey *v.* Turner, 2 Id. 79, 89; compare Union Bank *v.* Willis, 8 Metc. 504. In different jurisdictions there has been much diversity of opinion as

If made at the inception of the note, it is *prima facie* presumed to have been made for the same consideration, and a part of the original contract expressed by the note.[25] If

to whether, under this presumption (or under direct evidence to the same effect), the irregular indorser should be held as *joint maker or surety*, as in the Supreme Court of the *United States*, and as has been held also in *Arkansas*, (Killian *v.* Ashley, 24 Ark. 515); *Delaware*, (Gilpin *v.* Marley, 4 Houst. (Del.) 284; Massey *v.* Turner, 2 Id. 79, 89); *Georgia*, (by statute: Collins *v.* Evertet, 4 Geo. 273); *Louisiana*, (Lawrence *v.* Oakley, 14 La. 389; Chorn *v.* Merrill, 9 La. An. 533); *Maine*, (Childs *v.* Wyman, 44 Me. 441; Leonard *v.* Wilds, 36 Me. 265; Good *v.* Martin, above); *Maryland*, (Ives *v.* Bosley, 35 Md. 262, 268; Walz *v.* Alback, 37 Id. 404, 409); *Massachusetts*, (Hawks *v.* Phillips, 7 Gray, 284); *Michigan*, (Witterwax *v.* Paine, 2 Mich. 559; Rothschild *v.* Grix, 31 Id. 150); *Minnesota*, (Pierse *v.* Irvine, 1 Minn. 377); *Missouri*, (Schneider *v.* Schiffman, 20 Mo. 571. See also Heaton *v.* Dickson, 153 Mo. App. 312, 133 S. W. Rep. 159). *New Hampshire*, (Martin *v.* Boyd, 11 N. H. 385, 387; but compare Currier *v.* Fellows, 27 Id. 369); *North Carolina*, (Baker *v.* Robinson, 63 N. C. 191); *Rhode Island*, (Perkins *v.* Barstow, 6 R. I. 507); *South Carolina*, (McCreary *v.* Bird, 12 Rich. 554); *Tennessee*, Pharr *v.* Stevens, 124 Tenn. 669, 139 S. W. Rep. 730; *Vermont*, (Strong *v.* Riker, 16 Vt. 557; Sylvester *v.* Downer, 20 Vt. 355); and *West Virginia*, (if the payee so elects, Burton *v.* Hansford, 10 W. Va. 470, 481); or as a *guarantor*, as in England and in *Arkansas*, (if the payee overwrites a guaranty, Killian *v.* Ashley, 24 Ark. 515); *California*, (Pierce *v.* Kennedy, 5 Cal. 138; *contra*, Jones *v.* Goodwin, 39 Id. 493, s. c., 2 Am. Rep. 473); *Connecticut*, (Perkins *v.* Catlin, 11 Conn. 212; Ransom *v.* Sherwood, 26 Id. 437; Clark *v.* Merriman, 25 Id. 576); *Illinois*, (Webster *v.* Cobb, 17 Ill. 459, 465, and cases cited); *Iowa*, (by statute: Knight *v.* Dunsmore, 12 Iowa, 35); *Kansas*, (Firman *v.* Blood, 2 Kan. 496, 526); *Kentucky*, (by statute: Arnold *v.* Bryant, 8 Bush, 668); *Nevada*, (Van Doren *v.* Tjader, 1 Nev. 380, 387, 389); *Ohio*, (Champion *v.* Griffith, 13 Ohio, 228) *Texas*, (Chandler *v.* Westfall, 30 Tex. 477) *Virginia*, (Watson *v.* Hunt, 6 Gratt. 633, 642; Orrick *v.* Colston, 7 Id. 189, 199), and *West Virginia*, (if the payee so elects, Burton *v.* Hansford, 10 W. Va. 470, 481). In some of these States the rule has now been changed by the Negotiable Instruments Law.

In *New Jersey* there seems to be no liability without extrinsic evidence. Chaddock *v.* Van Ness, 35 N. J. L. 517, s. c., 10 Am. Rep. 256.

[25] Good *v.* Martin (above); Austin *v.* Boyd, 41 Mass. 64; Parkhurst *v.* Vail, 73 Ill. 343.

made after the inception of the note, and after an indorsement by the payee, it will be presumed it was not made for the same consideration; [26] and if it be attempted to charge the party as guarantor, a distinct consideration must appear.[27] To show that that which was presumptively an indorsement was, by intention of the parties, a guaranty to the payee, it is competent to prove the indorser's subsequent admissions of liability or promises to pay made to the payee,[28] provided the evidence satisfies the statute of frauds as to guaranties.

Under these rules oral evidence is admissible to show that, in the intent and understanding of the parties, an indorsement made in fact after manual delivery, was made in pursuance of a previous condition or understanding, such that it is to be referred back and take effect as if made before delivery.[29] The interpretation ought to be such as to carry into effect the intent of the parties; and evidence of the facts and circumstances which took place at the time of the transaction are admissible to aid in the interpretation of the language employed.[30]

100. Oral Evidence to Vary the Ascertained Contract.

When the object and consequent legal effect of the indorsement have been thus ascertained, the same rules heretofore

[26] Good *v.* Martin (above).

[27] Good *v.* Martin (above), p. 98, citing Essex Company *v.* Edmunds, 12 Gray (Mass.), 272; Brewster *v.* Silence, 7 N. Y. 207. If the indorsement is shown to have been made prior to or contemporaneous with the delivery to the payee, or in pursuance of an agreement made prior to or contemporaneous with the delivery, in consideration of which the payee agrees to accept it, a guaranty overwritten is a sufficient memorandum within the statute of frauds. Chaddock *v.* Van Ness, 35 N. J. 517, s. c., 10 Am. Rep. 256, and cases cited. But compare Van Doren *v.* Tjader, 1 Nev. 380.

[28] Eilbert *v.* Finkbeiner, 68 Penn. St. 243, s. c., 8 Am. Rep. 176. It might be otherwise of promises, &c., to a subsequent holder, for they might be made in mistake of law. Id., per Sharswood, J.

[29] Hawkes *v.* Phillips, 7 Gray, 284.

[30] Good *v.* Martin (above), p. 95; Badger *v.* Barnabee, 17 N. H. 120; Pierse *v.* Irvine, 1 Minn. 369; Perkins *v.* Catlin, 11 Conn. 212.

stated [31] exclude oral evidence of intention inconsistent with the legal effect of an indorsement, guaranty or joint promise, as the case may be.[32]

VIII. DEFENSES GENERALLY

101. Defenses Available against all Holders, whether Bona Fide or Otherwise.

The following defenses may be pleaded and proved against even an innocent holder for value:

1. The fact that defendant had no legal capacity to make the contract alleged to have been made by him.[33]

Declarations in payee's absence do not bind him. Draper *v.* Weld, 13 Gray, 580; Strong *v.* Riker, 16 Vt. 554.

[31] Paragraph 47.

[32] Allen *v.* Brown, 124 Mass. 78; Trescoll Bk. *v.* Caverly, 7 Gray, 217; Vore *v.* Hurst, 13 Ind. 551.

Evidence of an understanding at the time of an indorsement of notes that the person indorsing as president of a certain corporation would not thereby subject either himself or the corporation to liability is inadmissible as varying a written indorsement by parol. Riverview Land Co. *v.* Dance, 98 Va. 239, 35 S. E. Rep. 720.

"There being no claim of fraud in securing the indorsement, the trial court properly rejected the testimony by which it was sought to establish the fact that defendants did not intend to bind themselves as indorsers. The plaintiff, being a *bona fide* purchaser for value before due, was entitled to his note in its full integrity, and in law is presumed to have relied upon all the security he received. It was therefore incompetent for defendants to show that plaintiff did not rely upon defendant's indorsements." Halbach *v.* Trester, 102 Wis. 530, 78 N. W. Rep. 759.

[33] The incapacity of a party prior or subsequent to defendant is not usually a defense. Burke *v.* Allen, 29 N. H. 106, and cases cited. If the making or the transfer is even tacitly admitted in pleading, incapacity of the maker or the indorser, as the case may be cannot be proved unless expressly alleged. Robbins *v.* Richardson, 2 Bosw. 248. Conversely, a mere allegation of incapacity does not admit evidence that an indorsement alleged to have been duly made, was not made in the lawful manner. Ogden *v.* Raymond, 5 Bosw. 16, 3 Abb. Ct. App. Dec. 396.

A wife who indorses for accommodation her husband's promissory note dated and payable in New York is estopped thereby to show that the indorsement was made in New Jersey by the laws of which state a married woman is not

2. The fact that the instrument was given for a consideration for which the instrument itself, by statute, is declared void.[34]

3. The spuriousness or forgery of the contract alleged to have been made by defendant.

4. A material alteration in the contract of the defendant, made by a holder of the paper, and in no way sanctioned by defendant.[35]

liable as an accommodation indorser. Chemical Nat. Bank *v.* Kellogg, 183 N. Y. 92, 75 N. E. Rep. 1103, 111 Am. St. Rep. 717, 2 L. R. A. N. S. 299, 5 Ann. Cas. 158.

[34] 1 Dan. Neg. Inst., § 807. But if the statute does not expressly avoid the instrument, it is valid in hands of a *bona fide* purchaser for value, before maturity. Cowing *v.* Altman, 71 N. Y. 439, rev'g 5 Hun, 556. See also Spies *v.* Rosenstock, 87 Md. 14, 39 Atl. Rep. 268.

Where by statute all contracts founded on a gambling consideration are void, notes given for the purchase price of gambling machines are wholly void and unenforceable even in the hands of an innocent holder for value. Kuhl *v.* M. Gally Universal Press Co., 123 Ala. 452, 26 So. Rep. 535, 82 Am. St. Rep. 135.

Notes given for the purchase price of fertilizer which is not tagged according to law rest upon an illegal consideration and are void even in the hands of a *bona fide* purchase. Alabama Natl. Bank *v.* Parker, 146 Ala. 513, 40 So. Rep. 987.

[35] Hovorka *v.* Hemmer, 108 Ill. App. 443; Moss *v.* Maddux, 108 Tenn. 405, 67 S. W. Rep. 855; Ofenstein *v.* Bryan, 20 App. D. C. 1.

An alteration will release a surety even though the plaintiff is a *bona fide* holder. Simons *v.* McDowell, 125 Ga. 203, 53 S. E. Rep. 1031; Hill *v.* O'Neill, 101 Ga. 832, 28 S. E. Rep. 996.

An instrument converted into a promissory note by alterations is void even in the hands of a *bona fide* holder. Porter *v.* Hardy, 10 N. D. 551, 88 N. W. Rep. 458.

Where the words "or order" on a note were changed to "or bearer" but the note has in fact, never been, indorsed to the plaintiff, he cannot maintain an action thereon notwithstanding the fact that he is an innocent holder for value. Birch *v.* Daniel, 101 Ga. 228, 28 S. E. Rep. 622. A forged instrument gives no rights, even to a *bona fide* purchaser. Warren *v.* Smith, 35 Utah, 455, 100 Pac. Rep. 1069, 136 Am. St. Rep. 1071. That a note is a forgery or was obtained by fraud is a good defense at law and the aid of a court of equity cannot be invoked, the legal remedy being adequate. Vannatta *v.* Lindley, 198 Ill. 40, 64 N. E. 735, 92 Am. St. Rep. 270. But by the Negoti-

5. Fraud in the obtaining of defendant's signature, without any negligence on his part, or any intent to make any obligation or transfer.[36]

The mode of pleading and proving these facts, except so far as already stated, is reserved for the chapters on defenses in actions on contract.

102. Failure or Want of Consideration.

As between the parties to the act that lacks consideration, this defense is available. As against subsequent transferees it is available after defendant has shown that plaintiff has not the title of a *bona fide* holder.[37] It should be pleaded,[38] but it is not essential that the answer state whether the failure is set up as a denial, or a recoupment or counterclaim.[39]

able Instruments Law, § 205, an innocent holder for value in due course, not a party to the alteration, may enforce payment of the note according to its original tenor. Moskowitz *v.* Deutsch, 46 Misc. Rep. 603, 92 N. Y. S. 721.

[36] See Chapman *v.* Rose, 56 N. Y. 137, rev'g 44 How. Pr. 364. But see *contra* Taylor *v.* Cribb, 100 Ga. 94, 26 S. E. Rep. 468. As to duress, see paragraph 105.

But where the maker signed a blank instrument, fraud in filling in the blanks is no defense as against a *bona fide* purchaser. Clifford Banking Co. *v.* Donovan Com. Co., 195 Mo. 262, 94 S. W. Rep. 527.

[37] Wright *v.* Irwin, 33 Mich. 32; Powers *v.* French, 1 Hun, 582, 4 Thomp. & C. 65. Defense is good until the note comes into the hands of a *bona fide* holder. Chapman *v.* Ogden, 37 App. Div. 355, 56 N. Y. Supp. 73.

As between the original parties see Spies *v.* Rosenstock, 87 Md. 14, 39 Atl. Rep. 268; Kelley *v.* Guy, 116 Mich. 43, 74 N. W. Rep. 291; Higgins *v.* Ridgway, 153 N. Y. 130, 47 N. E. Rep. 32; Catterlin *v.* Lusk, 98 Mo. App. 182, 71 S. W. Rep. 1109; Batterman *v.* Butcher, 95 App. Div. 213, 88 N. Y. Supp. 685.

[38] Moak's Van Santv. Pl. 507, n.; Bingham *v.* Kendall, 17 Ind. 396, 399. *Contra*, at common law. Robertson *v.* Merriam, 106 Ill. App. 610.

Want of consideration is an affirmative defense. N. Y. Metal Ceiling Co. *v.* Leonard, 48 Misc. 500, 96 N. Y. Supp. 187. But see Walsh *v.* Marvel, 130 Ill. App. 305, holding that a verified plea of *non est factum* admits this defense and throws the burden of proof upon plaintiff to show consideration in the first instance.

[39] Wiltsie *v.* Northam, 3 Bosw. 162; Springer *v.* Dwyer, 50 N. Y. 19, rev'g 58 Barb. 189. Compare Dubois *v.* Hermans, 56 N. Y. 673,

Upon the whole issue as to original want of consideration, it will be for plaintiff to sustain the burden of showing that there was one;[40] although the negotiable paper is itself *prima facie* evidence of it. If there was a consideration, and defendant relies on its failure, the burden is on defendant[41] to prove the failure fully and explicitly.[42] When the defense is available, oral evidence is competent of the real consideration and the facts attending the making and delivery of defendant's obligation, which are not inconsistent with the instrument, and which tend to show that it has been diverted from its original purpose. When the paper was made in pursuance of a contract, it is competent to show what that contract was and its purpose.[43]

674; Payne *v.* Cutler, 13 Wend. 605; Meakim *v.* Anderson, 11 Barb. 215; Craig *v.* Missouri, 4 Pet. 410.

The sufficiency of an allegation of want of consideration discussed. Weiss *v.* Reiser, 62 Misc. 292, 114 N. Y. Supp. 983.

[40] Paragraph 29; Estabrook *v.* Boyle, 1 Allen, 412.

[41] Dresser *v.* Ainsworth, 9 Barb. 619.

And the failure of consideration should be specially pleaded. Scott *v.* Rawls, 159 Ala. 399, 48 So. Rep. 710.

[42] Holbrook *v.* Wilson, 4 Bosw. 64; Smith *v.* Paton, 6 Bosw. 145, affi'd in 31 N. Y. 66. The motive is not necessarily the consideration; and breach of a promise which constituted part of the motive for giving a note for a valid consideration is not necessarily a failure of consideration. Philpot *v.* Gruninger, 14 Wall. 577.

Failure of consideration is a defense to an action on a note by a subsequent holder with notice. Hale *v.* Aldaffer, 5 Kan. App. 40, 47 Pac. Rep. 320, 52 Pac. Rep. 194.

While it may be doubtful whether want of consideration may be shown in case of a note under seal, it is clear that failure of consideration may be shown in such case. Slaton *v.* Fowler, 124 Ga. 955, 53 S. E. Rep. 567.

[43] Bookstaver *v.* Jayne, 60 N. Y. 146, rev'g 3 Supm. Ct. (T. & C.) 397.

Where defendant gave his note to his brother, payable to the plaintiff, in order to secure peace between his brother and plaintiff, who were man and wife, such note is without consideration and the wife cannot hold the maker thereon. Kramer *v.* Kramer, 181 N. Y. 477, 74 N. E. Rep. 474, rev'g 90 App. Div. 176, 86 N. Y. Supp. 129.

In a suit on a promissory note, evidence that the note was given in pursuance of an oral agreement that the defendant should purchase certain stock for the plaintiff and that the note was given as

Partial failure is admissible, under an allegation of total failure,[44] unless defendant has been misled to his prejudice.

It is not sufficient for one of several joint makers to show that he received no consideration. He must also show that neither of the others did.[45]

103. Accommodation Paper.

This defense may be made available against another than the party accommodated, if defendant can show, either:

1. That plaintiff was a transferee after maturity; [46] or,
2. That he did not take for any consideration; [47] or,
3. That he took with notice of the accommodation character of the signature, and that the signature was beyond the scope of the writer's authority; or,
4. That the paper was wrongfully diverted, and that plaintiff did not take for value.[48]

security for the performance of that agreement and that such agreement had been fully performed by the defendant is admissible as showing discharge of the note and does not vary its terms. Clark *v.* Ducheneau, 26 Utah, 97, 72 Pac. Rep. 331.

[44] Landry *v.* Durham, 21 Ind. 232; Willis *v.* Bullitt, 22 Tex. 330.

"Partial failure of consideration may be set up as a defense to a promissory note in the hands of a payee or holder with notice or not for value." City Deposit Bank *v.* Green, 138 Iowa, 156, 115 N. W. Rep. 893.

Where there has been a partial failure of the consideration of a note, such failure is a defense to a suit on the note if the note was transferred after maturity or if the plaintiff had notice of the defense before the transfer of the note. Dewey *v.* Bobbitt, 79 Kan. 505, 100 Pac. Rep. 77.

[45] Kinsman *v.* Birdsall, 2 E. D. Smith, 395.

[46] Chester *v.* Dorr, 41 N. Y. 279.

An indorsee after maturity takes subject to all defenses which existed against the indorser from whom he took. Peale *v.* Addicks, 190 Pa. St. 585, 43 Atl. Rep. 527.

[47] But it is not enough to show that he took as collateral security for an antecedent debt. Grocers' Bank *v.* Penfield, 2 Abb. New Cas. 305, s. c., 69 N. Y. 502, qualifying 7 Hun, 279.

[48] A fraudulent diversion of the paper, as distinguished from a misapplication of the proceeds, must be shown for this purpose. Farmers' & Cit. Bank *v.* Noxon, 45 N. Y. 762; Wolfe *v.* Brouwer, 5 Robt. 601; Gray *v.* Bank of Kentucky, 29 Penn. St. 365. If the accommodation

Evidence of accommodation character alone does not put on plaintiff the burden of proving what value he paid; [49] but coupled with evidence of fraud, duress, or fraudulent diversion of the paper, it does.[50] Where there is only the simple fact that it was an accommodation bill or note, then the inference is that the holder did give value for it, because that was the very object for which the instrument was given.[51] Evidence of consent to a diversion of the paper from the purpose originally intended should be clear and explicit, not doubtful or liable to misconstruction.[52]

Evidence that the paper was made for a special purpose, and fraudulently misappropriated, is not available under a mere denial of making or indorsing,[53] nor under a mere allegation of want of consideration.[54] The fact that the maker of the paper held and put it into circulation for his own advantage, is sufficient evidence of notice to the party taking it that the indorsements upon it were made for his benefit, and not in the course of business.[55]

character of the paper is shown, and a diversion of it, defendant need not show that the diversion was injurious to him; the burden is on plaintiff to show that it was not. Rochester *v.* Taylor, 23 Barb. 18.

The fact that a promissory note signed by a member of a partnership is made payable to his own order and is indorsed by him first in his own name and then in the name of the partnership does not give notice to the indorsee that the indorsement of the firm was for the accommodation of the maker. Fiegenspan *v.* McDonnell, 201 Mass. 341, 87 N. E. Rep. 624.

[49] Harger *v.* Worrall, 69 N. Y. 370.

[50] Farmers,' etc. Bank *v.* Noxon, 45 N. Y. 762.

The liability of an accommodation party is defined by N. Y. Neg. Inst. Law, § 55.

[51] Seybel *v.* Bank, 54 N. Y. 291; Collins *v.* Gilbert, 94 U. S. (4 Otto) 753. According to some authorities, defendant must show that plaintiff had knowledge of the equity as well as of the accommodation character of the signature. 1 Dan. Neg. Inst., §§ 790, 791.

"An accommodation party to a note cannot set up lack of a consideration against a holder for value." Lowell *v.* Bickford, 201 Mass. 543, 88 N. E. Rep. 1.

[52] People *ex rel.* Barton *v.* Rensselaer Ins. Co., 38 Barb. 323.

[53] Rosc. N. P. 365; Collins *v.* Gilbert, 94 U. S. (4 Otto) 757.

[54] Catlin *v.* Hansen, 1 Duer, 309.

[55] Fielden *v.* Lahens, 2 AbCt. b.

104. Fraud.

As against a *bona fide* holder, it is not enough to show fraud even in regard to the nature or contents of the instrument, if it appears that the party meant to make some obligation, and left it to another to put in writing the limits of it, without due supervision.[56] The evidence of such fraud,

App. Dec. 111; Lemoine *v.* Bank of North America, 3 Dill. C. Ct. 44, and cases cited.

[56] Chapman *v.* Rose, 56 N. Y. 137, rev'g 44 How. Pr. 364. Compare Brown *v.* Reed, 79 Penn. St. 370, s. c., 21 Am. Rep. 75, and see 16 Alb. L. J. 127; Merritt *v.* Boyden, 191 Ill. 136, 60 N. E. Rep. 907, 85 Am. St. Rep. 246.

The fact that a note was given to the vendor of properties on the strength of fraudulent misrepresentations by others than the vendor does not avoid the note where such representations were not made by the authority or procurement of the vendor. Tradesmen's Nat. Bank *v.* Looney, 99 Tenn. 278, 42 S. W. Rep. 149, 38 L. R. A. 837, 63 Am. St. Rep. 830.

Where the maker of a note carelessly left room for an alteration to be made which would not excite suspicion, an innocent purchaser for value and before maturity can hold the maker thereon. Holmes *v.* Ft. Gaines Bank, 120 Ala. 493, 24 So. Rep. 959.

One who negligently leaves blank space in a note executed by him cannot defeat an innocent purchaser for value before maturity even though that purchaser had notice of facts that would have excited the suspicion of an ordinarily prudent person. Leseure *v.* Weaver, 89 Ill. App. 628.

In a suit against an indorser of a promissory note given in payment of certain stock purchased under a contract induced by the fraud of the plaintiff, such fraud of the plaintiff's is no defense where it appears that the defendant was not a party to the contract induced by the plaintiff's fraud but is merely in the relation of surety for the successor of a party to that contract. Elliott *v.* Brady, 192 N. Y. 221, 85 N. E. Rep. 69, 127 Am. St. Rep. 898, 18 L. R. A. N. S. 600; aff'g 118 App. Div. 208, 103 N. Y. Supp. 156.

Where a non-negotiable judgment note contained a statement that it was subject to the same rule regarding equities as commercial paper, a *bona fide* purchaser for value before maturity can enforce the same, notwithstanding the fact that the maker was fraudulently induced to make the note. Howie *v.* Lewis, 14 Pa. Super. Ct. 232.

Where the maker of a piece of commercial paper signed his name to a blank instrument, it is no defense, when sued on the paper by a *bona fide* purchaser, that the blanks were fraudulently filled in. Clif-

however, is available if coupled with evidence that the defendant was free from negligence.[57] Thus evidence that defendant could not read will excuse a confidence which would otherwise be negligence.[58]

105. Duress.

Evidence that the defendant's signature was obtained by duress puts on plaintiff the burden of proving his title.[59]

ford Banking Co. *v.* Donovan Com. Co., 195 Mo. 262, 94 S. W. Rep. 527.

[57] Walker *v.* Egbert, 29 Wisc. 194, s. c., 9 Am. Rep. 548, and cases cited; Briggs *v.* Ewart, 51 Mo. 245, s. c., 11 Am. Rep. 445.

Where a note was obtained by traudulent misrepresentations as to the number of mortgages on certain premises, there is a lack of consideration which is a defense against a holder with notice of the misrepresentations. Crebbin *v.* Farmers' Natl. Bank (Tex. Civ. App. 1899), 50 S. W. Rep. 402.

Where a note was obtained by fraudulent representations one who took the note with notice of the fraud cannot enforce it. Lancaster Nat. Bank *v.* Mackey, 5 Kan. App. 437, 49 Pac. Rep. 324.

If an alteration is made possible by the negligence of the person executing the instrument in leaving blanks unfilled therein, such maker is liable. Porter *v.* Hardy, 10 N. D. 551, 88 N. W. Rep. 458.

[58] Whitney *v.* Snyder, 2 Lans. 477 (approved in 56 N. Y. 142); Griffiths *v.* Kellogg, 39 Wisc. 290, s. c., 20 Am. Rep. 48.

"The law of the state is, that where a party is induced to sign a negotiable instrument by reason of fraud, artifice or deception practiced upon him by another as to the nature of the instrument, and the maker signs the same innocently and under the belief that it was a contract of a different character, then there can be no recovery upon the note, although the holder may be an innocent purchaser for value before maturity, unless the maker was guilty of laches or carelessness in omitting to read the same, or by some other means ascertaining the true nature and import of the instrument." Hutkoff *v.* Moje, 20 Misc. Rep. 632, 46 N. Y. Supp. 905.

The question of good faith is not disposed of by merely showing facts which would have put a reasonably prudent person on inquiry. Rolla Nat. Bank *v.* Rominee, 136 Mo. App. 57, 117 S. W. Rep. 104.

[59] McClintick *v.* Cummins, 2 McLean, 98, 1 Dan. Neg. Inst. 611.

Though a note be originally obtained by duress, the holder thereof is entitled to the benefit of the rule protecting a *bona fide* holder, provided such paper was purchased in good faith, in the usual course of

Evidence that it was obtained by violent duress, without any consideration, avoids the note even as against a *bona fide* holder.[60]

106. Impeaching Plaintiff's Title.

If the instrument, though not specially payable to plaintiff, is drawn or indorsed so as to be payable to bearer, its production by plaintiff, without any other evidence of his title, throws on defendant the burden of impeaching that title.[61] This may be done, under proper pleading, by evidence that he never acquired any title, or that he has absolutely divested himself of it, or that he acquired the paper with notice that his transferror had parted with title to another.[62]

If the complaint sets forth the plaintiff's title,—as, for instance, by alleging that defendant gave the note, or indorsed the note to B., &c.,[63] defendant may, under a denial, show that it was given or indorsed to others who still hold it. If the complaint makes only a general allegation of title, evidence that title is in another is not admissible as a defense,

business, before maturity, for full value, and without notice of any facts affecting the validity of the paper. Siegel *v.* Oehl, 110 N. Y. Supp. 916.

[60] See Loomis *v.* Ruck, 56 N. Y. 465.

But see Keller *v.* Schmidt, 104 Wis. 596, 80 N. W. Rep. 935 and see also Pate *v.* Allison, 114 Ga. 651, 40 S. E. Rep. 715 holding that an innocent holder of a note for value and before maturity will be protected, although the note may have been procured by the duress of the payee, and that a plea setting up the duress of the payee but not alleging that the plaintiff took after maturity or with notice or without paying value is demurrable.

[61] Smith *v.* Sac County, 11 Wall. 139, and cases cited.

One who simply borrows a note cannot enforce payment of it against the lender. Powers *v.* French, 1 Hun, 582, 4 Thomp. & C. 65.

[62] Sheldon *v.* Parker, 3 Hun, 498, s. c., 5 Supm. Ct. (T. & C.) 616.

The presumption of ownership from possession may be rebutted by surrounding circumstances. Adams *v.* Adams, 181 Ill. 210, 54 N. E. Rep. 958; aff'g 81 Ill. App. 637.

[63] Rosc. N. P. 364, 365; Hull *v.* Wheeler, 7 Abb. Pr. 411.

unless pleaded as new matter.[64] But in either case, if plaintiff shows that he has legal right to demand payment as against defendant, nothing short of evidence of his bad faith will avail the debtor to defeat the action.[65] Even if defendant should show that a stranger had a right to contest the plaintiff's title, the legal presumption is that the stranger does not intend to do so.[66] If plaintiff's title is not duly put in issue, evidence that he had none, and had not authorized the action, is inadmissible.[67] Under even a general denial, however, defendant may show that plaintiff has but a naked legal title, and that the real interest is in another, for the purpose of letting in evidence of the declarations and admissions of that other.[68]

The evidence of title afforded by producing the instrument on the trial may be rebutted by showing that the plaintiff did not obtain the right or title by which he seeks to recover until after the commencement of the action;[69] or that possession was originally acquired for a special purpose, and not as accompanying title.[70] The appearance of restrictive indorsements, subsequent to one which would charge de-

[64] See White *v.* Drake, 2 Abb. New Cas. 133, and cases cited. Compare Wedderspoon *v.* Rogers, 32 Cal. 569.

An allegation in the answer that plaintiff is not the real party in interest and that the notes in question never did belong to him, is a mere conclusion and insufficient to put plaintiff's title in issue. The facts must be specifically pleaded. Baxter *v.* Moore, 56 Ind. App. 472, 105 N. E. Rep. 588.

[65] City Bank of New Haven *v.* Perkins, 29 N. Y. 568; and see Poorman *v.* Mills, 35 Cal. 118.

[66] City Bank *v.* Perkins, 29 N. Y. 567.

[67] Way *v.* Richardson, 3 Gray, 412.

[68] Davis *v.* Carpenter, 12 How. Pr. 287.

In a suit by an indorsee of a note against the maker, it is a good defense that the payee was insane at the time of indorsing it to the plaintiff. Walker *v.* Winn, 142 Ala. 560, 39 So. Rep. 12, 110 Am. St. Rep. 50, 4 Ann. Cas. 537.

[69] Hovey *v.* Sebring, 24 Mich. 232, s. c., 9 Am. Rep. 122; Reynolds *v.* Kent, 6 C. L. J. 155, compare 43 Me. 364. See Alabama Terminal, etc., Co. *v.* Knox, 115 Ala. 567, 21 So. Rep. 495.

[70] See Rogers *v.* Morton, 12 Wend. 487, affi'd in 14 Id. 675; Micklethwaite *v.* Thebaud, 4 Sandf. 97. Evidence that the payee had possession of the note after he had

fendant as liable to bearer, is not evidence of title in another.[71] The fact that the plaintiff suing indorsers on a bill of exchange acquired title from the acceptor is *prima facie* evidence that he is not a *bona fide* holder.[72]

If the instrument is not in plaintiff's possession, his recovery may be defeated by showing that it is in the possession of an adverse claimant who would have apparent right of recovery by its production.[73] But the mere fact that plaintiff has not actual possession of the instrument, does not necessarily defeat his recovery. It is sufficient if he has the right to the money due upon it.[74]

107. Collateral Security.

Evidence adduced by defendant that plaintiff took the paper merely as collateral security does not alone affect plaintiff's right to recover;[75] but if defendant also shows an equity against the pledgor,—such as that the paper was accommodation paper on his part,[76]—the law, for the pur-

assigned it, for the purpose of demanding payment for plaintiff, and put it in an attorney's hands to sue, does not necessarily prove that he is the real party in interest. Grimes *v.* McAninch, 9 Ind. 278.

[71] Rider *v.* Taintor, 4 Allen, 356.

[72] Central Bank of Brooklyn *v.* Hammett, 50 N. Y. 158. *Contra*, Morley *v.* Culverwell, 7 Mees. & W. 174, 1 Dan. Neg. Inst., § 781*a*. Compare Hunter *v.* Kibbe, 5 McLean, 279.

[73] Van Alstyne *v.* Commercial Bank, 4 Abb. Ct. App. Dec. 452; Crandall *v.* Schrœppel, 1 Hun, 557, s. c., 4 Supm. Ct. (T. & C.) 78. See also Sheldon *v.* Parker, 3 Hun, 498, s. c., 5 Supm. Ct. (T. & C.) 616.

[74] Selden *v.* Pringle, 17 Barb. 458.

[75] Atlas Bank *v.* Doyle, 9 R. I. 76, s. c., 11 Am. Rep. 219. See also Grocers' Bank *v.* Penfield, 2 Abb. New Cases, 305; Baxter *v.* Moore, 56 Ind. App. 472, 105 N. E. Rep. 588.

A person to whom a note has been indorsed as collateral security is the owner of the same to the extent that he may sue upon it in his own name. Baxter *v.* Moore, 56 Ind. App. 472, 105 N. E. Rep. 588.

The new statutory rule that "an antecedent or pre-existing debt constitutes value" (Neg. Instr. L., § 51) includes negotiable instruments which have been given as collateral security merely. Brewster *v.* Shrader, 26 Misc. 480, 57 N. Y. Supp. 606.

[76] Atlas Bank *v.* Doyle (above); 1 Dan. Neg. Inst., § 832.

pose of preventing circuity of action, limits the recovery to the amount due from the pledgor.[77] The burden is on the plaintiff to prove what debts were secured and the amount due.[78] But if defendant relies on the fact of a payment or discharge of such debts, that is for him to show.[79]

Irregularity in forfeiting the pledge is not available to one not a party to the contract of pledge.[80]

108. Transfer after Maturity.

Proving transfer after maturity is not available unless coupled with evidence of equities existing against prior parties,[81] and attaching to the paper itself, as distinguished from collateral transactions.[82] Even then, plaintiff may prove that he took from one who was a *bona fide* purchaser for value before maturity, although plaintiff himself may have purchased after maturity or with a knowledge of the infirmity.[83] Where the time of maturity depends on the time of delivery, and the date and the time of delivery are not coincident, the latter may be shown by parol, in order to avoid the presumption of dishonor before transfer.[84]

109. Suretyship and Dealing with Principal.

As between the original parties to the transaction, one of several may show by oral evidence that he signed as surety,

Where the maker of a note gave it to the payee for his accommodation and the latter transferred it to another as collateral security for a lesser sum than the face of the note, a judgment against the maker on the note will be cancelled upon the maker's paying the sum for which the note was given as security. Blydenburgh *v.* Thayer, 3 Keyes (N. Y.), 293, 34 How. Pr. 88.

[77] See cases collected in 18 Alb. L. J. 247; Holcomb *v.* Wyckoff, 35 N. J. 35, s. c., 10 Am. Rep. 219.

[78] Maitland *v.* Citizens' Nat. Bank of Baltimore, 40 Md. 540, s. c., 17 Am. Rep. 620. *Contra*, Atlas Bank *v.* Doyle (above).

[79] Hilton *v.* Smith, 5 Gray, 400.

[80] Hatch *v.* Brewster, 53 Barb. 276.

[81] Way *v.* Richardson, 3 Gray, 414.

[82] National Bank of Washington *v.* Texas, 20 Wall. 88, and cases cited.

[83] Roberts *v.* Lane, 64 Me. 108, s. c., 18 Am. Rep. 242.

[84] Cowing *v.* Altman, 71 N. Y. 441, rev'g 5 Hun, 556.

so as to let in the defense of an extension discharging him; [85] but special conditions of suretyship not implied in the legal relation cannot be proved by parol evidence of contemporaneous agreement, if they would contradict the writing.[86] The like evidence of suretyship is competent against a subsequent holder if he is shown to have had knowledge of the true relation of the parties at the time of his dealing with the principal; [87] otherwise not.[88]

A defendant who is shown to be a surety under the foregoing rules, or who is charged as an indorser,[89] or drawer,[90] may show a valid agreement between the holder and the maker, or acceptor, or any party prior to defendant,[91] extending the time for payment, without consent of the defendant. But such agreement is matter of defense which

[85] Hubbard *v.* Gurney, 64 N. Y. 457, 3 So. Law Rev. 439.

A "change in the terms of the contract releases the surety from liability as against any person, no matter how he comes into possession of the instrument. If the alteration be admitted the contract becomes one to which the surety is not a party, and he can not be sued upon a debt he never did contract." Simons *v.* McDowell, 125 Ga. 203, 53 S. E. Rep. 1031.

A joint maker of a note, who is in reality a surety, may plead the statute of limitations as to sureties although the obligee had no notice that he was only a surety. Weller *v.* Ralston, 28 Ky. Law. Rep. 572, 89 S. W. Rep. 698.

[86] Thompson *v.* Hall, 45 Barb. 214, and cases cited.

A surety upon a note which stipulated that the makers waived notice of extension, cannot show by parol that the maker had agreed to collect the note when due. Milan First Natl. Bank *v.* Wells, 98 Mo. App. 573, 73 S. W. Rep. 293.

[87] Oriental Financial Co. *v.* Overend, L. R. 7 Ch. 142, 7 H. L. 348. *Contra*, 1 Dan. Neg. Inst., § 1338. Compare 1 Pars. Pr. N. & B. 233.

[88] Summerhill *v.* Tapp, 52 Ala. 227.

[89] Artisans' Bank *v.* Backus, 36 N. Y. 100, s. c., 3 Abb. Pr. N. S. 273, affi'g 31 How. Pr. 242.

[90] English *v.* Darley, 2 Bos. & P. 61.

[91] Rosc. N. P. 393, citing Hall *v.* Cole, 4 Ad. & E. 577.

But if the agreement between the principal and the holder is that an extension shall be granted upon the execution by t e principal of a renewal note, the surety is not discharged, if such renewal note is not executed. Farmers' Bank *v.* Wickliffe, 131 Ky. 787, 116 S. W. Rep. 249.

must be affirmatively alleged [92] and proved [93] by the defendant.

To invoke the rule that taking a new note suspends the right of action and discharges the surety not assenting, it should be made to appear that there was an agreement, either express, or implied from the facts proved, that the new note was taken in payment of the first note, or that the time of payment of the first note was extended in favor of the party who was primarily liable.[94] If either be proved, it is not necessary to show that the first note was surrendered.[95] If a new obligation was taken, evidence of a different contemporaneous oral agreement, is not competent.[96]

110. Payment.

Payment must be affirmatively pleaded. A denial of the formal allegation of nonpayment is not equivalent to an allegation of payment.[97] On an issue of payment, alone, the

[92] Rosc. N. P. 393.

[93] Artisans' Bank *v.* Backus (above).

[94] Hubbard *v.* Gurney, 64 N. Y. 467. Testimony of a party to the alleged agreement of extension relied on to discharge an indorser, merely to the effect that he solicited indulgence to arrange his affairs and try and relieve his indorsers, and that he was given to understand that this would be extended to him, if he remembers nothing more than this, is insufficient to sustain a finding of an agreement. NELSON, Ch. J., Bank of Utica *v.* Ives, 17 Wend. 503.

Where the holder of a note upon which there is a surety accepts in lieu of the note a new note secured by a mortgage, and subsequently this mortgage is annulled as being a preference under the insolvent law, and the court orders the insolvent to return the original note, the surety on the original note cannot be held thereon, since the holder by voluntarily accepting the new note in lieu thereof, released the surety. Frederick-Town Sav. Inst. *v.* Michael, 81 Md. 487, 32 Atl. Rep. 189, 340, 33 L. R. A. 628.

"A note coming into the hands of the maker after payment, cannot be reissued by him so as to bind a surety." Seattle First Natl. Bank *v.* Harris, 7 Wash. 139, 34 Pac. Rep. 466.

[95] Hubbard *v.* Gurney (above).

[96] Burbank *v.* Beach, 15 Barb. 326.

[97] Edson *v.* Dillaye, 8 How. Pr. 273.

"The introduction of the unpaid note by plaintiff was sufficient

burden is on the defendant to show payment;[98] and this is so even where evidence is requisite, and has been given, that the instrument was present at the place where it was payable, on the day it fell due.[99] Where the only issue is payment, neither party is bound to produce the instrument.[1]

If a party to the instrument is shown once to have delivered it so as to become liable on it, the mere fact of its present production by him is generally *prima facie* evidence against those seeking to hold him liable on it, and in his favor, that it has been paid or otherwise discharged;[2] but this presumption does not necessarily arise where he is shown to have had other means of regaining possession.

evidence if evidence was necessary, in support of his negative allegation of non-payment. (Brennan *v.* Brennan, 122 Cal. 440, 55 Pac. Rep. 124, 68 Am. St. Rep. 46), but payment is an affirmative defense which must be pleaded." Pastene *v.* Pardini, 135 Cal. 431, 67 Pac. Rep. 681.

Payment and failure of consideration should be specially pleaded. Scott *v.* Rawles, 159 Ala. 399, 48 So. Rep. 710.

[98] Knapp *v.* Runals, 37 Wis. 135; Sampson *v.* Fox, 109 Ala. 662, 19 So. Rep. 896.

The defendant's testimony that the note in suit was paid, although not contradicted, is not sufficient to take the case from the jury. Fuller Buggy Co. *v.* Waldron, 188 N. Y. 630, 81 N. E. Rep. 1165, aff'g 112 App. Div. 814, 99 N. Y. S. 561; Downing *v.* Donegan, 1 Cal. App. 710, 82 Pac. Rep. 1111; Lynch *v.* Lyons, 131 App. Div. 120, 115 N. Y. Supp. 227; Carver *v.* Forry, 158 Ind. 76, 62 N. E. Rep. 697; Walston *v.* Davis, 146 Ala. 510, 40 So. Rep. 1017; Waid *v.* Greer, (Tenn. Ch. A.), 56 S. W. Rep. 1029; Plaut *v.* Straub, 131 App. Div. 154, 115 N. Y. Supp. 148; Olson *v.* Day, 23 S. D. 150, 120 N. W. Rep. 883, 20 Ann. Cas. 516.

[99] Fullerton *v.* Bank of United States, 1 Pet. 604, 617.

[1] Rosc. N. P. 392; Mead *v.* Brooks, 8 Ala. 840. *Contra*, Marfield *v.* Davidson, 8 Gill & J. 209.

The defendant is not relieved of the burden of proving the defense of payment by reason of the fact that the note has been lost. Walston *v.* Davis, 146 Ala. 510, 40 So. Rep. 1017.

[2] Perez *v.* Bank of Key West, 36 Fla. 467, 18 So. Rep. 590. But the mere production by the plaintiff of a note executed by himself and the defendant as co-makers, and cancelled by the stamp of a bank, is not, even *prima facie*, sufficient to entitle the plaintiff to recover contribution of the defendant. Bates *v.* Cain's Estate, 70 Vt. 144, 40 Atl. Rep. 36; Grey *v.* Grey, 47 N. Y. 552, rev'g 2 Lans.

The possession of the paper by the plaintiff is presumptive evidence that it has not been paid by those liable on it to him. But if he was liable on it to others, to whom he paid the amount at maturity, it may defeat his action, unless he gives evidence that he acquired title by transfer, not merely possession by surrender on payment.[3] A payment, for which a general receipt is indorsed upon the instrument, is presumed to have been made by the maker or acceptor, who was primarily liable, even when the drawer has possession and sues the acceptor.[4] If the instrument is produced from the plaintiff's custody, it is for him to explain a receipt appearing thereon if he seeks to impeach it.[5]

Where a new bill or note is given in renewal of an earlier, and the earlier is retained, the new is presumptively only a suspension of the debt, and not a satisfaction until paid, unless it be shown that it was expressly agreed that the earlier one should be extinguished. Delivery of the earlier without such agreement does not of itself raise a presumption of extinguishment. And presumptive evidence of intent to extinguish may generally be rebutted by showing that by such construction the debt would be lost.[6] One who

173; and see Hackney *v.* Vrooman, 62 Barb. 650. See Seattle First Natl. Bank *v.* Harris, 7 Wash. 139, 34 Pac. Rep. 466.

[3] See page 10, paragraph 4, of this vol.

The possession of notes by the payee creates a presumption of non-payment, but this may be rebutted. Davis *v.* Gaines, 28 Ark. 440; Schwind *v.* Hall, 129 Cal. 40, 61 Pac. Rep. 573.

[4] 1 Dan. Neg. Inst., § 1229; Shephard *v.* Calhoun, 72 Ill. 337. See Connelly *v.* Sullivan, 119 Ill. App. 469.

[5] See paragraph 51. Compare 2 Greenl. Ev., 13th ed. 480, § 527. Authority of an agent to receive payment is not necessarily implied from possession. Doubleday *v.* Kress, 50 N. Y. 410, rev'g 60 Barb. 181; Scoville *v.* Landon, Id. 686.

The mere fact that a note sued on by the administrator of the payee bore the words: "Kewanna Bank, March 8, 1897, paid Kewanna, Indiana," does not give rise to a presumption of payment either to the deceased payee or to the administrator. Toner *v.* Wagner, 158 Ind. 447, 63 N. E. Rep. 859.

[6] 2 Dan. Neg. Inst., § 1266. Compare Nightingale *v.* Chafee, 11 R. I. 609, s. c., 23 Am. Rep. 531.

The mere transfer of certain securities to a holder of a note

makes payment to a second person, not the owner of a note and not in possession of it, of money to be applied in payment of the debt thereby evidenced, assumes the burden of proving that the party to whom payment was made was empowered to collect the money.[7] No presumption of the payment of a promissory note arises from the fact that an action is not brought upon it until the day before the day when it would have been barred by the Statute of Limitations.[8]

111. Qualifying Agreement.

Evidence of an agreement between the original parties qualifying or suspending the apparent liability of the maker is not competent against a holder for value before maturity, unless it is first shown that he had knowledge thereof at the time the transfer was made.[9]

IX. DEFENDANT'S EVIDENCE TO REQUIRE PLAINTIFF TO PROVE TITLE AS A HOLDER FOR VALUE BEFORE MATURITY

112. The General Rule.

The right of a transferee to shut out defenses such as arise from equities between the antecedent parties, depends on his having the title of a purchaser and holder of a negotiable

by the maker does not create a presumption that such securities were in payment of the note. Matter of Clark, 16 Misc. Rep. 405, 39 N. Y. Supp. 722.

[7] Richards *v.* Waller, 49 Nebr. 639, 68 N. W. Rep. 1053; Chandler *v.* Pyott, 53 Nebr. 786, 74 N. W. Rep. 263; Bank of the University *v.* Tuck, 101 Ga. 104, 28 S. E. Rep. 168.

An agent who is empowered to collect interest has not the implied authority to collect the principal, especially before the note falls due. Walsh *v.* Peterson, 59 Nebr. 645, 81 N. W. Rep. 853.

[8] Newcombe *v.* Fox, 1 App. Div. (N. Y.) 389.

The fact that a note is found among the papers of the maker upon his death creates a presumption that it had been paid. Dodrill *v.* Gregory, 60 W. Va. 118, 53 S. E. Rep. 922.

[9] Brown *v.* Spofford, 95 U. S. (5 Otto), 474, 483.

Same rule applies to secret re-

instrument, who took it, 1, in good faith; 2, for a valuable consideration; 3, in the ordinary course of business; 4, when it was not overdue; 5, without notice of its dishonor, and 6, without notice of facts which impeach its validity as between the antecedent parties. The plaintiff's production of the instrument, with proof of its execution, etc., as above stated, raise a sufficient presumption in his favor on all these points.[10]

Defendant, to lay the foundation for defenses arising from such equities, must adduce evidence sufficient to go to the jury,[11] tending to show either,. 1. That plaintiff, when he took the paper, had notice of the equities—in other words, must negative plaintiff's good faith (in which case the burden is thrown on plaintiff to prove that one under whom he claims was in fact a purchaser for value, &c., before maturity);[12]

strictions as to the use of accommodation paper. Keenan *v.* Blue, 240 Ill. 177, 88 N. E. Rep. 553.

[10] Collins *v.* Gilbert, 94 U. S. (4 Otto), 754, and cases cited; Clarke *v.* Newton, 235 Ill. 530, 85 N. E. Rep. 747; Tolman *v.* Janson, 106 Iowa, 455, 76 N. W. Rep. 732; Mann *v.* Merchants, etc., Trust Co., 100 Ill. App. 224. See Am. Natl. Bank *v.* Fountain, 148 N. C. 590, 62 S. E. Rep. 738; Nagle *v.* Schnadt, 239 Ill. 595, 88 N. E. Rep. 178; Morrison *v.* Farmers', etc., Bank, 9 Okl. 697, 60 Pac. Rep. 273.

"The presumption that the indorsee of a negotiable note is a *bona fide* holder for value is not repelled merely by proof that the paper, as between the immediate parties, was without consideration. . . . Nor does proof that the proceeds of a note, intended to be discounted, have been diverted from the agreed channel change the rule." Jovesof *v.* Rockey, 58 Misc. 559, 109 N. Y. Supp. 818. "A plaintiff suing upon a negotiable note or bill is presumed, in the first instance to be a *bona fide* holder. But when the maker has shown that the note was obtained from him under duress, through a fraud, or that it had no legal existence, previous to its negotiation, the plaintiff is then required to show under what circumstances and for what value he became the holder." Strickland *v.* Henry, 66 App. Div. 23, 73 N. Y. Supp. 12.

[11] Smith *v.* Sac County, 11 Wall. 139, 147, and authorities cited. If the cause is tried without a jury the judge may pass on the question, as preliminary to further evidence. Brookman *v.* Millbank, 50 N. Y. 378.

[12] Hill *v.* Sands, 5 N. Y. Leg. Obs. 19. On proof that the note was fraudulent and void as between

or, 2, That there was fraud, duress, or illegality in the inception of the contract, or negotiation in fraud of the rights of the defendant (in which case, and without evidence that plaintiff had notice thereof,[13] the burden is thrown upon plaintiff of supporting the presumption of title by showing due negotiation in fact).[14] If defendant shows that the paper

the maker and payee, an *intermediate* holder will not be presumed, in favor of plaintiff, to have paid value. Holcomb *v.* Wyckoff, 35 N. J. 35, s. c., 10 Am. Rep. 219, 222; Roberts *v.* Lane, 64 Me. 108, s. c., 18 Am. Rep. 242.

"The indorsee or assignee of commercial paper who takes the same before maturity, for a valuable consideration, without knowledge of any defect and in good faith, will be protected against the defenses of the maker, and mere suspicion of defect of title or the knowledge of circumstances calculated to excite suspicion in the mind of a prudent man, or even gross negligence on his part at the time of the transfer, will not defeat his title. In other words, the only thing which will defeat his titles is bad faith on his part and the burden of proof is upon the person assailing his right to establish that fact by a preponderance of the evidence." Bradwell *v.* Pryor, 221 Ill. 602, 77 N. E. Rep. 1115; Howell *v.* Merchants T. & S. Co., 134 Ill. App. 467; Kavanagh *v.* Bank of America, 239 Ill. 404, 88 N. E. Rep. 171.

"Suspicious circumstances, to be sufficient to require investigation, must be of a substantial character, and so strong that bad faith on the part of the indorsee in failing to make such investigation may be reasonably inferred." Batesville Bank *v.* Lehner, 43 Ind. A. 457, 87 N. E. Rep. 990.

[13] N. Y. & Virginia State Stock Bank *v.* Gibson, 5 Duer, 574. But see Hutchinson *v.* Boggs, 28 Penn. St. 294.

Where the maker of a note admits that it was made for a valuable consideration and without fraud, there could be no defect in the title such as to throw on the holder the burden of proving that he was a holder in due course. Beck *v.* Maller, 131 App. Div. 243, 115 N. Y. Supp. 596.

[14] The necessity of evidence of this may be dispensed with by omitting to require it at the trial. Wilson *v.* Rocke, 58 N. Y. 642; Pope *v.* Branch County Savings Bank, 23 Ind. App. 210, 54 N. E. Rep. 835; Batesville Bank *v.* Lehner, 43 Ind. App. 457, 87 N. E. Rep. 990; French *v.* Talbott Paving Co., 100 Mich. 443, 59 N. W. Rep. 166.

Where a note is procured by false representations, it is tainted with fraud in its inception and the presumption of good faith which ordinarily attaches to the purchase of negotiable paper before due no longer obtains, and the burden in

was lost or stolen, it throws the burden on plaintiff of showing that it came to him in due course of business and for value.[15]

113. Failure or Want of Consideration.

Failure or want of consideration,[16] as distinguished from

such case is upon the plaintiff to show that he received the paper in due course and without notice of the defense. City Natl. Bank *v.* Jordan, 139 Iowa, 499, 117 N. W. Rep. 758.

Where it is shown that a check was obtained from the defendant by fraud, there is a defect of title which, under the Negotiable Instruments Law, threw upon the plaintiff the burden of showing that he, or some one from whom he claimed, acquired title as a holder in due course. Packard *v.* Figlinolo, 114 N. Y. Supp. 753; Warner *v.* Smith, 35 Utah, 455, 100 Pac. Rep. 1069, 136 Am. St. Rep. 1071.

An assignee of a note who is not a holder in due course may nevertheless be able to hold the maker notwithstanding the defenses against the assignor, if the maker's conduct furnishes the basis for an estoppel. Marling *v.* Fitzgerald, 138 Wis. 93, 120 N. W. Rep. 388, 131 Am. St. Rep. 1003, 23 L. R. A. N. S. 177.

The method of procedure in these cases is for plaintiff to produce the note, prove its execution and the indorsements and then rest. This establishes a *prima facie* case and throws the burden on defendant to proceed to prove his defense. If defendant's proof establishes or tends to establish, his particular objection, then plaintiff must prove that he is a *bona fide* holder of the note for value before maturity. Siegel *v.* Oehl, 110 N. Y. Supp. 916; Schultheis *v.* Sellars, 223 Pa. 513, 72 Atl. Rep. 887, 22 L. R. A. 1210.

Where defendant denies that the note was given for value, but admits the making and delivery of the note, the non-payment thereof, and the status of the plaintiff, it is sufficient to read the note in evidence and rest. Defendant should offer evidence showing or tending to show want of consideration in order to make it incumbent upon plaintiff to show by a fair preponderance of evidence that there was such consideration. Bringman *v.* Von Glahn, 71 App. Div. 537, 75 N. Y. Supp. 845; Beck *v.* Maller, 131 App. Div. 243, 115 N. Y. Supp. 596.

[15] Kuhns *v.* Gettysburgh Natl. Bk., 68 Penn. St. 445. So, per-

[16] Mechanics' & Traders' Natl. Bank of N. Y. *v.* Crow, 60 N. Y. 85, affi'g 5 Daly, 191; Wilson *v.* Lazier, 11 Gratt. 477.

There is a conflict of opinion upon this point (see 8 C. J. 987), although the weight of authority still adheres to the proposition as

a fraudulent or illegal inception of the contract,[17] is not enough to rebut the presumption that plaintiff is a *bona fide* holder, or put him to proof of the amount paid by him. Evidence that the consideration was positively illegal,[18] as distinguished from being merely void,[19] does throw the burden on plaintiff.

X. PLAINTIFF'S EVIDENCE OF TITLE AS HOLDER FOR VALUE BEFORE MATURITY

114. Burden of Proof.

To enable him to recover, after the burden is thrown upon

haps, where it was lodged in *escrow*, and wrongfully delivered. Chipman *v.* Tucker, 38 Wisc. 43, and see pp. 52, 60.

A finder or thief of a negotiable instrument indorsed in blank or payable or indorsed to bearer can pass a good title thereto to a *bona fide* purchaser before maturity. Warren *v.* Smith, 35 Utah, 455, 100 Pac. Rep. 1069, 136 Am. St. Rep. 1071.

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announced in the text. Bunzel *v.* Maas, 116 Ala. 68, 22 So. Rep. 568; Ft. Wayne First Natl. Bank *v.* Rupert, 178 Ind. 669, 100 N. E. Rep. 5; Holden *v.* Phœnix Rattan Co., 168 Mass. 570, 47 N. E. Rep. 241; Graham *v.* Lawrence, 44 S. W. Rep. (Tex. Civ. App.) 558.

A note given under an agreement with the payee whereby the latter was to advance certain money subsequent as the maker should need it, is supported by valid consideration, although no money was ever advanced as agreed. Marling *v.* Fitzgerald, 138 Wis. 93, 120 N. W. Rep. 388, 131 Am. St. Rep. 1003, 23 L. R. A. N. S. 177.

"Failure of consideration as between the drawer and drawee is no defense in an action by the payee or holder against an acceptor, if the payee or holder took the bill before maturity in good faith and for value." Morrison *v.* Farmers', &c., Bank, 9 Okl. 697, 60 Pac. Rep. 273.

A partial failure of consideration as between the parties to a negotiable note does not require an indorsee suing thereon to show himself a holder in due course. Cole Banking Co. *v.* Sinclair, 34 Utah, 454, 98 Pac. Rep. 411, 131 Am. St. Rep. 885.

[17] Ross *v.* Bedell, 5 Duer, 465; Valhir *v.* Zane, 6 Gratt. 246.

[18] Holden *v.* Cosgrove, 12 Gray, 216; In re Hill, 187 Fed. 214; Matlock *v.* Scheuerman, 51 Or. 49, 93 Pac. Rep. 823, 17 L. R. A. N. S. 747.

[19] Rosc. N. P. 386.

A promissory note based on an

him, plaintiff must prove that he (or one under whom he claims) took the paper before maturity, for value,[20] even although there were intermediate indorsers, unless there is evidence that they paid value.[21] Fraud being shown, the presumption is that the deceiver will transfer the paper, so as to enable some other to collect it; and this presumption avails against the holder to require him to show that value was paid.[22]

illegal consideration (such as an agreement to keep secret a crime) is wholly void. Folmar *v.* Siler, 132 Ala. 297, 31 So. Rep. 719.

[20] Collins *v.* Gilbert, 94 U. S. (4 Otto) 753, and cases cited. Wetumpka *v.* Wetumpka Wharf Co., 63 Ala. 611.

"The subsequent indorsement after maturity will not relate back to cut off defenses." Huntington *v.* Lombard, 22 Wash. 202, 60 Pac. Rep. 414.

It is not error for the trial court to exclude evidence that the plaintiff had notice that the defendant was an accommodation indorser, where plaintiff is a *bona fide* holder before maturity. Charleston Sav. Inst. *v.* Farmers', &c., Bank, 73 S. C. 545, 54 S. E. Rep. 216.

"When fraud has been established in procuring the note or in the title of any one who has negotiated the instrument the burden is on the plaintiff to show that he or some one under whom he claims acquired the title as a holder in due course—that is, that he acquired the title (1) before maturity, (2) in good faith and for value, (3) without notice of any infirmity or defect in the title of the person negotiating it." Am. Natl. Bank *v.* Fountain, 148 N. C. 590, 62 S. E. Rep. 738.

[21] Bank of St. Albans *v.* Gilliland, 23 Wend. 311.

Mere proof that the holder parted with value before maturity is not sufficient, after the burden has been thrown upon him, to prove that he is a holder in due course. Barre Natl. Bank *v.* Foley, 54 Misc. 126, 103 N. Y. Supp. 553; Pierson *v.* Huntington, 82 Vt. 482, 74 Atl. Rep. 88, 137 Am. St. Rep. 1029, 29 L. R. A. N. S. 695.

[22] Bailey *v.* Bidwell, 13 Mees. & W. 73; First Natl. Bank *v.* Green, 43 N. Y. 298. "The substance of the remaining contentions of the defendant is, that, as there was evidence that a defense to the notes in the whole was in the plaintiff as against Lux by way of recoupment of the damages suffered from the breach of contract, the burden was upon the plaintiffs as indorsees, if this defense is made out, to prove that they were *bona fide* holders of the notes, and that the notes were taken by them before maturity for value, and that therefore the presiding justice cannot properly order a verdict for the plaintiffs. The doctrine contended for by the plaintiff is undoubtedly the law

generally in suits on promissory notes by an indorsee against the maker; but then a distinction has been taken between the cases where a promissory note has been originally obtained by a payee from the maker by fraud, or has been fraudulently put in circulation by the payee, or was given upon an illegal consideration, and the cases where there has been only a want or failure of consideration, in whole or in part, as between the maker and payee. In the former class of cases the production of the note by the indorsee and the proof or admission of genuineness of the signatures are not enough to make out the case for the plaintiff if the fraud or illegal consideration is proved, but the burden still remains on him to produce some additional evidence that he took the note in good faith for value before maturity; while in the latter class of cases the production of the note by the indorsee and the proof or admission of the genuineness of the signatures make out a *prima facie* case in his favor, which is not made merely by proof of a want or failure of consideration, but the burden of also introducing evidence that the indorsee did not take the note in good faith for value before maturity is on the defendant." Holden *v.* Phœnix Rattan Co., 168 Mass. 570, 572, 47 N. E. Rep. 241. See further on this subject Bunzel *v.* Maas, 116 Ala. 68, 22 So. Rep. 568; Banks *v.* McCosker, 82 Md. 518, 34 Atl. Rep. 539; Rossiter *v.* Loeber, 18 Mont. 372, 45 Pac. Rep. 560; Crosby *v.* Ritchey, 47 Nebr. 924, 66 N. W. Rep. 1005; Vickery *v.* Burton, 6 N. D. 245, 249, 69 N. W. Rep. 193; Knowlton *v.* Shultz, 6 N. D. 417, 71 N. W. Rep. 550; Limerick Natl. Bank *v.* Adams, 70 Vt. 132, 40 Atl. Rep. 166; First Natl. Bank *v.* Foote, 12 Utah, 157, 42 Pac. Rep. 205. In order to prove that the payee of the note had obtained the same by fraud, it is competent to ask the maker to state the circumstances under which he signed the note. Banks *v.* McCosker, 82 Md. 518, 34 Atl. Rep. 539. The defendant to an action by an indorsee upon a promissory note may show, under the general issue, that the note is void, as between the original parties, for want of consideration and fraud, and that the plaintiff is chargeable with notice thereof. Limerick Natl. Bank *v.* Adams, 70 Vt. 132; 40 Atl. Rep. 166. Whenever it becomes necessary for the members of a co-partnership to show that they acquired a promissory note by indorsement in good faith without knowledge or notice of its imputed original infirmities, such want of knowledge must be shown as to all of the partners; and as one partner cannot give evidence that his co-partner was ignorant of a particular fact except by repeating or testifying to the co-partners' declaration, which would be clearly inadmissible, it follows that each partner must show his want of knowledge by his own testimony, or that other facts must be submitted to the jury from which they may legitimately infer the

115. Evidence That Transfer was Before Maturity.

Plaintiff must show that delivery,[23] and also indorsement, if indorsement was necessary, were made before maturity. Delivery and mistake do not excuse delay in indorsing.[24]

Against a maker or drawer who delivers paper after its date, or lodges it with a depositary with authority to make such a delivery, one claiming as a transferee for value may show that it was delivered at the time of the transfer, and thus remove the presumption of dishonor arising from the apparent date.[25]

If paper payable *on demand* is offered in evidence duly indorsed, but with an undated indorsement, the presumption is that it was indorsed before maturity; and the burden is on him impeaching it on the ground of dishonor before indorsement, to show that the transfer took place after a

absence of such knowledge. McCosker *v.* Banks, 84 Md. 292, 296, 35 Atl. Rep. 935.

"When a negotiable instrument is executed through the fraud of the payee, and is afterwards fraudulently put in circulation, the burden is upon the holder to prove that he paid value for it without notice of the fraud." Johnson County Bank *v.* Kemp Mercantile Co., 114 S. W. Rep. (Tex. Civ. App.) 402.

[23] A verbal pledge of the paper without delivery is not enough. Either a delivery, or some positive act showing an actual transfer of the paper itself, or of the right to dispose of it, should be proved. Russell *v.* Scudder, 42 Barb. 31, 35, MILLER, J.; and see Woodruff *v.* Wicker, 2 Bosw. 613.

Where A and B both have safety deposit boxes in a bank and the cashier of the bank fraudulently withdraws a note, indorsed in blank, from B's box and sells it to A, who is innocent of the fraud, there is a sufficient delivery to vest the title to the note in A if the cashier puts the note in A's box, although A never had the note in his own hands. Irwin *v.* Deming, 142 Iowa, 299, 120 N. W. Rep. 645.

[24] Lancaster Natl. Bank *v.* Taylor, 100 Mass. 18, 1 Am. Rep. 71, and cases cited.

"To impeach the title of a holder for value of negotiable paper, by proof of any facts and circumstances outside of the instrument itself, it must first be shown that he had knowledge of such facts and circumstances at the time the transfer was made." Pickens Tp. *v.* Post, *supra.*

A transfer on the day of maturity is "before maturity." Continental Natl. Bank *v.* Townsend, 87 N. Y. 8.

[25] Cowing *v.* Altman, 71 N. Y. 441, rev'g 5 Hun, 556.

reasonable time had elapsed. But if the transfer is shown to have taken place after the expiration of a reasonable time, or if no demand was made within such time, so as to charge the indorser, the burden is on plaintiff to show excuse for the delay.[26]

116. — and Before Notice.

If notice of the infirmity is shown to have been given to the holder before maturity, plaintiff must show that the title was perfected not only by delivery but by indorsement,[27] and (if necessary) by payment of value, all made before such notice; and on showing this he will be protected only to the extent of the value so paid.[28]

117. — and for Value.

Plaintiff must show what value was paid.[29] If the paper never had an inception until it came to the holder's hands, he cannot recover without proof of payment of full value. Usurious discount is fatal.[30] Otherwise, the amount of con-

[26] 1 Pars. on Pr. N. & B. 380. For the mode of proving discount in the ordinary course of business, by producing the bank's books, see Ocean Natl. Bank *v.* Carll, 55 N. Y. 440, and again 9 Hun, 237.

[27] Clark *v.* Whitaker, 50 N. H. 474, s. c., 9 Am. Rep. 286.

[28] Neg. Inst. Law, § 93, Dresser *v.* Missouri, &c. Railway Construction Co., 93 U. S. (3 Otto) 92; Albany County Bank *v.* People's Co-op. Ice Co., 92 App. Div. 47, 86 N. Y. Supp. 773.

[29] First Natl. Bank *v.* Green, 43 N. Y. 298, 301. "If in an action by an indorsee against the maker the negotiable note is shown to have been obtained by fraud, the presumption arising merely from the possession of the instrument, that the holder in good faith paid value is so far overcome that he cannot have judgment unless it appears affirmatively from all the evidence, whether produced by the one side or the other, that he, in fact, purchased for value." King *v.* Doane, 139 U. S. 166, 173. See also Kneeland *v.* Lawrence, 140 U. S. 209; Atlas Natl. Bank *v.* Holm, 34 U. S. App. 472, 478, 71 Fed. Rep. 489.

"To establish good faith, the plaintiff must show the circumstances connected with his procurement of the note and what he paid for it." Pierson *v.* Huntington, 82 Vt. 482, 74 Atl. Rep. 88, 137 Am. St. Rep. 1029, 29 L. R. A. N. S. 695.

[30] Eastman *v.* Shaw, 65 N. Y.

sideration is not material, except as bearing on the question of actual or constructive notice,[31] or as limiting the recovery in certain cases.

118. Evidence of Good Faith.

At this stage of the case plaintiff is not called on to show that he had no notice.[32] If he shows that he, or the one under whom he claims, is a transferee for value and before maturity, within the foregoing rules, and there is nothing on the face of the paper, to charge him with inquiry,[33] or in the circumstances, to show his bad faith,[34] the burden is thrown on defendant to prove bad faith in taking the transfer.[35]

522. Compare Miller *v.* Crayton, 3 Supm. Ct. (T. & C.) 360, and Williams *v.* Tilt, 36 N. Y. 319.

[31] Gould *v.* Segee, 5 Duer, 270.

Proof that the note was paid for in full *prima facie* establishes that it was taken in due course. Hodge *v.* Smith, 130 Wis. 326, 110 N. W. Rep. 192; Pierson *v.* Huntington, 82 Vt. 482, 74 Atl. Rep. 88, 137 Am. St. Rep. 1029, 29 L. R. A. N. S. 695.

[32] Cowing *v.* Altman, 71 N. Y. 440, rev'g 5 Hun, 556; Dalrymple *v.* Hillenbrand, 62 N. Y. 5, affi'g 2 Hun, 488, s. c., 5 Supm. Ct. (T. & C.) 57.

[33] See paragraph 121. Neg. Inst. L., § 95.

Though a person's actual good faith may be unquestioned, yet, in a commercial sense, he may be deemed to have acted in bad faith where the circumstances, as known to him, should have led him to make inquiries which would have apprised him of the real situation. Ward *v.* City Trust Co., 192 N. Y. 61, 84 N. E. 585, rev'g 117 App. Div. 130, 102 N. Y. Supp. 50.

Carelessness will not operate to defeat title of purchaser but may be evidence of bad faith. Cunningham *v.* Scott, 90 Hun, 410, 35 N. Y. Supp. 881.

Effect of failure to inquire as to validity of indorsement. Salamanca First Natl. Bank *v.* Weston, 25 App. Div. 414, 49 N. Y. Supp. 1126.

Mere surmise or suspicion not sufficient to put purchaser on inquiry. Hibbs *v.* Brown, 112 App. Div. 214, 224, 98 N. Y. Supp. 353.

[34] Jones *v.* Gordon, H. of L., 37 Law Times, N. S. 480. Per Blackburn, J. Mee *v.* Carlson, 22 S. D. 365, 117 N. W. Rep. 1033, 29 L. R, A. N. S. 351; Taylor *v.* Trussell (Tex. Civ. A.), 139 S. W. Rep. 660.

[35] Catlin *v.* Hansen, 1 Duer, 309; Hart *v.* Potter, 4 Id. 458; Davis *v.* Bartlett, 12 Oh. St. 534.

Having thus restored his *prima facie* case, by proving that he took the note before maturity and for value, plaintiff need not go any further. From the nature of the issue, want of notice cannot be shown by direct evidence, and so

119. "Taking Up."

To enable one already liable upon the paper, or already chargeable with notice of equities, to recover against others, as a *bona fide* holder on taking it up, he should show a transfer of it to him [36] as distinguished from a payment of it by him,[37] but the evidence that the transaction was so intended need not be express, for the intent may be inferred from circumstances.[38] If it be shown that he took it up, as dis-

the burden of evidence—as distinguished from the burden of proof (Leavitt *v.* Thurston, 38 Utah, 351, 113 Pac. Rep. 77)—shifts again to the defendant (Washington, etc., R. Co. *v.* Murray, 211 Fed. 440, 128 C. C. A. 112; Hart *v.* Church, 126 Cal. 471, 58 Pac. Rep. 910, 59 Pac. Rep. 296, 77 Am. St. Rep. 195; Dewey *v.* Merritt, 106 Ill. App. 156; Hayes *v.* Blaker, 138 Mo. App. 24, 119 S. W. Rep. 1004; Lumberton First Natl. Bank *v.* Brown, 160 N. C. 23, 75 S. E. Rep. 1086; Hodge *v.* Smith, 130 Wis. 326, 110 N. W. Rep. 192). "The rule as to the order and burden of proof with respect to the *bona fide* purchaser is that, after the defendant proves or offers proof, tending to establish his special pleas, the plaintiff must then prove that he purchased the note in the ordinary course of trade, and paid value therefor, before its maturity. This done, he need go no further, and need not prove, though he was required to allege, the negative, that he made such purchase and payment without notice. The burden here shifts, and, if it be desired to avoid the effect of such purchase and payment the defendant must prove that before the payment the plaintiff had knowledge of the defenses existing against the note, or notice of such facts or circumstances as were sufficient to put him on inquiry that, if followed up, would have discovered the existence of such defenses." German-Am. Natl. Bank *v.* Lewis, 9 Ala. A. 352, 355, 63 So. Rep. 741. It has been held by a few of the courts that this rule has not been changed by the Negotiable Instruments Law (American Natl. Bank *v.* Lundy, 21 N. D. 167, 129 N. W. Rep. 99; German-American Natl. Bank *v.* Lewis, above), but the contrary seems to receive greater support in recent decisions (Title Guarantee, etc., Co. *v.* Pam, 155 N. Y. Supp. 333; McClory *v.* Towne, 173 Ill. App. 113; Indiana State Bank *v.* Cook, 125 Iowa, 111, 100 N. W. Rep. 72; Hill *v.* Dillon, 176 Mo. App. 192, 161 S. W. Rep. 881; Shellenberger *v.* Nourse, 20 Ida. 323, 118 Pac. Rep. 508).

[36] Freedman's Savings, &c., Co. *v.* Dodge, 93 U. S. (3 Otto) 382, and see pp. 6–11 of this vol.

[37] Lancey *v.* Clark, 64 N. Y. 209.

[38] Same cases.

tinguished from paying it, evidence of his knowledge of an original want of consideration, etc., is not admissible.[39]

XI. DEFENDANT'S EVIDENCE THAT PLAINTIFF IS NOT A HOLDER IN GOOD FAITH

120. Bad Faith.

To show bad faith, evidence of guilty knowledge, or of wilful ignorance is essential.[40] For this purpose circumstances which ought to have put a prudent man on inquiry are admissible in evidence; and fraud established, whether by direct or circumstantial evidence, is sufficient;[41] but, on the whole evidence, notice or fraud must clearly appear.[42]

A very trivial price is a circumstance relevant on the question of bad faith.[43]

[39] Benedict *v.* De Groot, 1 Abb. Ct. App. Dec. 125. Compare Burr *v.* Smith, 21 Barb. 262; Hooper *v.* De Long, 37 Super. Ct. (J. & S.) 127.

[40] Hotchkiss *v.* Natl. Bank, 21 Wall. 354; Collins *v.* Gilbert, 94 U. S. (4 Otto) 753; Commissioners of Marion County *v.* Clark, Id. 285, 1 Dan. Neg. Inst., § 775.

Unless the holder of a check has taken it in good faith he cannot avail himself of the rule that the validity of a negotiable instrument cannot be questioned. An answer which alleges that the plaintiff had full knowledge that there was no consideration for a check at the time it was transferred to him cannot be stricken out as frivolous. Weiss *v.* Rieser, 62 Misc. 292, 114 N. Y. Supp. 983.

[41] Murray *v.* Lardner, 2 Wall. 121.

If the circumstances connected with the transaction are such as would arouse the suspicion of an ordinarily prudent man and it appears that plaintiff failed to make the investigation suggested by the facts, he cannot be said to be a purchaser in good faith. Mee *v.* Carlson, 22 S. D. 365, 117 N. W. Rep. 1033, 29 L. R. A. N. S. 351.

[42] Morehead *v.* Gillmore, 77 Penn. St. 118, s. c., 18 Am. Rep. 435; Hamilton *v.* Vought, 34 N. J. 18; Phelan *v.* Moss, 67 Pa. St. 59, s. c., 5 Am. Rep. 402. *Contra*, 43 Vt. 125, s. c., 5 Am. Rep. 265; Kavannagh *v.* Bank of America, 239 Ill. 404, 88 N. E. Rep. 171; Bradwell *v.* Pryor, 221 Ill. 602, 605, 77 N. E. Rep. 1115; Johnson County Savings Bank *v.* Koch, 38 Pa. Super. 553.

[43] 1 Dan. Neg. Inst., § 779. But see Scott *v.* Johnson, 5 Bosw. 213; But see Lipscomb *v.* Talbott, 243 Mo. 1, 147 S. W. Rep. 798.

121. Notice.

Notice, or other facts equivalent, must be alleged in order to be admissible. A general allegation of bad faith is not enough.[44]

Express notice given to the transferee prior to the transfer, —as, for instance, notice that certain securities had been stolen,—is *prima facie*, but not conclusive, evidence of bad faith, and may be rebutted by proof that the notice was lost, or its existence or contents forgotten at the time of transfer.[45] Advertisement of loss is not competent unless brought home to the transferee; [46] but evidence from which it is probable that the advertisement was seen,—for instance, that he took or habitually read the paper,—is enough to go to the jury.[47]

Marks on the instrument itself, of a character to apprise one to whom it is offered, of the alleged defect, are sufficient to establish notice.[48] But the fact that the terms of the instrument indicate a special consideration, such as a warranty, for instance, do not charge the transferee with notice of a

[44] 2 Pars. on Prom. N. & B. 274; Ball *v.* Consolidated, &c. Co., 32 N. J. L. 102; Parker *v.* Raynal, 1 La. Ann. 209.

[45] Lord *v.* Wilkinson, 56 Barb. 593.

[46] 2 Pars. on Prom. N. & B. 258.

[47] Id. Compare Kellogg *v.* French, 15 Gray, 354.

[48] Goodman *v.* Simmonds, 20 How. (U. S.) 342, 365; Iron Mountain Bank *v.* Murdock, 62 Mo. 70; Collins *v.* Gilbert, 94 U. S. (4 Otto) 753. As, for instance, where printed words were erased but still visible. Angle *v.* Northwestern Mutual Life Insurance Co., 92 U. S. (2 Otto) 330, 341. Absence from the bond of a scrip certificate which had been pinned to it and was referred to in it—*Held* competent but not sufficient evidence to put the purchaser on inquiry. Hotchkiss *v.* National Banks, 21 Wall. 358, and see 47 N. Y. 143.

An indorsement "without recourse" is a circumstance calculated to arouse suspicion of fraud in the mind of a prudent person. Mee *v.* Carlson, 22 S. D. 365, 117 N. W. Rep. 1033, 29 L. R. A. N. S. 351.

A check dated in Portchester, New York, June 1, 1900, and bought by a Kansas bank June 8, 1900, in good faith and for value is not overdue to such an extent as to put the bank on inquiry that anything was wrong. Citizens' State Bank *v.* Cowles, 89 App. Div. 281, 86 N. Y. Supp. 38.

breach.[49] The duty of inquiry raised by a mistake of date apparent on the face of the note, is satisfied by inquiry as to the fact of date; and does not charge with knowledge of a disconnected matter, such as effect of authority in an agent.[50]

122. Negligence.

Proof that the holder was in such a situation as that he might have had notice, had he been diligent in making inquiries which the situation offered and invited him to make, is not enough.[51] Hence suspicious circumstances,—such as that the seller, alleged to have diverted the paper, was embarrassed in circumstances and did business with plaintiff as

[49] Mabie *v.* Johnson, 8 Hun, 309.

[50] Miller *v.* Crayton, 3 Supm. Ct. (T. & C.) 360.

The purchaser of a check which shows upon its face that the date has been changed takes with notice of the infirmity. Elias *v.* Whitney, 50 Misc. 326, 98 N. Y. Supp. 667.

[51] Lake *v.* Reed, 29 Iowa, 258, s. c., 4 Am. Rep. 209; Collins *v.* Gilbert, 94 U. S. (4 Otto) 753.

In Schroeder *v.* Seittz, 68 Mo. App. 233, the trial court charged the jury that if they found from the evidence that plaintiff received the check "in the usual course of business, for value *without actual notice of any facts impeaching its validity*, then the plaintiff is entitled to recover in this action and you will find a verdict in his favor." Objection was made to this change because the court failed to define the difference between actual, presumptive and constructive notice. The appellate court sustained the instruction in the following language: "It is the well settled law of this State that such notice as is sufficient to put a prudent man upon inquiry and charge him with knowledge of such facts as might have been ascertained by ordinary diligence, does not apply to negotiable paper. Where such paper is received for value and in the usual course of trade, the rights of the holder can only be defeated by evidence of actual notice on his part of facts which impeach the validity of the instrument." In a Texas case, however, the rule was thus stated: "It is of course true that one, who in good faith for a valuable consideration becomes the owner of a negotiable instrument before its maturity, may assume that the rights of the respective parties to such paper are precisely what they purport to be, but if this is the right of such a person, it is also his limitation, for he cannot assume that the title of his transferror is better than it purports to be." Downing *v.* Neeley, 129 S. W. Rep. (Tex. Civ. App.) 1192.

agent; [52] or that he offered it for a less sum than at the legal rate of discount; [53] or that the paper was nearly due; [54] are not alone sufficient evidence of bad faith. Mere negligence in taking the paper, however gross, is not sufficient as matter of law.[55] But while gross negligence is not itself bad faith, it may be competent evidence for the jury.[56]

XII. MUNICIPAL AND OTHER COUPON BONDS

123. Title.

Possession of bonds drawn or indorsed so as to be payable to bearer, is *prima facie* evidence of title.[57] The identity of the bonds produced with those alleged in the complaint, may be assumed if no objection is made at the trial.[58] In an action on coupons, the possession of the coupons is *prima facie* evidence that the holder of them is the holder of the bonds from which they were cut, without producing the bonds themselves.[59]

124. Evidence of Regularity and Power.

A municipal corporation is not estopped from asserting the invalidity of its bonds by the conduct of its officers or

[52] Farmers' & Citizens' Natl. Bank *v.* Noxon, 45 N. Y. 762.

[53] Mechanics' Bank of Williamsburgh *v.* Foster, 44 Barb. 87, s. c., 19 Abb. Pr. 47, 29 How. Pr. 408.

[54] Marine Bank of New York *v.* Clements, 31 N. Y. 33.

[55] Chapman *v.* Rose, 56 N. Y. 137, rev'g 44 How. Pr. 364; Brown *v.* Spofford, 95 U. S. (5 Otto) 474, 478.

"Where a person takes an assignment of a promissory note before due in good faith, for a valuable consideration, even though he may be guilty of gross negligence, he will hold it by a title valid against the world, it will not in his hands be subject to a defense of failure of consideration." First Natl. Bank *v.* Cox, 140 Ill. App. 98.

[56] Collins *v.* Gilbert (above); Jones *v.* Gordon, H. of L., 37 Law Times, N. S. 480, 2 Pars. on Prom. N. & B. 279.

[57] Martin *v.* Somerville Water Power Co., 27 How. Pr. 161, 169.

[58] Wickes *v.* Adirondack Co., 4 Supm. Ct. (T. & C.) 250. Compare Chambers County *v.* Clews, 21 Wall. 317.

[59] Aurora City *v.* West, 7 Wall. 82; Deming *v.* Inhabitants of Houlton, 64 Me. 254, s. c., 18 Am. Rep. 253, and see 6 Moak's Eng. 120, note.

agents, or acts of acquiescence on the part of the inhabitants.[60] Want of power in the officer by whom the act was performed cannot be supplied by estoppel drawn from the conduct of the officer, nor by ratification by him; and want of power in the corporation cannot be supplied by estoppel against it or ratification by it. But if it had power, want of its delegation to the officer may be supplied by estoppel or by ratification, drawn from its own conduct or silence.[61]

[60] Weismer *v.* Village of Douglass, 64 N. Y. 91, 105; 21 Am. Rep. 586; Oxford Bd. of Com'rs *v.* Union Bank, 96 Fed. 293, 37 C. C. A. 493; Washington Co. *v.* David, 2 Nebr. (Unof.) 649, 89 N. W. Rep. 737.

"Whoever deals in municipal bonds must be presumed to know what powers such corporations have, under the enabling laws of the State, to issue the securities in which they are making investments." Middleport *v.* Ætna L. Ins. Co., 82 Ill. 562.

Where a suit, between a holder of municipal bonds and the municipality in which the validity of the bonds is put in issue, is compromised and the interest rate payable thereon reduced and such reduced interest paid by the municipality for years, such municipality is estopped to deny the validity of the bonds. Colburn *v.* McDonald, 72 Nebr. 431, 100 N. W. Rep. 961.

The holder of municipal bonds is charged with constructive notice of the statutes and if such bonds are invalid because not authorized by the law, such invalidity is a defense against any holder whether he has or has not had actual notice thereof. Wetumpka *v.* Wetumpka Wharf Co., 63 Ala. 611.

"It must be admitted, as well-settled law, that where there is a total want of power to subscribe for stock and to issue bonds in payment, a municipality cannot estop itself from raising such a defense by admissions, or by issuing securities negotiable in form, nor even by receiving and enjoying the proceeds of such bonds."

"But where the municipality is empowered to subscribe with or without conditions as it may think fit, and where the conditions are such as it chooses to impose, there seems to be no good reason why it may not be competent for such municipality to waive such self-imposed conditions, provided of course, such waiver is by the municipality acting as the principal, and not by mere agents or official persons." Graves *v.* Saline Co., 161 U. S. 359, 16 S. Ct. 526, 40 Law Ed. 732.

[61] 5 Abb. N. Cas. 49, note, and cases cited.

But see Shoemaker *v.* Goshen Tp., 14 Ohio St. 569 where it is held that where a municipality has power to issue certain bonds and its duly constituted officers

In favor of a *bona fide* purchaser for value and before maturity, or an assignee of such a purchaser, the recital in municipal bonds, by officers empowered to determine the question, that the precedent conditions prescribed by law have been performed, is conclusive.[62] The recital is itself a decision of the fact by the appointed tribunal.[63] And the certificate of the proper officer that the bond has been duly issued and the signatures are genuine, and that the same has been duly registered in his office according to law, cannot be contradicted by evidence that there was actually no registration in his office.[64] But the validity or existence of the

purport to do so, irregularities or defects in the proceedings relating to such issue may be waived by the subsequent acquiescence of the municipality and the municipality will be estopped to assert such irregularity.

[62] Commissioners, &c. *v.* Bolles, 94 U. S. 108, and cases cited; and notwithstanding error in the recital. Commissioners, &c. *v.* January, Id. 206. Thus it is conclusive as to the validity and genuineness of the signatures of the requisite number of taxpayers, (Town of Venice *v.* Murdock, 92 U. S. [2 Otto] 494); as to the giving of regular notice of the popular election, which was a condition precedent, (Humboldt Township *v.* Long, Id. 642); and that the value of the taxable property of the township was in amount sufficient (Marcy *v.* Township of Oswego, Id. 637).

The recitals in municipal bonds that conditions precedent have been complied with constitute an estoppel *in pais* upon the municipality. Belo *v.* Forsythe Co. Comrs., 76 N. C. 489.

But where the bonds contain no recitals either as to the authority of the officers issuing them or as to the performance of condition precedent to their issuance the municipality may plead the truth of those matters. Green Co. *v.* Shortell, 116 Ky. 108, 75 S. W. Rep. 251.

[63] Town of Coloma *v.* Eaves, 92 U. S. (2 Otto) 484; and see Van Hostrup *v.* Madison City, 1 Wall. 291.

[64] Township of Rock Creek *v.* Strong, 96 U. S. (6 Otto) 271, 278.

Where bonds were issued by a *de facto* municipal corporation in conformity with the law authorizing *de jure* corporations to issue bonds, and such *de facto* corporation is later dissolved and a *de jure* corporation organized by the same territory, the assumption of the bonds issued by the *de facto* corporation renders them valid obligations of the *de jure* corporation. Bradford *v.* Westbrook, 39 Tex. Civ. A. 638, 88 S. W. Rep. 382.

alleged statute may be impeached against any holder.[65] If it appear on the face of the bonds that they are not in conformity with the act, the holder cannot prove ignorance[66] of the terms of the act.

125. Notice of Defect, &c.

The nonpayment of a single coupon overdue since the commencement of the month in which the bond was purchased, though competent on the question whether plaintiff is a *bona fide* holder, yet, in connection with the fact that previous coupons had been paid, is entirely insufficient to charge him with notice or duty of inquiry.[67] The number of a coupon bond, being essential to identity, may be regarded as material, within the rule as to alterations.[68]

XIII. BANK CHECKS

126. Stamp.

The provision of the internal revenue law[69] excluding checks, drafts and orders, or copies thereof, from admission in evidence unless duly stamped, applies only to United States courts, not to the State courts.[70] Omission to stamp,

[65] Town of South Ottawa *v.* Perkins, 94 U. S. (4 Otto) 260. As to the mode of doing this, see 3 Abb. N. Cas. 372, note.

One who purchases municipal bonds is chargeable with knowledge of the statute authorizing their issuance, and he must see to it that the statute has been complied with before he can, with absolute safety, take the bonds. Citizens' Sav. Bank *v.* Greenburgh, 173 N. Y. 215, 65 N. E. Rep. 978.

Where the statute authorizing the issuance of municipal bonds provides that they shall not be valid and binding until certain named conditions have been complied with, non-compliance with those conditions is a good defense even in the hands of a *bona fide* purchaser. Eagle *v.* Kohn, 84 Ill. 292.

[66] Horton *v.* Town of Thompson, 71 N. Y. 514, rev'g 7 Hun, 452.

[67] Cromwell *v.* County of Sac, 96 U. S. (6 Otto) 51, 57.

[68] Force *v.* City of Elizabeth, 28 N. J. Eq. 403, and cases cited.

[69] U. S. Rev. St., § 3421.

[70] People *ex rel.* Barbour *v.* Gates, 43 N. Y. 40, rev'g 57 Barb. 291, s. c., 39 How. Pr. 74. *Contra*, Chartiers & Robinson Turnpike Co. *v.* McNamara, 72 Penn. St. 278, s. c., 13 Am. Rep. 673; Thomasson *v.* Wood, 42 Cal. 416.

to defeat the paper, must be shown to have been done with intent to defraud the revenue.[71] It is not enough to show that it was done intentionally for another purpose.[72] The burden of proving a lost instrument to have been unstamped is on the party objecting to its production. There being no evidence on either side, it will be presumed to have been stamped. When it has been shown that at any particular time it was unstamped, the burden is shifted, and the party relying upon it must prove that it was duly stamped.[73]

127. Title.

Production is the same evidence of title as in the case of other negotiable paper.[74] The payee may recover in his own name, although another person may be interested in the proceeds.[75] Evidence of usage is competent to show that a bank which in good faith receives a check from a depositor and passes it to his credit, and on the same day pays, and charges against such deposit, checks drawn by him, is a *bona fide* holder of the deposited check for value.[76]

[71] Baker *v.* Baker, 6 Lans. 509; Rowe *v.* Bowman, 183 Mass. 488, 67 N. E. Rep. 636; Hooper *v.* Whitaker, 130 Ala. 324, 30 So. Rep. 355.

[72] Redlich *v.* Doll, 54 N. Y. 234. Rules applicable to affixing of stamps by collector, to cure omission. 14 Wall. 361.

[73] Marine Investment Co. *v.* Haviside, L. R., 5 H. of L. 624, s. c., 4 Moak's Eng. 17.

[74] Townsend *v.* Billinge, 1 Hilt. 353; Cruger *v.* Armstrong, 5 Johns. Cas. 7.

A check is an assignable instrument and suit may be brought thereon by any holder to whom it has been assigned in due course of business. Kemp *v.* Northern Trust Co., 108 Ill. App. 242.

[75] Fish *v.* Jacobsohn, 2 Abb. Ct. App. Dec. 132.

The indorsee of a check has title and the right to sue thereon, although another may be beneficially interested therein. Matthews *v.* Moran, 19 Misc. Rep. 24, 42 N. Y. Supp. 968.

Where the indorser of a check has paid the amount thereof to the indorsee, the former has the right to erase the indorsement, if the check is in his possession, and thereby vest himself with the legal title. Harpending *v.* Daniel, 4 Ky. Law Rep. 300, 80 Ky. 449.

[76] Market Bank *v.* Hartshorne, 3 Abb. Ct. App. Dec. 173, s. c., 3 Keyes, 137. Compare National Gold Bank & Trust Co. *v.* Mc-

A check payable to a fictitious or impersonal payee, is admissible under an allegation of a check payable to bearer.[77]

128. Oral Evidence to Vary.

In accordance with rules already stated,[78] it is not competent to vary the terms of the check by showing a contemporaneous oral agreement that payment was not to be demanded at maturity, but that time was to be given at the election of the drawer,[79] or was to be made in uncurrent funds.[80] But oral evidence that it was given as security for a proposed loan which was not made, and that it had therefore no consideration, is admissible.[81]

129. Laches.

Unreasonable delay in the presentment of a check, if relied on as a defense, should be averred in the answer.[82] The burden of proof is upon the payee to show that the drawer was not injured by the former's failure to present the check for payment within a reasonable time.[83] The better opinion is that the court will not presume laches against the plaintiff without some evidence indicating it;[84] but if delay and injury thereby is shown, the burden is on plaintiff to prove an excuse for the delay.[85] For this purpose evidence of usage of

Donald, 51 Cal. 64, s. c., 21 Am. Rep. 697.

[77] Mechanics' Bank *v.* Straiton, 3 Abb. Ct. App. Dec. 269, s. c., 36 How. Pr. 190.

[78] Paragraphs 36, &c.

[79] Hill *v.* Gaw, 4 Barr. (Pa.) 493.

[80] Pack *v.* Thomas, 21 Miss. (13 Smedes and M.) 11.

[81] Bernhard *v.* Brunner, 4 Bosw. 528.

[82] See Harbeck *v.* Craft, 4 Duer, 122.

[83] Hamlin *v.* Simpson, 105 Iowa, 125, 74 N. W. Rep. 906.

Where delay in presenting a check causes no loss to the drawer, such delay is not a defense against a recovery by a *bona fide* holder. Cox *v.* Citizens' State Bank, 73 Kan. 789, 85 Pac. Rep. 762.

[84] Smith *v.* Janes, 20 Wend. 192.

A check, while payable instantly on demand, does not have to be presented on the same day it is given even where the party receiving it and the drawee are in the same town. Cox *v.* Citizens' State Bank, 73 Kan. 789, 85 Pac. Rep. 762.

[85] Hazleton *v.* Colburn, 1 Robt. 345, s. c., 2 Abb. Pr. N. S. 199.

A check drawn on a bank in Perth Amboy, N. J., was received

the place is competent; [86] but it must be shown; it cannot be presumed to exist without evidence.[87] Evidence of willingness of bank to pay a check of the drawer, notwithstanding the fact that he has no funds in the bank, is inadmissible in an action on the check, as the payee is relieved from making presentation and demand if the drawer has no deposit in the bank.[88]

130. Action Against Drawer.

A simple check which has not been presented for payment, is not evidence of indebtedness from the drawer to the payee, before demand. But after dishonor and notice the check imports a debt from the drawer to the payee, and it may be sued on without proving the consideration, value received being presumed.[89]

Plaintiff may show that the check, though drawn in the name of one partner only was so drawn pursuant to usage of the defendant's firm to keep their bank account in that name, and that he advanced the consideration upon credit of the firm, and not upon the individual security of the partner in

by the payer by mail July 10th. On the following day he deposited the check with a New York bank which did not present it for payment at the Perth Amboy bank until July 14th, on which day that bank became insolvent. The check was dishonored.—*Held*, that in the absence of evidence excusing that delay on the part of the New York bank, the payee's agents, the loss resulting from the failure of the Perth Amboy bank should fall upon the payee. Williams *v.* Brown, 53 N. Y. App. Div. 486, 65 N. Y. Supp. 1049. See also Dehoust *v.* Lewis, 128 N. Y. App. Div. 131, 112 N. Y. Supp. 559.

Delay in the presentation of a check for payment discharges the drawer only to the extent of the loss caused by it. Neg. Inst. L., § 322.

The only way in which the drawer can be injured by the delay is where the bank becomes insolvent. Moskowitz *v.* Deutsch, 46 Misc. 603, 92 N. Y. Supp. 721.

[86] Turner *v.* Bank of Fox Lake, 4 Abb. Ct. App. Dec. 434, affi'g 23 How. Pr. 399.

[87] Smith *v.* Miller, 43 N. Y. 171, rev'g 6 Robt. 157, 413, s. c., 6 Abb. Pr. N. S. 234.

[88] Culver *v.* Marks, 122 Ind. 554, 17 Am. St. Rep. 377, 23 N. E. Rep. 1086.

[89] 2 Dan. Neg. Inst., § 560.

whose name the check was drawn.[90] A check is presumed to be drawn against a deposit;[91] and plaintiff must aver and prove either demand, nonpayment, and notice to the drawer, or such facts—for example, want of funds at the bank, or stopping payment—as dispense with demand and notice.[92]

A check with "memorandum" or "mem." written on its face, is, according to the usage of merchants, a mere due bill,[93] and demand and notice are unnecessary.[94]

131. Action Against the Bank.

The holder of a bank check, whether a private person or a public officer, suing the bank thereon, must prove, either that the bank accepted or certified it, or that they charged it against the drawer.[95] Against a *bona fide* holder, evidence of violation of instructions,[96] or want of funds,[97] or the holder's delay in presenting for payment,[98] is not available.

The authority of a cashier to certify a check drawn by a third person[99] may be inferred by the jury from evidence

[90] Crocker *v.* Colwell, 46 N. Y. 212.

[91] White *v.* Ambler, 8 N. Y. 170.

[92] Shultz *v.* Depuy, 3 Abb. (N. Y.) Pr. 252. But as to pleading, see Riqua *v.* Guggenheim, 3 Lans. 51.

[93] U. S. *v.* Isham, 17 Wall. 502.

[94] Turnbull *v.* Osborne, 12 Abb. Pr. N. S. 200.

[95] Bank of the Republic *v.* Millard, 10 Wall. 152, and cases cited. And see Attorney-General *v.* Continental Life Ins. Co., 71 N. Y. 325, rev'g 10 Hun, 604.

[96] Farmers' & Mechanics' Bank *v.* Butchers' & Drovers' Bank, 4 Duer, 219, affi'd in 16 N. Y. 125, s. c., Id. 623, 28 Id. 425; Merchants' Bank *v.* State Bank (below).

[97] Phœnix Bank *v.* Bank of America, 1 N. Y. Leg. Obs. 26; Meads *v.* Merchants' Bank of Albany, 25 N. Y. 143.

The holder of a check on a bank may sue the bank for non-payment of the check if at the time of presentation thereof the drawer has funds in the bank subject to check. Turner *v.* Hot Springs Natl. Bank, 18 S. D. 498, 101 N. W. 348, 112 Am. St. Rep. 804, 5 Ann. Cas. 937.

[98] Willets *v.* Phœnix Bank, 2 Duer, 121, s. c., 11 N. Y. Leg. Obs. 211, 1 Lib. L. Mag. 649; Farmers' & Mechanics' Bank *v.* Butchers' & Drovers' Bank, 4 Duer, 219, 16 N. Y. 125, 14 Id. 623, 28 Id. 425.

[99] Claflin *v.* Farmers' & Citizens' Bank, 25 N. Y. 293, s. c., 24 How. Pr. 1, rev'g 36 Barb. 540;

that with the knowledge and acquiescence of the directors he had frequently pledged the credit of the bank, in other similar ways; for example, by certificates of deposit, memoranda, etc., and from evidence of usage to the same effect in other banks of the same place.[1]

XIV. STOCK AND PREMIUM NOTES

132. Stock Notes.

Although the note sued on is in form for premiums, plaintiff may allege and prove that it was in fact given and taken as a capital-stock note, and used as such in organizing the company, so as to recover its entire amount, without showing that it has been assessed.[2]

133. Premium Notes.

In the absence of any denial, in pleading, an admission by the insured, in his premium note, of the policy, its number and date, is *prima facie* evidence of the issuing and existence of the policy, and of its contents.[3] From the fact that the note was given to a corporation whose business was insurance, as part of an insurance premium then payable, the insur-

Pope *v.* Bank of Albion, 59 Barb. 226.

Certificates of deposit signed by the cashier of a bank must, in the absence of proof to the contrary, be taken to be the act of the bank. Abbott *v.* Jack, 136 Cal. 510, 69 Pac. Rep. 257.

[1] Merchants' Bank *v.* State Bank, 10 Wall. 604.

The authority of a cashier to execute an agreement whereby the bank borrowed money is established by evidence that the transaction had the implied approval of one of the officers of the bank, by testimony of the cashier himself that one of the officers approved of the transaction, and by testimony of another officer that the acts of the cashier in borrowing money in similar ways had for a long period been invariably acquiesced in. Whitney *v.* Foster, 117 Mich. 643, 76 N. W. Rep. 114.

[2] Sands *v.* St. John, 36 Barb. 628, s. c., 23 How. Pr. 140; s. p., Sand *v.* Son, 56 N. Y. 662, rev'g 1 Supm. Ct. (T. & C.) adden. 13.

[3] Way *v.* Billings, 2 Mich. (Gibbs) 397.

ance may be presumed to have been within the corporate powers.[4]

134. Losses and Assessments.

In an action on a premium note for losses assessable, plaintiff, whether the corporation [5] or a receiver,[6] must give some evidence that losses, or other valid liabilities, which rendered an assessment proper,[7] actually occurred [8] during defendant's membership,[9] and that pursuant to the statute,[10] and upon inquiry had,[11] an assessment was actually [12] and legally[13] made. The evidence of losses should be such as would avail against the corporation,—for instance, a report adjudicating its insolvency; [14] or proof of judgments recovered against it, or the presentment and allowance of claims; [15] or the record of losses kept by the company.[16] Evidence that there was ground for an assessment cannot supply the omission to assess,[17] nor can the existence of an assessment raise a sufficient presumption of liabilities.[18]

135. Defenses.

If defendant relies on want or failure of consideration, such as the fact that the company has not earned premiums

[4] Mutual Benefit Life Ins. Co. *v.* Davis, 12 N. Y. (2 Kern.) 569.

[5] Atlantic Mut. Fire Ins. Co. *v.* Fitzpatrick, 2 Gray, 279, 281.

[6] Jackson *v.* Roberts, 31 N. Y. 304.

[7] Jackson *v.* Roberts, 31 N. Y. 304; Devendorf *v.* Beasley, 22 Barb. 656; American Ins. Co. *v.* Schmidt, 19 Iowa, 502.

[8] Pacific Mut. Ins. Co. *v.* Guse, 49 Mo. 329, s. c., 8 Am. Rep. 132.

[9] Manlove *v.* Bender, 39 Ind. 371, s. c., 13 Am. Rep. 280.

[10] Thomas *v.* Whallon, 31 Barb. 172.

[11] Sands *v.* Graves, 58 N. Y. 94, rev'g 1 Supm. Ct. (T. & C.) adden. 13.

[12] Id.

[13] Augusta Mut. Fire Ins. Co. *v.* French, 39 Me. 522, 525.

[14] Sands *v.* Shoemaker, 4 Abb. Ct. App. Dec. 149.

[15] Sands *v.* Kimbark, 27 N. Y. 147, affi'g 39 Barb. 108. See also Sands *v.* Hill, 42 Barb. 651.

[16] People's Mut. Ins. Co. *v.* Allen, 10 Gray, 297.

[17] Sands *v.* Graves, 58 N. Y. 94, rev'g 1 Supm. Ct. (T. & C.) adden. 13.

[18] Pacific Mut. Ins. Co. *v.* Guse, 49 Mo. 329, s. c., 8 Am. Rep. 132.

from him to the amount of the note, the burden is on him to prove it.[19] So, if he relies on the insolvency of the company, at the time of issuing the policy, known to its officers and to the plaintiff,[20] the burden is on him to prove such knowledge.

The form of a note is not conclusive, but it may be shown to have been given as a stock or capital note, and thus let in the statute of limitations.[21] Nor is an apparent assessment conclusive.[22]

Compare Sands *v.* Hill, 42 Barb. 651. As to demand, etc., see Sands *v.* Shoemaker, 4 Abb. Ct. App. Dec. 149; and Sands *v.* Graves (above), and cases cited; Sands *v.* Lilienthal, 46 N. Y. 541.

[19] Nelson *v.* Wellington, 5 Bosw. 178.

[20] Clark *v.* Metcalf, 54 N. Y. 683.

[21] Sand *v.* Son, 56 N. Y. 662, rev'g 1 Supm. Ct. (T. & C.) adden. 13.

[22] People's Mut. Fire Ins. Co. *v.* Westcott, 14 Gray, 440; and see Sands *v.* Sweet, 44 Barb. 108.

CHAPTER XII

ACTIONS ON NON-NEGOTIABLE PROMISSORY NOTES

Peculiar Rules.

Most of the rules stated in the first division of the last chapter apply; but in qualification of them it should be observed that in case of non-negotiable paper, possession by one other than the payee is not, alone, evidence of title; [23] nor is possession necessary, to enable to recover.[24] Con-

[23] Barrick *v.* Austin, 21 Barb. 241; Robinson *v.* Texas Pine Land Assoc. (Tex. Civ. App.), 40 S. W. Rep. 620 (due bill). *Contra*, Johnston County Sav. Bank *v.* Scroggin Drug Co., 152 N. C. 142, 67 S. E. Rep. 253, 136 Am. St. Rep. 821, 50 L. R. A. N. S. 581. See also Bartlett Est. Co. *v.* Fraser, 11 Cal. App. 373, 105 Pac. Rep. 130.

A third person's possession of a non-negotiable note, without written assignment, is no evidence of ownership. Ball's Heirs *v.* Hill, 38 Tex. 237. See also Richardson *v.* Drug Co., 92 Mo. App. 515.

Where it was shown that due bills marked "Not transferable" were usually issued to the defendant's employees only, it was held that the mere possession of such due bills by one not an employee did not raise the presumption of ownership therein. Robinson *v.* Texas Pine Land Assoc., 40 S. W. Rep. (Tex. Civ. App.) 620.

Where the commercial qualities of notes were found to have been destroyed because of a stipulation for the extension of the time of payment thereof, it was held that the possession of these notes indorsed in blank was not *prima facie* evidence of ownership. Mitchell *v.* St. Mary, 148 Ind. 111, 47 N. E. Rep. 224.

Likewise, it has been held that the possession of a note not made payable to bearer or indorsed in blank by a third party was not *prima facie* evidence of ownership; and this rule was held to obtain where such a note was found among the papers of a deceased person. Hair *v.* Edwards, 104 Mo. App. 213, 77 S. W. Rep. 1089.

However, there is a line of cases holding that the possession of an unindorsed note is *prima facie* evidence of ownership in the holder. Such a case is Martin *v.* Martin, 174 Ill. 371, 51 N. E. Rep. 691, 66 Am. St. Rep. 290.

[24] Rosc. N. P. 351. Proof of loss is enough without proof of destruction. 2 Pars. on Pr. N. & B. 290.

sideration must be alleged and proved.[25] The words "for value received" in pleading are a sufficient allegation;[26] and in the instrument are *prima facie* evidence of consideration.[27] If a consideration is indicated, but its actual payment is not, the fact that it had passed should be alleged and proved.[28]

Oral evidence is not competent to show that a non-negotiable note was intended to have a negotiable quality,[29] such

[25] Spear *v.* Downing, 34 Barb. 522, s. c., 12 Abb. Pr. 437, 22 How. Pr. 30.

A promissory note payable only to the payee and not to order or bearer, being non-negotiable, does not import consideration. Kinsella *v.* Lockwood, 79 Misc. 619, 140 N. Y. Supp. 513.

In the absence of statutory provision, there is no presumption of consideration in the case of non-negotiable notes. Accordingly the burden is on the plaintiff to plead and prove the facts showing the consideration. St. Lawrence County Natl. Bank *v.* Watkins, 76 Misc. (N. Y.) 633, 135 N. Y. Supp. 461.

Where a defendant who was sued upon his non-negotiable note alleged want of consideration, it was held that evidence that a part only of the consideration was illegal was inadmissible. Barger *v.* Farnham, 130 Mich. 487, 90 N. W. Rep. 281.

No presumption of consideration exists. Deyo *v.* Thompson, 53 N. Y. App. Div. 9, 65 N. Y. Supp. 459.

[26] Id.

"It seems to us that the term 'for a valuable consideration' is so commonly used and has such a well-known meaning in commercial and legal usage that it is illogical to say that it expresses a conclusion of law rather than a statement of fact or conclusion of fact." St. Lawrence County Natl. Bank *v.* Watkins, 153 N. Y. App. Div. 551, 138 N. Y. Supp. 116. And in Owens *v.* Blackburn, 161 N. Y. App. Div. 827, 146 N. Y. Supp. 966, the term "value received" in the body of a non-negotiable note which was alleged *in hæc verba* was held to be an admission that the instrument was issued for a sufficient consideration.

[27] Jerome *v.* Whitney, 7 Johns. 321.

The recital "value received," in the body of the note, constitutes an admission that the instrument was issued for a sufficient consideration. Owens *v.* Blackburn, 161 N. Y. App. Div. 827, 146 N. Y. Supp. 966.

[28] Spear *v.* Downing (above); Considerant *v.* Brisbane, 14 How. Pr. 487; Evans *v.* Williams, 60 Barb. 346.

[29] Ballard Pavement Co. *v.* Mandel, 2 MacArthur, 351, 359.

The mere introduction in evidence of a note found to be non-negotiable, with proof of the payee's indorsement thereon, does not

as that of entitling an indorser to notice,[30] but he is liable as guarantor or joint maker, according to the intention of the contract, which may be shown by oral evidence; [31] and notice need not be proved though alleged.[32]

make out a case against him as in case of an indorser of a negotiable instrument. Davis *v.* McColl, 179 Mo. App. 198, 166 S. W. Rep. 1113.

[30] Richards *v.* Waring, 4 Abb. Ct. App. Dec. 47; Cromwell *v.* Hewitt, 40 N. Y. 491, 16 Alb. L. J. 47, and cases cited.

As to notes not negotiable in form it has been regarded since the decision in Richards *v.* Waring, 1 Keyes, 576, and Cromwell *v.* Hewitt, 40 N. Y. 491, as authoritatively settled that the payee or holder may charge the party who puts his name on the back of the note as either maker or guarantor, according to the actual intention.

The effect of these decisions is to hold him who writes his name upon the back of a non-negotiable note to a greater, or at least different, liability than where he is an indorser on a note negotiable in form. N. Y. Security and Trust Co. *v.* Storm, 81 Hun, 33, 36, 30 N. Y. Supp. 605.

Where a note is non-negotiable under the laws of another state where it was made payable, the indorsers are not entitled to notice of non-payment. Barger *v.* Farnham, 130 Mich. 487, 90 N. W. Rep. 281.

[31] Id., and see chapter XXI, paragraphs 96–100 of this vol. See Baltimore Third Natl. Bank *v.* Lange, 51 Md. 138, 34 Am. Rep. 304.

The payee of a non-negotiable promissory note does not become liable as an indorser by merely writing his name on the back thereof, but proof is admissible to show the real agreement under which the signature was placed on the note. Jossey *v.* Rushin, 109 Ga. 319. Cited in Saussy *v.* Weeks, 122 Ga. 70, 49 S. E. Rep. 809.

[32] Billingham *v.* Bryan, 10 Iowa, 317.

"The certificates of deposit being non-negotiable, the indorsers thereof are liable to the holders without demand upon the maker and notice of nonpayment." Park *v.* Best, 157 N. W. Rep. (Iowa) 233.

CHAPTER XXIII

ACTIONS ON ACCOUNTS STATED

1. Grounds of action.
2. Pleading.
3. Character of the parties.
4. The account and its statement.
5. The promise.
6. Testimony of witness: production of account.
7. *Res gestæ.*
8. Express assent.
9. Tacit assent to account stated.
10. Defendant's evidence to disprove assent.
11. Incapacity.
12. Impeaching the account itself.
13. Consideration.
14. Omissions and errors.
15. Offsets.
16. Limitations.

1. Grounds of Action.

An account stated is an agreement between persons who have had previous transactions, fixing the amount due in respect of such transactions, and promising payment. As distinguished from a mere admission or acknowledgment, it is a new cause of action,[33] and hence, if appearing to have been

[33] An unsigned account is not a new cause of action for the purpose of enabling plaintiff to recover in an action brought after the original cause of action was barred by the statute, where the statute requires a new promise to be in writing, signed, etc. Chace *v.* Trafford, 116 Mass. 529, s. c., 17 Am. Rep. 171. Compare Smith *v.* Forty, 4 C. & P. 126, N. Y. Code Civ. Proc., § 395. It is not necessary in proving an account stated, the gist of which consists in the agreement to or acquiescence in the correctness of the account by the other party, to first show the books of original entry from which the account agreed upon by the parties was made up. The very object in rendering, stating, and settling accounts is to avoid the necessity of making such proof. Jacksonville, &c., Ry. Co. *v.* Warriner (Ala.), 16 So. Rep. 898.

"An account stated may be defined, in general terms, to be where an account is rendered, and a debt in a specified sum is acknowledged as due from one party to the other; or where parties, who have had previous transactions, agree upon a definite balance as due. The debtor and creditor must mutually agree as to the respective demands, and as

to the balance ascertained on the final adjustment. An admission of an indebtedness in a specified sum is sufficient to constitute a claim on account stated. The admission may be implied from the circumstances. When an account is rendered showing the balance due, and the debtor retains it, without making objection within a reasonable time, his failure or omission to object is presumptively construed as an admission of its correctness. If the charges be all on one side, it is sufficient if there be an acknowledgment or admission, express or implied, of a certain sum due. And if the account of the plaintiff alone be stated showing the amount due, an acknowledgment or admission of such account is sufficient to constitute it an account stated, though the defendant may have counterclaims which are not deducted. If the items of the account of the plaintiff were read over to the defendant by the agent of the plaintiff and he made no objection thereto, the claim became an account stated." Ware *v.* Manning, 86 Ala. 238, 5 So. Rep. 682.

An action upon an account stated is a new and distinct cause of action from the original liability, based upon a promise, express or implied, to pay a specific amount, and the consideration therefor is the original transaction between the parties. Delabarre *v.* McAlpin, 101 N. Y. App. Div. 468, 92 N. Y. Supp. 129.

The account stated is a new and independent contract, and the whole action is based upon that contract. Therefore, when there had been an oral agreement establishing an account stated, it was not necessary to go back of this agreement to show that it was based upon a written statement as evidence of indebtedness. Converse *v.* Scott, 137 Cal. 239, 70 Pac. Rep. 13.

The cause of action in such case (account stated) is not the obligation originally created when the items of indebtedness arose. It is the agreement of the parties, made after the transactions constituting the account, that a certain balance remains due from one to the other and a promise of the party found to be indebted to pay to the other the sum so ascertained, and in suing in this form of action it is unnecessary for the plaintiff to set forth the subject matter of the original debt. Schutz *v.* Morette, 146 N. Y. 137, 141, 40 N. E. Rep. 780.

An account stated involves a promise to pay an amount agreed upon as a balance due and therefore the law raises a new obligation on the part of the one against whom the balance stands to pay the sum so determined. Ivy Coal, etc., Co. *v.* Long, 139 Ala. 535, 36 So. Rep. 722.

An account stated means a balance struck between the parties on a settlement. When the plaintiff can show that mutual dealings between the parties have been settled, and a balance decided on, the law implies a promise

made since the action commenced, is not competent in evidence.[34] An account stated is not now regarded as a contract upon new consideration, and does not create an estoppel, but it establishes *prima facie* the accuracy of the items without further proof.[35] The statement is not the equivalent of

to pay that balance. Kusterer Brewing Co. *v.* Friar, 99 Mich. 190, 58 N. W. Rep. 52.

An account stated becomes a new agreement and takes the place of the obligations resting upon the parties by reason of the prior account. Harrison *v.* Henderson, 67 Kan. 202, 72 Pac. Rep. 878.

The action is founded upon a new contract and not upon the original items entering into the same. Naylor *v.* Lewiston, etc., Co., 14 Ida. 789, 96 Pac. Rep. 573.

[34] Rosc. N. Pac. Rep. 590.

[35] Loventhal *v.* Morris, 103 Ala. 332, 15 So. Rep. 672. See also Gordon *v.* Frazier, 13 App. Cas. (D. C.) 382. A party cannot by verbally agreeing to the correctness of an account stated to him, and verbally promising to pay the same, legally bind himself to pay any items of indebtedness included therein that are due by another and for which he is in no way responsible except through such verbal promise. But when sued upon such account, as upon an account stated, he can show that the items therein are the indebtedness of another for which he is not responsible; and as to such items the plaintiff cannot recover unless he can show a promise in writing signed by the defendant to pay the same. Martyn *v.* Arnold & Co., 36 Fla. 446, 18 So. Rep. 791. An account stated is not conclusive upon either party, but is simply *prima facie*, presumptively correct, and may be impeached for any error induced by fraud or mistake. Samson *v.* Freedman, 102 N. Y. 699, 701, 7 N. E. Rep. 419; Martyn *v.* Arnold & Co., 36 Fla. 446, 18 So. Rep. 791; Bergen *v.* Hitchings, 22 App. Div. (N. Y.) 395.

An account stated is not conclusive as to the balance due "unless in arriving at the agreed balance there has been some concession made upon items disputed between the parties, so that the balance is the result of a compromise, or some act has been done or forborne in consequence of the accounting, and relying upon it, which would put the party claiming the benefit of it in a worse position than as though it had not been had, so as to bring the case within the principles of an estoppel *in pais*." Segelke, etc., Mfg. Co. *v.* Vincent, 135 Wis. 237, 115 N. W. Rep. 806.

It is presumed that an account stated is correct. Bankers' Union of the World *v.* Favalora, 73 Nebr. 427, see also 27 L. R. A. 811, 102 N. W. Rep. 1013.

In Gooding *v.* Hingston, 20 Mich. 439, it was held that an admission or acknowledgment by one party that there was a balance or a sum of money due another, was

an express promise to pay the balance when the items do not constitute a legal debt or duty.[36]

2. Pleading.

An allegation that one party made a statement of an account, and delivered it to the other, who made no objection to it, is not an allegation that an account was stated between them.[37] These are but matters of evidence tending to show, but not conclusively, an account stated. If an account stated is alleged, the original consideration need not be alleged nor proved.[38]

prima facie sufficient to support a declaration upon an account stated.

The promise is to pay the actual sum stated. Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. Rep. 371.

In an action to foreclose a lien filed in support of an account stated, the plaintiff need not prove the items which make up the account. Naylor *v.* Lewiston, etc., Ry. Co., 14 Idaho, 789, 96 Pac. Rep. 573.

[36] Young *v.* Hill, 67 N. Y. 162, rev'g 6 Hun, 613. Compare Melchoir *v.* McCarty, 31 Wis. 252, s. c., 11 Am. Rep. 605; Seago *v.* Deane, 4 Bing. 459. As to jump settlements, see Calkins *v.* Griswold, 11 Hun, 208; Hamilton, &c. Co. *v.* Goodrich, 6 Allen, 191, 199.

An account stated was held not conclusive as to its accuracy, when it was shown that it was based upon unlawful, usurious and exorbitant charges. Peeples *v.* Yates, 88 Miss. 289, 40 So. Rep. 996.

[37] See Patillo *v.* Allen-West Commission Co., 108 Fed. Rep. 723, 47 C. C. A. 637; Emery *v.* Pease, 20 N. Y. 62. But if there is no dispute as to the facts, it is competent for the court to instruct the jury that such an account is a stated account. Toland *v.* Sprague, 12 Pet. 300.

The mere rendition of an account from one party to another does not constitute an account stated, upon which an action can be maintained. Consequently an allegation "that plaintiff on said last named day rendered to defendant a statement of said account" did not constitute a proper allegation of an account stated, in that it failed to aver a specific sum due the plaintiff, and further because it was necessary to show that the defendant had either expressly or by implication admitted the account. M'Kenzie *v.* Poorman Silver Mines of Colorado, 88 Fed. Rep. 111, 31 C. C. A. 409.

[38] Hall *v.* N. Y. Brick, etc., Co., 95 N. Y. App. Div. 371, 88 N. Y. Supp. 582; 1 Steph. N. P. 362, 1 Chit. Pl. 358; Milward *v.* Ingram, 2 Mod. 43.

The defense to an action upon an account stated must relate to

Under the new procedure, the question whether evidence of the original indebtedness is competent where plaintiff fails to prove the statement of an account, depends on whether defendant has been misled to his prejudice by the variance. If not, the pleading is amendable.[39]

3. Character of the Parties.

If defendant accounted with plaintiff in a particular character, he will be taken to have admitted that character.[40]

4. The Account and Its Statement.

It is not necessary to show a mutual account[41] between the parties, nor even any account in the commercial sense,

it, and not to matters of anterior liability, except in so far as they constitute a foundation for, or introduction to, the real, substantial defense impeaching the settlement for fraud, or error and mistake. Gordon *v.* Frazer, 13 App. Cas. (D. C.) 382. See also Armitage *v.* Saunders, 94 Mich. 482, 54 N. W. Rep. 174.

[39] Woolsey *v.* Village of Rondout, 4 Abb. Ct. App. Dec. 639; and see Goings *v.* Patten, 1 Daly, 168, s. c., 17 Abb. Pr. 339; Smith *v.* Glens Falls Ins. Co., 66 Barb. 556, 62 N. Y. 85; Greenfield *v.* Mass. Mut. Life Ins. Co., 47 N. Y. 430. Otherwise at common law.

Where the plaintiff fails to prove his account stated and asks no amendment, the complaint should be dismissed even though there is evidence showing an indebtedness from the defendant to the plaintiff. Volkening *v.* De Graaf, 81 N. Y. 268.

Where the plaintiff has alleged a count upon an account stated and one upon an open account, he should not be compelled to elect. Oberndorfer *v.* Moyer, 30 Utah, 325, 84 Pac. Rep. 1102.

Where the complaint does not set forth a cause of action on an account stated, but evidence is admitted without objection tending to sustain such a cause of action, the court may consider the complaint amended so as to conform to the proof and submit the question of an account stated to the jury. Wrought Iron Range Co. *v.* Young, 85 Ark. 217, 107 S. W. Rep. 674.

In an action upon the original account it seems that a plea of an account stated if supported will bar recovery. Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. Rep. 371.

[40] Peacock *v.* Harris, 10 East, 104; Rosc. N. P. 590.

[41] See Case *v.* Hotchkiss, 1 Abb. Ct. App. Dec. 324; Cobb *v.* Arundell, 26 Wis. 553; Ware *v.* Manning, 86 Ala. 238, 5 So. Rep. 682; Ware *v.* Dudley, 16 Ala. 742.

A defendant who had dealt with the plaintiff, as a corporation, for

nor more than one item.[42] The transactions must be past transactions,[43] but the dates in the statement are sufficient proof of this. The statement must be express, and fix a sum,[44] but it is not essential that it include, or purport to include, all indebtedness between the parties. If it fix the sum for a certain period, it is competent, leaving defendant to establish a set-off.[45]

a period of six years, could not deny its corporate existence when sued on transactions connected with the said dealings. Plummer *v.* Struby-Estabrooke Mercantile Co., 23 Colo. 190, 47 Pac. Rep. 294.

[42] See cases below.

[43] Cooper *v.* Upton, 60 W. Va. 648, 64 S. E. Rep. 523; Zacarino *v.* Pallotti, 49 Conn. 36; Mellon *v.* Campbell, 11 Penn. St. 415. But money due on a sealed instrument is not alone matter for an account stated. Middleditch *v.* Ellis, 2 Exch. 623, Rosc. N. P. 590. Otherwise if it be included with other items. Foster *v.* Allanson, 2 Term. R. 479. Compare Young *v.* Hill, 67 N. Y. 162, rev'g 6 Hun, 613. Compound interest is not recoverable merely because included in an account stated. Young *v.* Hill (above).

It must appear that there had been at the time of the accounting previous transactions on which the account stated was based. Daytona Bridge Co. *v.* Bond, 47 Fla. 136, 36 So. Rep. 445.

An account stated cannot be made the instrument to create a liability where none before existed. It only determines the amount of a debt where a liability existed as a result of prior transactions. Chase *v.* Chase, 191 Mass. 556, 78 N. E. Rep. 115.

[44] Bouslog *v.* Garrett, 39 Ind. 338; Lane *v.* Hill, 18 Q. B. 252; Bernasconi *v.* Anderson, M. & M. 183; Ware *v.* Manning, 86 Ala. 238, 5 So. Rep. 682.

It has been held that promises to pay "the bill," "that bill," and "the balance," indicated the sum to be paid as clearly as if actually spoken, where it appeared that the parties understood perfectly what amount was referred to. Goodrich *v.* Coffin, 83 Me. 324, 22 Atl. Rep. 217.

[45] Filer *v.* Peebles, 8 N. H. 226.

"A voluntary settlement of accounts between parties affords a presumption that all items properly chargeable at the time were included. This presumption is not conclusive, but clear and convincing proof that such items were unintentionally omitted is necessary to sustain a subsequent claim to recover them." State Life Ins. Co. *v.* Postal, 43 Ind. A. 144, 84 N. E. Rep. 156, 1093.

"Where the correctness of the account presented is admitted, either expressly or by failure to object within a reasonable time, it will amount to an account stated as to everything included therein,

An allegation of account stated is supported by evidence that the parties actually met and considered and agreed upon the items and the result,[46] or by evidence of a bill rendered by one and not objected to by the other,[47] or by the delivery of the common pass-book of the parties, balanced,[48]

although the person so acknowledging its accuracy may have an offset thereto arising out of some independent transaction. But, while one part of a transaction is left open for further adjustment or litigation, another part cannot become an account stated." Crawford *v.* Hutchinson, 38 Or. 578, 65 Pac. Rep. 84.

If only one item of an account is objected to, this may constitute an admission of the correctness of the other items to which no objection is interposed. Burns *v.* Campbell, 71 Ala. 271; Ware *v.* Manning, 86 Ala. 238, 5 So. Rep. 682.

[46] Darlington *v.* Taylor, 3 Grant. 195; and see McCullough *v.* Judd, 20 Ala. 703. "To prove an account sued on as an open account it is not indispensably necessary to produce before the jury a written statement of the account or to establish the items of the account. It is quite sufficient if it be shown in a case like this that the defendant bought goods from the plaintiff, whether one or many items, and admitted the correctness of the charge made by the plaintiff against him for them, with knowledge of the facts; or in other words an account as upon an open account, or upon an account simply, may be well supported by proof of an account stated." Sullivan Timber Co. *v.* Brushagel, 111 Ala. 114, 118, 20 So. Rep. 498.

[47] Cobb *v.* Arundell (above); Wiggins *v.* Burkham, 10 Wall. 129, and without itemizing. May *v.* Kloss, 44 Mo. 300.

An admission by the defendant of the correctness of an account rendered may be inferred from the fact of his retaining the same for a sufficient or reasonable length of time without objecting thereto, but such retention is merely evidence from which the admission is inferred, and from which admission the promise to pay would be implied. M'Kenzie *v.* Poorman Silver Mines of Colorado, 88 Fed. Rep. 111, 31 C. C. A. 409.

The fact that a merchant has rendered his customer a bill for each item purchased during the course of their dealings will not in itself support an action on an account stated for the total of the items of the account. Loventhal *v.* Morris, 103 Ala. 332, 15 So. Rep. 672.

[48] Hutchinson *v.* Market Bank of Troy, 48 Barb. 302.

"When a pass book of a depositor is written up and delivered to him, or the bank renders him an itemized statement of his account, and he retains the same without objecting thereto within a reasonable time, it constitutes an account stated." Nodine *v.* First

or by an award of arbitrators if coupled with an admission that the balance was due; [49] but without some ratification an award is not competent.[50]

5. The Promise.

To prove an account stated the evidence must justify the inference of an agreement [51] as distinguished from a mere

Natl. Bank, 41 Or. 386, 68 Pac. Rep. 1109.

"The entry of the debits and credits in the depositor's pass book by a banking institution striking the balance and then delivering the book to the customer with his cancelled checks, constituted a rendition of account, and . . . the retention of the book so balanced by the customer for an unreasonable time without objection to the account as rendered, constitutes an account stated." Kenneth Inv. Co. *v.* Republic Natl. Bank, 96 Mo. App. 125, 70 S. W. Rep. 173.

[49] Buschman *v.* Morling, 30 Md. 384; Salmon *v.* Watson, 4 B. Moore, 73. See Gooding *v.* Hingston, 20 Mich. 439.

Under a count of "account stated" it was held competent to offer in evidence an award of arbitrators and an admission of the balance due. Buschman *v.* Morling, 30 Md. 384.

Where the evidence shows a policy of insurance issued by the defendant to the plaintiff, a loss by fire in the buildings covered by the policy, and that the loss was adjusted and the defendant company promised pursuant thereto to pay a fixed sum to the plaintiff, he may recover on an account stated. Manchester Fire Assur. Co. *v.* Fitzpatrick, 120 Ill. App. 535.

[50] Bates *v.* Townley, 2 Exch. 152.

There is no account stated where it does not appear that the defendant ever took part in the choice of appraisers or recognized them as having authority to bind it by their findings. Chicago, etc., Ry. Co. *v.* Peters, 45 Mich. 636, 8 N. W. Rep. 584.

[51] Robertson *v.* Wright, 17 Gratt. 534; Comer *v.* Way, 107 Ala. 300, 19 So. Rep. 966, 54 Am. St. Rep. 93; Volkening *v.* De Graaf, 81 N. Y. 268.

Evidence of loose statements by a party at different times to third persons, that he owed another a certain amount will not constitute an account stated. Thurmond *v.* Sanders, 21 Ark. 255.

The rule is uniform that in stating an account, as in making any other agreement, the minds of the parties must meet. Accordingly when it was left to a third person to fix the amount due, the minds of the parties never met on the question of the sum owed. Haish *v.* Dillon, 71 Nebr. 290, 98 N. W. Rep. 818.

admission.[52] Thus a compulsory admission by a witness,[53] or assent obtained by a threat to sell the property of the party,[54] or the act of a clerk in giving a transcript from corporate books, without evidence of intent to state the account,[55] is not enough. But the agreement may be implied from circumstances.[56] A written promise need not be

[52] Breckon *v.* Smith, 1 Ad. & E. 488.

A mere statement by one party to another that he will compensate him for a trespass committed upon his property does not constitute an account stated. Parker *v.* Clemons, 80 Vt. 521, 68 Atl. Rep. 646.

There must be an agreement express or implied to pay the amount admitted to be due. Moore *v.* Maxwell, 155 Ala. 299, 46 So. Rep. 755.

[53] Tucker *v.* Barron, 7 B. & C. 623. See also Dunham *v.* Griswold, 100 N. Y. 224, 3 N. E. Rep. 76.

One who first expressed surprise at the amount of a bill, then suggested that it was another's duty to pay it and finally gave a naked promise to settle for it to avoid trouble, did not thereby admit that the amount of the bill was his own just debt. The court said: "An account stated consists not in a promise to pay, but an admission that the account is just and true." Stephens *v.* Ayers, 57 Hun, 51, 10 N. Y. Supp. 502. See also Stenton *v.* Jerome, 54 N. Y. 480.

[54] Stenton *v.* Jerome, 54 N. Y. 480.

[55] Harvey *v.* West Side Elevated Rw. Co., 13 Hun, 392.

Where it appeared that the defendant was one of the two managing directors of a corporation, was in control of its factory and of the books in which the balance in question was found, and accustomed to give directions to the bookkeeper as to making entries; and that he afterward verified a petition to which was annexed a schedule of the assets of the corporation, in which his name appeared as a debtor in the same amount as shown upon the ledger, it was for the jury to say whether an account had been stated between the defendant and the corporation. Spellman *v.* Muehlfeld, 166 N. Y. 245, 59 N. E. Rep. 817 [rev. 48 N. Y. App. Div. 265, 62 N. Y. Supp. 746].

[56] Stebbins *v.* Niles, 25 Miss. 267; Spellman *v.* Muehlfeld, 166 N. Y. 245, 59 N. E. Rep. 817 [rev. 48 N. Y. App. Div. 265.] See also Leinbach *v.* Wolle, 211 Pa. St. 629, 61 Atl. 248.

Proof that the defendant kept silent for several weeks after an account had been rendered, and thereafter made payments from time to time together with a statement, "I will pay you some money every month, as much as I can spare, until paid," justified the inference that there had been an ac-

proved,[57] nor even an express promise.[58] But a written admission, such as implies a promise, may be proved, though made in any form, such, for instance, as the signature of the account;[59] or a due bill, though naming no payee;[60] or a

count stated. Mulford *v.* Cæsar, 53 Mo. App. 263.

Where it appeared that the defendant had made several partial payments on an account for goods sold to him, which consisted of only a few items, and had had possession of the goods for some months even though there was no express agreement upon the account by a mutual looking over the same, the law raised from such fact an implied agreement to the correctness of the account. An account thus stated is not conclusive upon either party, but simply *prima facie*, presumptively correct and may be impeached for any error induced by fraud or mistake. Samson *v.* Freedman, 102 N. Y. 699, 7 N. E. Rep. 419. See also Jugla *v.* Troutet, 120 N. Y. 21, 23 N. E. Rep. 1066, 4 Silv. App. 383.

[57] Converse *v.* Scott, 137 Cal. 239, 70 Pac. Rep. 13; Allen-West Common. Co. *v.* Patillo, 90 Fed. Rep. 628, 33 C. C. A. 194; Forbes *v.* Wheeler, 39 Misc. 538, 80 N. Y. Supp. 373; Watkins *v.* Ford, 69 Mich. 357, 37 N. W. Rep. 300. See also Delabarre *v.* McAlpin, 101 N. Y. App. Div. 468, 92 N. Y. Supp. 129; Freeman *v.* Howell, 4 La. Ann. 196. A corporate resolution, though unrecorded, is enough. St. Mary's Church *v.* Cagger, 6 Barb. 576.

[58] Hall *v.* N. Y. Brick, etc., Co., 95 N. Y. App. Div. 371, 88 N. Y. Supp. 582; Loventhal *v.* Morris, 103 Ala. 332, 15 So. Rep. 641. But between partners an express promise must be proved, 4 Abb. N. Y. Dig. new ed. 736, Rosc. N. P. 590.

If a balance is admitted to be due the law will imply the promise to pay. Forbes *v.* Wheeler, 39 Misc. 538, 80 N. Y. Supp. 373.

[59] Montgomerie *v.* Ivers, 17 Johns. 38.

A statement signed by the debtor and annexed to an account as follows: "I hereby acknowledge that the above balance, two hundred thirty dollars, is correct," is sufficient to constitute an account stated. Tennessee Brewing Co. *v.* Hendricks, 77 Miss. 491, 27 So. Rep. 526. The jury is justified in finding that an indorsement of "O. K." on an itemized statement by a debtor constitutes an account stated. Clark *v.* Hoffman, 128 Ill. App. 422.

[60] Fesenmayer *v.* Adcock, 16 Mees. & W. 449. If defendant relies on the fact that plaintiff is not the true payee, it is for defendant to prove it. Id.

The giving of a due bill "to balance of account" was held to be evidence of an account stated when the proof offered by the plaintiff and the defendant as to whether there had been a settlement was conflicting. Frost *v.* Clark, 82 Iowa, 298, 48 N. W. Rep. 82. See

note, if absolute as to the indebtedness, though conditional as to time of payment; [61] or a letter acknowledging correctness of,[62] or making no objection to, an account rendered, and drawing for the precise balance.[63] An admission in a writing under seal will sustain the action if the instrument is not a substitute for or merger of the original simple contract.[64]

A qualified acknowledgment is not enough; [65] but an un-

also Mackay *v.* Kahn, 17 N. Y. Supp. 503.

[61] Nunez *v.* Dautel, 19 Wall. 560; Morgan *v.* Jones, 1 C. & J. 162, S. P., Rosc. N. P. 382; Lemere *v.* Elliott, 6 H. & N. 656.

"The giving of a note for the amount shown due by an account is *prima facie* evidence of an account stated; but it is only that and it remains to the maker of the note to show that it was not given in acknowledgment of the correctness of the account and in settlement thereof." Kneeland *v.* Pennell, 49 Misc. 94, 96 N. Y. Supp. 403.

[62] Vinal *v.* Burrill, 16 Pick. 401.

Where a client wrote his attorney a letter relative to the latter's charges for services rendered in a chancery suit in the lower court and on appeal, stating:—"I agree with you and think myself that your exertions in the appeal case are well worth the $500 you charge. But I did think, and do now believe the $3000, the charge in the case, was too much. Still as the opposite party received that amount, I did not expect to get off with less," —this was held to be an admission of an indebtedness of $500 only. Nooe *v.* Garner, 70 Ala. 443.

[63] Lockwood *v.* Thorne, 11 N. Y. 170, rev'g 12 Barb. 487.

But where, in answer to the plaintiff's letter containing a statement of claims against the defendant, the latter requested information regarding certain data relating to the account and promised to consider the same on its merits on receipt of the information, this reply did not show such failure to object as would amount to an assent to the correctness of the account. Ault *v.* Interstate Loan, etc., Assoc., 15 Wash. 627, 47 Pac. Rep. 13.

[64] Hoyt *v.* Wilkinson, 10 Pick. 33.

An assent to the correctness of an account, whether express or inferred from circumstances, must not be qualified by any condition or contingency which relieves it from the character of a promise to pay the amount. Weigel *v.* Hartman Steel Co., 51 N. J. Law, 446, 452.

[65] Rosc. N. P. 588.

When a balance was struck which a party assumed as his liability but with an understanding that he "would pay the amount due when he could do so," there was no such implied promise as usually

qualified admission of a single item is competent;[66] and objection to one item alone may imply admission of the rest.[67]

The admissions of an agent authorized to settle and adjust the accounts of his principal, made in the attempted adjustment of an account, are admissible against the principal.[68] But if the account was stated by or to an agent there must be evidence of his authority[69] at the

attaches to an account stated. Work *v.* Beach, 53 Hun, 7, 6 N. Y. Supp. 27.

[66] 2 Whart. Ev., § 1140.

[67] Rosc. N. P. 590. "A count upon an account stated may be supported by evidence that the account was settled with the agent of the plaintiff, or by admissions made to an agent." Powell *v.* Wade, 109 Ala. 95, 97, 19 So. Rep. 500.

An objection to one item only of an account is an admission of the correctness of the other items. Joseph *v.* Southwark Fdy., etc., Co., 99 Ala. 47, 51, 10 So. Rep. 327. And see Mulford *v.* Cæsar, 53 Mo. App. 263.

When a mistake in one item of an account was discovered after the same had been settled and adjusted, the commencement of an action to recover for this item did not entitle the defendant to open the entire account unless he could show fraud in the settlement of other items. Green *v.* Metropolitan St. Ry. Co., 171 N. Y. 194, 63 N. E. Rep. 958, 89 Am. St. Rep. 807.

[68] North Pac. Lumber Co. *v.* Willamette Mill Co., 29 Ore. 219, 44 Pac. Rep. 286.

Accounts stated being ordinary contracts may of course be made by an agent having authority thereto. Sariol *v.* McDonald Co., 127 App. Div. 648, 111 N. Y. Supp. 796.

Where one employed an attorney to straighten out his accounts with the defendant bank, the relation of principal and agent only existed between them, so that when the attorney on an examination of the books of the bank expressed, in the presence of his employer, satisfaction with the account, his declaration thus made was deemed sufficient to establish an account stated. Burraston *v.* Nephi First Nat. Bank, 22 Utah, 328, 62 Pac. Rep. 425.

[69] Rosc. N. P. 589; Harvey *v.* West Side Elevated Ry. Co., 13 Hun, 392.

There is a presumption that the president and secretary of a corporation have full authority to state an account for the corporation. Pick *v.* Slimmer, 70 Ill. App. 358.

One could not hold a corporation bound as by an account stated, when the statement thereof relied upon was rendered to an officer having no authority to receive and audit it. Missouri Pac. Ry. Co. *v.* B. F. Coombs & Bro. Common. Co., 71 Mo. App. 299.

time.[70] Admission to a stranger is not evidence of account stated.[71]

6. Testimony of Witness: Production of Account.

The witness may state what he understood at the time as the agreement of the parties, if it be his impression as to what was said,[72] though he cannot recollect the precise language;[73] but he cannot state his belief, as an inference from what was said,[74] or as a matter of opinion respecting the bearing of what was said upon the question of fact.[75] The parol testimony of a witness that the parties made a settlement of accounts in his presence, his knowledge being derived from declarations and admissions to each other in his hearing, is not rendered incompetent by the fact that the settlement was based on a written memorandum produced by one of the parties at the time, and which was not shown to, and never in the possession of the witness.[76] But if the

[70] Thallimer *v.* Brinckerhoff, 4 Wend. 394. An account stated by the treasurer of a corporation is evidence to charge the corporation is evidence to charge the corporation. Davis *v.* Georgetown Bridge Co., 1 Cranch C. Ct. 147.

The grant of authority to an agent to purchase goods does not give him authority to bind his principal by an account stated. Moore *v.* Maxwell, 155 Ala. 299, 46 So. Rep. 755.

[71] Rosc. N. P. 590.

An admission by the defendant, in a conversation with a third person, that he was indebted to the plaintiff in the named sum, is not evidence of an account stated, unless the third person was the agent of the plaintiff. Thurmond *v.* Sanders, 21 Ark. 255.

A statement by the creditor to another in the presence of the debtor, if not dissented from, may constitute an account stated. Forbes *v.* Wheeler, 39 Misc. 538, 80 N. Y. Supp. 373.

[72] Thomas *v.* White, 11 Ind. 132.

[73] See Chaffee *v.* Cox, 1 Hilt. 78.

[74] Williams *v.* Dewitt, 12 Ind. 309, 311.

[75] As to this distinction, see 2 Abb. New Cas. 229, note.

[76] Cramer *v.* Shriner, 18 Md. 140.

Where the defendant's brother told the plaintiff, in the defendant's absence, that the latter would pay the plaintiff's bill, though exorbitant, it was held that this statement by the brother was inadmissible; but conversations between the brother and the plaintiff relating to the plaintiff's charges, had in the defendant's room and within

agreement proved by the witness was an assent to the written statement, the paper should be produced, or its absence accounted for.[77] If the statement so agreed to was a copy, it is not necessary to produce the books or other original;[78] but the original is better evidence than a copy of the copy.[79] Defendant's admission that the account examined by him was correct is admissible against him, although made during a negotiation for settlement.[80] And after the correctness of the items of an account has been proved, the account and entries and vouchers concerning the items are admissible, not as evidence in themselves, but as explaining what is

his hearing, were competent as evidence establishing an account stated. Lallande *v.* Brown, 121 Ala. 513, 25 So. Rep. 997.

[77] Vinal *v.* Burrill, 16 Pick. 401.

[78] See Phillips *v.* Tapper, 2 Penn. St. 323.

[79] Reddington *v.* Gilman, 1 Bosw. 235.

Where the testimony proved that the party to whom a statement of account was rendered, at that time examined both the statement and the book from which it had been made up, the book was competent as an admission against the one who had so examined it. Raub *v.* Nisbett, 118 Mich. 248, 76 N. W. Rep. 393.

[80] Bartlett *v.* Tarbox, 1 Abb. Ct. App. Dec. 120. An admission of fact by a party is evidence against him, although made in a conversation respecting a compromise of a controversy. Marvin *v.* Richmond, 3 Den. 58; Bartlett *v.* Tarbox, 1 Keyes, 495; Murray *v.* Coster, 4 Cow. 617, 635; Armour *v.* Gaffey, 30 App. Div. 121, 130. But admissions expressly stated to be made without prejudice for the purpose of affecting a compromise of a matter in controversy are not admissible in evidence against the objection of one making them. Bowers *v.* Hanna, 101 Iowa, 660, 70 N. W. Rep. 745. And if the admission is of such a nature that the court can see it would not have been made except for the purpose of the negotiations and under an agreement fairly to be implied from the circumstances that it was not to be used to the prejudice of the party making it, it is inadmissible. White *v.* Old Dominion S. S. Co., 102 N. Y. 660, 6 N. E. Rep. 289. Thus, evidence of the amount fixed by the claimant, in an ineffectual attempt to compromise, as the sum he was willing to take, is not competent against him in an action wherein the amount of his claim is in question. Tennant *v.* Dudley, 144 N. Y. 504, 39 N. E. Rep. 644. The admissions of a party to a suit are admissible in evidence without first fixing the time and place of the conversation. Teller *v.* Ferguson, 24 Col. 432, 51 Pac. Rep. 429.

referred to.[81] If the witness's testimony is to the identity of the written statement produced, the paper is competent, although he cannot recollect from memory the items he was directed to set down, and vouchers referred to in the account are not produced.[82]

7. Res Gestæ.

What one of the parties said immediately after the settlement, and in explanation of it, but in the absence of the other, is not a part of the *res gestæ* so as to be competent in his own favor.[83]

8. Express Assent.

If defendant's express assent to the account is proved, he may prove in his own favor all that was said by him in the same conversation [84] that in any way qualifies or explains the statement already in evidence, or modifies the use that plaintiff might otherwise make of it.[85]

9. Tacit Assent to Account Rendered.

Between merchants of the same [86] or different [87] countries, or other persons between whom there are accounts current

[81] Id.

[82] M'Clelland *v.* Crawford, 2 Bibb (Ky.), 336. And see chapter XVI, paragraph 37, of this vol.

[83] Rockwell *v.* Taylor, 41 Conn. 55.

[84] Compare Nesbit *v.* Stringer, 2 Duer, 26.

[85] Rouse *v.* Whited, 25 N. Y. 170, rev'g 25 Barb. 279. Compare Delamater *v.* Pierce, 3 Den. 315, affi'd in How. App. Cas. 1.

[86] Wiggins *v.* Burkham, 10 Wall. 129.

The rule as to accounts stated was formerly applied to accounts between merchants only, but in most of the states of this country it has been extended to embrace every kind of transaction in which the relation of debtor and creditor is involved. Crawford *v.* Hutchinson, 38 Or. 578, 65 Pac. Rep. 84.

It seems that in Virginia and West Virginia there is still a tendency to limit the applicability of the rules as to accounts stated to transactions between merchants and principals and agents having mutual accounts. See McGraw *v.* Traders' Nat. Bank, 64 W. Va. 509, 63 S. E. Rep. 398.

[87] Freeland *v.* Heron, 7 Cranch, 147; Tickel *v.* Short, 2 Ves. Sr. 239.

in the ordinary course of business,[88] if an account has been presented, and no objection has been made thereto, after a reasonable time,[89] it is treated, under ordinary circumstances, as being, by acquiescence, a stated account, because the silence of the one to whom the account is sent warrants the inference of an admission of its correctness.[90] This inference is more or less strong according to the circumstances of the

An account stated may readily be implied between merchants who reside in different places. Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. Rep. 371.

[88] Shepard *v.* Bank, 15 Mo. 143. The presentation of itemized statements showing monthly balances, if allowed to pass unquestioned, implies satisfaction with the same, and acquiescence in the claim. Rossman *v.* Bock, 97 Mich. 430, 56 N. W. Rep. 777.

[89] Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. Rep. 371; Langden *v.* Roane, 6 Ala. 518, 41 Am. D. 60. Two or three posts. Sherman *v.* Sherman, 2 Vern. 276. Story says several posts. 1 Story's Eq. Jur., § 520.

"The doctrine that an account rendered becomes an account stated after the lapse of a reasonable time for examination by the party against whom it is rendered, and he makes no objection, is, in general, founded upon a just inference that a party against whom a claim is made will dispute it, if incorrect or unfounded." Shutz *v.* Morette, 146 N. Y. 137, 142, 40 N. E. Rep. 780.

The question as to what constitutes a reasonable time within which to object to an account is normally for the jury to decide from the evidence. Lewis *v.* Utah Constr. Co., 10 Idaho, 214, 77 Pac. Rep. 336.

But where the facts are undisputed the question is one of law for the court. Nodine *v.* First Natl. Bank, 41 Or. 386, 68 Pac. Rep. 1109; Crawford *v.* Hutchinson, 38 Ore. 578, 65 Pac. Rep. 84.

Where a customer fails to object for two years to statements sent him from time to time by his broker, it is proper to find that an account had been stated. Allen-West Common. Co. *v.* Patillo, 90 Fed. Rep. 628, 33 C. C. A. 194.

Obviously the sending of statements to a person other than he who incurred the indebtedness even if they are retained by him without comment, cannot constitute an account stated. Allen *v.* Somerset Hotel Co., 88 N. Y. Supp. 944; Daytona Bridge Co. *v.* Bond, 47 Fla. 136, 36 So. Rep. 445.

Where there is no pre-existing debt or liability the rendering of an account, to one who keeps it without objection, does not make an account stated. Cooper *v.* Upton, 60 W. Va. 648, 64 S. E. Rep. 523.

[90] Burns *v.* Campbell, 71 Ala. 271. See also Joseph *v.* South-

case.[91] Plaintiff had better be prepared with some evidence that he received no objection from defendant within a reasonable time;[92] and to prove the ordinary course of mail, if neces-

wark Fdy., etc., Co., 99 Ala. 47, 10 So. Rep. 327. *Contra*, 2 Whart. Ev., § 1140.

The silence of the party against whom the account was rendered operates as an admission of the correctness of the account and *prima facie* establishes the claim in favor of the party presenting it. But this doctrine does not seem to apply as against an executor to whom a claim against the estate he represents has been presented, since to do so would tend to subject estates of decedents to the payment of unfounded claims. Schutz *v.* Morette, 146 N. Y. 137, 40 N. E. Rep. 780.

The receipt by an attorney of a claim for collection against an individual, a letter written to that individual by the attorney stating the amount of the alleged claim, that it had been placed with him for collection, and this accompanied by a request that an answer be made thereto before suit is brought, and a failure to reply thereto, no matter for how long a time, cannot form the basis of a cause of action on an account stated. Frank *v.* Lynch, 90 N. Y. Supp. 408.

A grocer cannot establish an account stated against a wife for household groceries by proving that he sent her several bills to which she made no reply. Blendermann *v.* Wray, 60 Misc. 117, 111 N. Y. Supp. 827.

[91] The failure to object to an account is admissible as an acknowledgment of the correctness thereof, the weight or sufficiency of such proof being a question of fact to be determined by the jury. Chisman *v.* Count, 2 M. & G. 307; Toland *v.* Sprague, 12 Pet. 300; Guernsey *v.* Rexford, 63 N. Y. 631; Sharkey *v.* Mansfield, 90 N. Y. 227; Hendrix *v.* Kirkpatrick, 48 Neb. 670, 672, 67 N. W. Rep. 759.

In determining whether an account has been stated the rendition of an account, with its retention by the debtor without objection, is but a circumstance, to be submitted with all other circumstances surrounding the transaction. Harrison *v.* Henderson, 67 Kan. 202, 72 Pac. Rep. 878.

Where the presentation of an account is by mail the person sought to be charged must in terms be a party to the account, or the grounds upon which it is sought to hold him as a debtor should be clearly made known to him and a demand for payment made, otherwise no presumption arises from his silence in relation thereto. Daytona Bridge Co. *v.* Bond, 47 Fla. 136, 36 So. Rep. 445.

[92] According to some authorities the burden is on defendant to prove objection made. Ruffner *v.* Hewitt, 7 W. Va. 585. The failure of a debtor to object within a reasonable time to monthly statements rendered to him amounts

sary, in order to show that a reasonable time elapsed, for the court will not take judicial notice of it.[93] If such proof is made and no excuse for not objecting shown by defendant, the account will be admitted as a stated account.[94] When thus admitted, the burden is thrown upon defendant to impeach it,[95] in the manner stated below. If express promise or assent is not shown by direct evidence, the account is not conclusive,[96] but only shifts the burden of proof.[97]

to an admission by him that the account is correctly stated. Pabst Brewing Co. *v.* Lueders, 107 Mich. 41, 64 N. W. Rep. 872.

But the mere failure to object "immediately" or "within a reasonable time" to an account sent by mail to one who has never had any dealings with the sender, will not render the account so sent an account stated so as to authorize a recovery upon it. Daytona Bridge Co. *v.* Bond, 47 Fla. 136, 36 So. Rep. 445.

[93] Wiggins *v.* Burkham, 10 Wall. 129.

The testimony of a bookkeeper that he prepared a statement of the account against appellees, placed it in a stamped envelope, addressed it to the appellees and deposited it in an open mail box from which the postman always took mail, and that he had never known of any objection to the statement, established facts from which there was some presumption of an assent to the account on the part of the appellees. Bee *v.* Tierney, 58 Ill. App. 552.

[94] Tolland *v.* Sprague, 12 Pet. 330; Towsley *v.* Dennison, 45 Barb. 490. Compare Guernsey *v.* Rexford, 63 N. Y. 631.

Where it appeared that an account existed between the parties covering a period of about three years and that the creditor sent the debtor statements from time to time which were retained without objection, there was sufficient evidence to sustain an allegation of an account stated. Lutcher & Moore Lumber Co. *v.* Eells, 108 Ill. App. 156.

[95] Wiggins *v.* Burkham (above).

The burden of showing an inaccuracy in an account stated, or that it was stated through fraud or mistake, rests upon the party denying the account. Bankers' Union of the World *v.* Favalora, 73 Neb. 427, 102 N. W. Rep. 1013. See also 19 Neb. 100.

[96] Guernsey *v.* Rexford, 63 N. Y. 631. See also Peeples *v.* Yates, 88 Miss. 289, 40 So. Rep. 996.

"An account which has become a stated account by having been rendered to and received by one who made no objection thereto within a reasonable time, is only *prima facie* evidence of the correctness of the items and of the

[97] Towsley *v.* Dennison, 45 Barb. 490; Freeland *v.* Heron, 7 Cranch, 147.

10. Defendant's Evidence to Disprove Assent.

The inference of assent may be repelled not only by direct evidence of objection made before the account was rendered,[98] or even after acting on it,[99] but by any circumstances tending to a contrary conclusion,[1] such as that the party was absent from home, suffering from illness, or expected shortly to see the other, and intended and preferred to make his objections in person.[2] Express assent may be rebutted by evidence that it was hastily and inconsiderately made.[3]

11. Incapacity.

It is not competent to prove that in the opinion of a witness the defendant was dull of comprehension, and not of sufficient capacity or education to understand long accounts,[4] unless in connection with evidence of unsoundness of mind, or undue influence or fraud.[5]

liability of the party therefor, which may be repelled and overcome by the party sought to be charged upon it." Daytona Bridge Co. *v.* Bond, 47 Fla. 136, 36 So. Rep. 445.

[98] Cobb *v.* Arundell, 26 Wisc. 553.

The mere admission of the correctness of the items of an account, with a denial of liability, will not make it an account stated. Moore *v.* Maxwell, 155 Ala. 299, 46 So. Rep. 755.

[99] Lockwood *v.* Thorne, 18 N. Y. 285, rev'g 24 Barb. 391, and explaining 11 N. Y. 170.

[1] Guernsey *v.* Rexford, 63 N. Y. 631; Champion *v.* Joslyn, 44 Id. 653.

A *prima facie* presumption that a letter containing a statement of the plaintiff's claim was received by the defendant arose from proof of its mailing; but the express testimony of the defendant that he had never received it entirely negatived this presumption. Ault *v.* Interstate Sav., etc., Assoc., 15 Wash. 627, 47 Pac. Rep. 13.

[2] Wiggins *v.* Burkham, 10 Wall. 129.

So where one has testified that at the time he executed a bond and mortgage to secure a supposed balance upon the settlement of an account, he was "under the stress of some pressure, (and) his books were not accessible" to compare his accounts with those rendered, it was error for the trial court to refuse to permit him to show that an error had been made in the adjustment of the accounts. Boyce *v.* Walker, 130 N. Y. App. Div. 305, 114 N. Y. Supp. 166.

[3] Stewart *v.* Conner, 13 Ala. 94.

[4] Stewart *v.* Conner, 13 Ala. 94.

[5] See p. 56, of this vol.

12. Impeaching the Account Itself.

An account stated if established, whether by express or implied assent, throws upon the other party the burden of showing its incorrectness.[6] He may prove fraud, omission, or mistake, and in these respects he is in nowise concluded by the admission implied from his silence after it was rendered.[7] He must, however, prove fraud, or show clearly the error or mistake on which he relies;[8] and it is conclusive unless some fraud, mistake, omission or inaccuracy is shown.[9] An exception is recognized when the parties are not upon equal terms, and then a court of equity may wholly disre-

[6] Fisk *v.* Basche, 31 Or. 178, 49 Pac. Rep. 981; Martyn *v.* Arnold & Co., 36 Fla. 446, 18 So. Rep. 791; Bergen *v.* Hitchings, 22 App. Div. 395; Wisner *v.* Consolidated Fruit Jar Co., 25 App. Div. (N. Y.) 362; Boyce *v.* Walker, 130 N. Y. App. Div. 305, 114 N. Y. Supp. 166.

The effect of an account stated is to establish, *prima facie*, the accuracy and correctness of the items in question, and the strength of the presumption of correctness depends to some extent upon the circumstances of the particular case. Peeples *v.* Yates, 88 Miss. 289, 49 So. Rep. 996.

[7] Wiggins *v.* Burkham, 10 Wall. 129; Perkins *v.* Hart, 11 Wheaton, 256; Doubleday *v.* Shumaker, 60 Misc. 227, 113 N. Y. Supp. 83.

An account stated is subject to impeachment for mistake. Boyce *v.* Walker, 130 N. Y. App. Div. 305, 114 N. Y. Supp. 166.

Thus the court upheld a referee who opened an account and corrected the mistake of a bookkeeper, who, by including bad debts in the profits account, gave the plaintiff, whose share of the income of the business was based on a percentage of the profits, an excessive amount. Conville *v.* Shook, 144 N. Y. 686, 39 N. E. Rep. 405.

[8] Towsley *v.* Dennison, 45 Barb. 490. See also Ware *v* Manning, 86 Ala. 238, 5 So. Rep. 682.

[9] Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. Rep. 371; Young *v.* Hill, 67 N. Y. 162, rev'g 6 Hun, 613. It is never an absolute estoppel. Hutchinson *v.* Bank, 48 Barb. 302.

The rule that an account stated can only be attacked for fraud, mistake, or manifest error, does not apply in a case where the existence of such account stated is denied. Baker *v.* Guffin, 43 Misc. 1, 86 N. Y. Supp. 579.

Even in the absence of fraud, mistake, etc., the previous transactions between the parties may be investigated so far as to ascertain whether or not the relationship of debtor and creditor existed previous to the account stated. Cooper *v.* Upton, 60 W. Va. 648, 64 S. E. Rep. 523.

gard it.[10] Even the signing of the account by a party is not conclusive evidence of accuracy.[11] And, on the other hand, a clause stating that the settlement is subject to the correction of errors and omissions which may afterward be found, does not render the account any the less a settled account, and subject to all the rules applicable to stated accounts.[12] A mistake in footing does not affect the legal effect of an account stated, which may be ascertained by a correct footing.[13]

Under the new procedure, it is the better practice to allege, in pleading, the fraud or mistake on which defendant relies to surcharge or falsify plaintiff's account.[14] To falsify items

[10] Young *v.* Hill (above). *Contra*, as to all but professional relations. Philips *v.* Belden, 2 Edw. Ch. 1, 17, and see Ogden *v.* Astor, 4 Sandf. 336.

Where the facts with regard to an account stated are such as to strongly imply fraud the court will not hesitate to order a restatement of the account. It seems also that it may be ordered restated in the absence of evidence of fraud when it appears to be based upon unlawful, usurious and exorbitant charges. Peebles *v.* Yates, 88 Miss. 289, 40 So. Rep. 996.

The defense that the balance determined includes usurious interest is available although the account stated is not assailed for fraud or mistake. Jorgenson *v.* Kingsley, 60 Neb. 44, 82 N. W. Rep. 104.

[11] Nichols *v.* Alsop, 6 Conn. 477; Stewart *v.* Conner, 13 Ala. 94.

[12] Young *v.* Hill (above).

The letters "E and O E" in an account stated may be explained to show that they mean errors and omissions excepted (Wonderly *v.* Christian, 91 Mo. App. 158), and when so explained will not render the account any the less an account stated. Kent *v.* Heghleyman, 28 Mo. App. 614.

A statement, "This settlement is correct according to our understanding at this time, but should anything occur we are amicably to settle it," did not render an account any less an account stated. Marmon *v.* Waller, 53 Mo. App. 610.

[13] Walling *v.* Rosevelt, 1 Harr. 41. See Ware *v.* Maning, 86 Ala. 238, 5 So. Rep. 682.

[14] Compare Bouslog *v.* Garrett, 39 Ind. 338; Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. Rep. 371; Naylor *v.* Lewiston, etc., Ry. Co., 14 Idaho, 789, 96 Pac. Rep. 573; Langdon *v.* Roane, 6 Ala. 518, 41 Am. D. 60; Marmon *v.* Waller, 53 Mo. App. 610.

Under a general denial, although the defendant cannot prove any affirmative defense, he is entitled to controvert and deny the proof of the plaintiff, and also to intro-

the original books, if any, should be produced, or the accounting party subpœnaed,[15] or given notice to produce them.

13. Consideration.

Evidence that the original consideration of an item was positively illegal, is competent; but evidence that the original agreement, of which that consideration was a part, was not valid, is not competent, if defendant had a legal consideration.[16]

14. Omissions and Errors.

For the purpose of explaining or negativing an omission or other error, it is competent to adduce the original books from which the account was drawn off,[17] and to prove why the party failed to discover, and how he did discover the error; [18] but a party cannot testify, as a witness, to his reason, not communicated to the other party, for the omis-

duce any evidence which controverts the facts which the plaintiff is bound to prove, in order to sustain his action. Baker *v.* Guffin, 43 Misc. 1, 86 N. Y. Supp. 579.

[15] Upton *v.* Bedlou, 4 Daly, 216.

Where the existence of the account stated was put in issue the defendant could prove payment of the items upon which plaintiff's claim was based, and also could introduce proof tending to show that the transaction out of which the plaintiff alleged he became entitled to items for services rendered had never been completed. Baker *v.* Guffin, 43 Misc. 1, 86 N. Y. Supp. 579.

[16] This seems to be the true principle. See Melchoir *v.* McCarty, 31 Wis. 252, s. c., 11 Am. Rep. 605; Youngs *v.* Hill, 67 N. Y. 162, rev'g 6 Hun, 613.

The consideration for the promise is the original transaction between the parties. Delabarre *v.* McAlpin, 101 N. Y. App. Div. 468, 92 N. Y. Supp. 129.

The law will not imply a promise to pay as an account, stated items which were then outlawed. Delabarre *v.* McAlpin, 101 N. Y. App. Div. 468, 92 N. Y. Supp. 129.

A defense that the alleged promise to pay the stated account was an oral promise to pay the debts of other persons presents a question of the legality of the promise and is not demurrable. State Life Ins. Co. *v.* Postal, 43 Ind. A. 144, 84 N. E. Rep. 156, 1093.

[17] Hampton *v.* Michael, 6 Gratt. (Va.) 151.

[18] Glenn *v.* Salter, 50 Ga. 170.

sion.[19] A mere omission of a questioned item by assent of both parties, is not conclusive against it.[20]

15. Offsets.

A claim of offsets as distinguished from an omission, should be alleged in pleading; and even if anterior to the account, it is not merely on that ground admissible unless alleged.[21] A general settlement raises a legal,[22] but not conclusive [23] presumption that earlier demands were satisfied. A subsequent accounting, including fresh items, should be pleaded; otherwise of a mere correction of the first.[24]

16. Limitations.

If no new consideration upon the statement of account is shown, other than the mutual assent, the statute of limitations applicable to the original indebtedness may serve to bar it, if pleaded,[25] but the statement itself may take the case out of the statute, if it be such as to satisfy the requirement of an acknowledgment or new promise.

[19] Champion *v.* Joslyn, 44 N. Y. 653.

Where the balance found due upon the statement and settlement of an account is accepted, such settlement cannot be attacked upon the basis of verbal protests made at the time of the settlement. Ranald S. S. Co. *v.* Wesenberg, 122 Fed. Rep. 969.

[20] Bright *v.* Coffman, 15 Ind. 371.

[21] Johnson *v.* Johnson, 4 Call (Va.), 38.

Payment being an affirmative defense should be specially pleaded. Forbes *v.* Wheeler, 39 Misc. 538, 80 N. Y. Supp. 373.

[22] Smith *v.* Tucker, 2 E. D. Smith, 193.

[23] Bushee *v.* Allen, 31 Vt. 631.

[24] Rosc. N. P. 591.

The balance found upon a statement of accounts is at once subject to the Statute of Limitations, Visher *v.* Wilbur, 5 Cal. A. 562, 90 Pac. Rep. 1065, 91 Pac. Rep. 412, and the statute begins to run anew from that time. Auzerais *v.* Naglee, 74 Cal. 60, 15 Pac. Rep. 371.

Where balances found on the statement of accounts at the end of each year become items of the succeeding current account, they are supported by a new promise when the account is stated at the end of the succeeding year and the Statute of Limitations runs from the date of the last statement. Brown, etc., Co. *v.* Guise, 14 N. M. 282, 91 Pac. Rep. 716.

[25] See paragraph 1, note 1.

CHAPTER XXIV

ACTIONS ON AWARDS

1. Fact of submission.
2. Its scope.
3. Promise to abide award.
4. Umpire, &c.
5. Oath.
6. Enlargement of time.
7. Making award.
8. Presumptions in favor of award.
9. Extrinsic evidence to vary.
10. Effect of award.
11. Competency of arbitrator as witness.
12. Defenses; pleading.
13. — omissions; excess of authority.
14. — other objections.

1. Fact of Submission.

The submission, if in issue, must be proved by evidence that both the parties were bound.[26] If it was in writing the rules stated in chapter XXI and chapter XXVII will apply to mode of proving execution. A rule of court entered on the submission is not a sufficient authentication of the submission; but a submission by order of the court, in a case where the court had power to refer, is proved by production of the order,[27] or a duly certified copy. Even where the statute

[26] Rosc. N. P. 471.

No one will be bound by the decision of arbitrators unless he has agreed to arbitrate, and the agreement should be clearly established. Koon *v.* Hollingsworth, 97 Ill. 52.

A submission to arbitration is a contract and the parties thereto must have legal capacity. The general presumption of law is, nothing appearing to the contrary, that every one has conformed to the law, and the burden of proof is on him who alleges the contrary. Brown *v.* Mize, 119 Ala. 10, 24 So. Rep. 453.

An instruction that "all the facts and circumstances introduced as evidence must show that both parties agreed to submit the matter and abide by the award," was held correct. Couch *v.* Harrison, 68 Ark. 580, 60 S. W. Rep. 957.

Where a father claimed a parcel of land in his own right, he could not bind his children to submit their claims thereto to arbitrators, since his interest was adverse to theirs. Fortune *v.* Killebrew, 86 Tex. 172, 23 S. W. Rep. 976.

[27] Id. Morse on Arb. 600.

Although the statute provides

prescribes the formalities of submissions, the presumption is in favor of the validity of a submission, unless the contrary appears.[28] In case of an oral submission, or in a conflict of evidence as to the execution of a written submission, or as secondary evidence of the making of a written submission, it is competent to show that defendant had partly performed the award, or that he had, on presentation of the award, promised to perform it, or his admission of having submitted the matter to arbitration.[29] Unless the statute requires writing, assent to a submission, even by a corporation, may be inferred from circumstances.[30]

the method of selecting the arbitrators, the parties may agree upon another method if they choose. Bishop *v.* Valley Falls Mfg. Co., 78 S. C. 312, 58 So. Rep. 939.

[28] Morse on Arb. 49. But see paragraph 14.

The statutory remedy with regard to arbitration does not repeal the common law rule, but affords a more certain remedy, which is cumulative to the common law proceeding. Poggenburg *v.* Conniff, 67 S. W. Rep. 845, 23 Ky. L. 2463.

When on its face the contract may be regarded as providing for either a statutory arbitration or an arbitration at common law, it should be referred to the statute. Bishop *v.* Valley Falls Mfg. Co., 78 S. C. 312, 58 S. E. Rep. 939.

To acquire jurisdiction to confirm an award, "the requirements of the statute must be complied with, and it must appear that the agreement of submission was executed with the formalities prescribed by law. "So where the agreement, executed by one of the parties thereto in a foreign state, did not appear to have been duly authenticated, the court held that this failure to comply with statutory provisions was fatal. Matter of Concrete Steel, etc., Co., 65 Misc. 210, 121 N. Y. Supp. 237.

[29] Morse on Arb. 602, and cases cited.

When it does not appear whether a submission was oral or written, the presumption, in the absence of proof to the contrary, is that it was in writing. Brown *v.* Mize, 119 Ala. 10, 24 So. Rep. 453.

[30] Isaacs *v.* Beth Hamedash Soc., 1 Hilt. 469.

It could properly be inferred that a party had, by a previous agreement, assented to a parol submission, where it was proved that she had attended hearings before the referee and stated her claim. Lobb *v.* Lobb, 26 Pa. St. 327.

Generally, where there is capacity to contract, there is power to arbitrate. Accordingly a municipal corporation may submit to arbi-

The authority of an agent or attorney to submit may be inferred from evidence of the principal's acquiescence in similar submissions.[31] It is conclusively proved by evidence that the principal appeared and proceeded before the arbitrator,[32] or otherwise acquiesced in and ratified the submission.[33]

An oral submission, and proceeding upon it, do not estop the party from setting up that the controversy was one not a subject for arbitration, or not a subject for oral submission.[34]

tration by a resolution of its council. Benedict *v.* Oneida County, 24 Hun, 413, 418. The corporate seal is not needed. Brady *v.* Brooklyn, 1 Barb. 584.

[31] Wood *v.* Auburn & Rochester R. R. Co., 8 N. Y. (4 Seld.) 160.

It has been decided that an attorney has implied authority arising from his employment, to submit matters in dispute to arbitration. Morris *v.* Grier, 76 N. C. 410.

But there are decisions holding that an attorney has no implied authority to make a submission *in pais*, unknown to his client or without an order of the court. It seems, furthermore, that he has no authority to make a material change in the submission without an express direction from his client so to do. Daniels *v.* New London, 58 Conn. 156, 19 Atl. Rep. 573, 7 L. R. A. 563.

In Stinerville, etc., Stone Co. *v.* White, 25 Misc. 314, 54 N. Y. Supp. 577, it was held that an attorney's authority to submit a controversy to arbitration must be proved, since such an act does not fall within his general powers.

A submission, whether by deed, parol, or rule of court, should be revoked or set aside if the parties are dissatisfied with it; but where one party to the controversy went to trial and only on appeal, after objections to the adverse award had been overruled, complained of the lack of authority of the attorney; the appellate court could not entertain the complaint. Bingham *v.* Guthrie, 19 Pa. St. 418.

[32] Diedrick *v.* Richley, 2 Hill, 271.

Where the president of a corporation signed a submission to which the corporate seal was affixed, and the records showed that the company participated in the selection of the arbitrators and in the proceedings had by them, the court held that there was no merit in the claim that the president signed without authority. White Star Min. Co. *v.* Hultberg, 220 Ill. 578, 77 N. E. Rep. 327.

[33] Smith *v.* Sweeny, 35 N. Y. 291.

[34] French *v.* New, 2 Abb. Ct.

2. Its Scope.

A submission is to be given a liberal, but not a forced construction, in favor of including and terminating controversies.[35] Documents referred to in it are competent evidence to show what was in controversy.[36] If ambiguous, the course of evidence and discussion before the arbitrators in presence of both parties, is competent as tending to show that matters presented on both sides were embraced, and matters not mentioned by either were not embraced in the submission.[37]

App. Dec. 209, s. c., 28 N. Y. 147, rev'g 20 Barb. 481.

In the case of an oral submission, the burden of proving a mutual and concurrent agreement to submit the matter in controversy to the consideration and determination of the arbitrators selected pursuant to the agreement rested upon the plaintiff who sued to recover the amount of the award. Fooks *v.* Lawson, 15 Del. 115, 40 Atl. Rep. 661.

But as a general rule, a parol submission to arbitrate is valid as to matters submitted, as a common law arbitration. Lilley *v.* Tuttle, 52 Colo. 121, 117 Pac. Rep. 896, Ann. Cas. 1913, D. 196.

[35] Munro *v.* Alaire, 2 Cai. 320; Curtis *v.* Gokey, 68 N. Y. 305.

"Statutes providing for and regulating arbitration, and authorizing the entry of judgment on the award itself . . . are remedial and should be liberally construed so as to advance the legislative purpose of putting an end to litigation." Bishop *v.* Valley Falls Mfg. Co., 78 S. C. 312, 58 So. Rep. 939.

[36] Winship *v.* Jewett, 1 Barb. Ch. 173.

"The scope of the submission and of the decision in the arbitration proceedings must be determined from the agreement of arbitration and the award, and from such proof as may throw light upon the subject." Jensen *v.* Deep Creek Farm, etc., Co. 27 Utah, 66, 74 Pac. Rep. 427.

[37] Morse on Arb. 59–64; but compare Feidler *v.* Cooper, 19 Wend. 285.

When ambiguity arose with respect to an arbitration agreement as to whether the validity of a judgment or the subject matter on which it was based was in dispute, the fact that the parties treated the submission as relating to the validity of the judgment was evidenced by the fact that they joined in fully in presenting their matter of difference to the arbitrators, and also by the fact that they (the arbitrators) in effect held that the judgment was valid. The construction to be put on an ambiguous contract may properly be and is often ruled by the meaning the parties thereto, in the execution thereof, attributed to the same. Jones *v.* Thomas, 120 Wis. 274, 97 N. W. Rep. 950.

A written submission is a contract within the rule that its terms cannot be varied by an oral contemporaneous or previous agreement; [38] but it may be modified or superseded by a subsequent oral agreement.[39]

3. Promise to Abide Award.

When a submission is proved, an agreement to abide by the award is implied, and an express promise need not be proved.[40]

[38] For this rule see chapter XVI, paragraph 8, and chapter XIX, paragraph 14, of this vol.

A party will not be allowed to inject an oral condition into a written stipulation and avoid the award made thereon by showing non-compliance with the condition. To permit this would be to vary and add to the terms of the written submission. Payne *v.* Crawford, 97 Ala. 604, 11 So. Rep. 725.

[39] French *v.* New, 28 N. Y. 147, rev'g 20 Barb. 481.

[40] Couch *v.* Harrison, 68 Ark. 580; Smith *v.* Morse, 9 Wall. 76; Valentine *v.* Valentine, 2 Barb. Ch. 430; Efner *v.* Shaw, 2 Wend. 567.

"An award under an arbitration at common law was not the end of the matter, for unless the losing party chose to comply with it, the successful party was obliged to incur the delay and expense of bringing his action to enforce compliance." Bishop *v.* Valley Falls Mfg. Co., 78 S. C. 312, 58 S. E. Rep. 939.

"In the case of parol submission, a distinction was anciently taken between cases where there was, and where there was not, a promise to perform the award. If the award was only for the payment of money it was conceded an action might at all times be maintained for it, though there were no promise in the submission to perform the award; but if the award was of a collateral act, it was supposed there was no means of compelling performance, unless by submission there had been an express promise of performance. In the more modern times, however, the mere act of submission has been held an implied promise to abide by the determination of the arbitrators; and an action can now, not only be maintained upon such an award, but the award under such a submission, has the same legal effect, in barring an action on the original subject of dispute, as though the submission contained an express promise to perform the award." Evans *v.* McKinsey, Litt. Sel. Cas. (Ky.) 262, 265. Quotation taken from Corpus Juris, Vol. 5, p. 33.

An agreement to submit to arbitration implies an agreement to abide by the decision of the arbitrators. Dikes, Adm. *v.* Hammond, 86 Iowa, 563.

4. Umpire, &c.

Under an allegation of submission to and award by arbitrators, submission to and award by an umpire, is a variance.[41] The appointment of an umpire, or additional arbitrator, if any such were appointed and made the award, must be proved. It cannot be proved by a recital in his award.[42] Appointment by parol is good unless otherwise provided by statute or by agreement.[43]

5. Oath.

The arbitrator's oath, if required by statute,[44] and notice

In answer to an objection that it was not proved that the parties to a submission agreed to abide by the award, the court instructed the jury that no special form of words was necessary to prove such an agreement, but that it might be shown by subsequent admissions of the parties, appearing either from their language or conduct or from other circumstances. Fooks *v.* Lason, 15 Del. 115, 40 Atl. Rep. 661.

[41] Lyon *v.* Blossom, 4 Duer, 318. Unsound in so far as it holds that the variance cannot be cured by amendment.

The objection that an award was void because one who acted as umpire failed to use the word "Umpire" after his signature, but signed with one of the arbitrators, so describing himself, was of no merit, since in the body of the award it clearly appeared that his functions were in fact those of an umpire. Runyon *v.* Rutherford, 55 W. Va. 436, 47 S. E. Rep. 150.

[42] Still *v.* Halford, 4 Campb. 19. Compare Morse on Arb. 446, and cases cited.

The signatures affixed to an award are not of themselves sufficient evidence that those who signed were selected as arbitrators. Fore *v.* Berry, 94 S. C. 71, 78 S. E. Rep. 706, Ann. Cas. 1915 A. 955.

It has, moreover, been held that the appointment of an umpire must be shown on the face of the award, where it appeared that two parties appointed as arbitrators had power under the submission or rule of court to select an umpire in case they failed to agree. Foreman *v.* Bibb, 65 N. C. 128.

[43] Elmendorf *v.* Harris, 5 Wend. 516, s. c., 23 Wend. 628. Compare Smith *v.* Morse, 9 Wall. 76.

The contention that since the submission was under seal, the selection of an umpire must likewise be under the seal of the arbitrators was not upheld, since such formality was not required by the terms of the submission and furthermore since it was too late to interpose that objection after the award had been made. Bryan *v.* Jeffreys, 104 N. C. 242, 10 S. E. Rep. 167.

[44] See Browning *v.* Wheeler, 24 Wend. 258.

of hearing,[45] are presumed, unless the contrary appear. Evidence of waiver excuses the omission; and the fact that defendant proceeded without them is sufficient evidence of waiver.[46]

6. Enlargement of Time.

An enlargement of the time to award implies a new submission, and the new agreement in strictness should be alleged;[47] and if in issue must be proved,[48] if the validity of the award depends upon it. If the time was fixed by a sealed submission, written evidence, though unsealed, is competent to show extension,[49] and so, in any case, is oral evidence of waiver by proceeding without objection after the time had passed.[50]

But the arbitrator's oath is not indispensable at common law. If it is not required or demanded, the presumption stands that it was dispensed with. Payne *v.* Crawford, 97 Ala. 604, 11 So. Rep. 725.

[45] Mayor, &c. of N. Y. *v.* Butler, 1 Barb. 325.

In New Jersey it seems that "it is definitely determined that parties to an arbitration are entitled to notice from the arbitrators of a time and place for a hearing to an end that they may be present and present their case." Crystal Ice, etc., Co. *v.* Elmer, 82 N. J. Eq. 486, 89 Atl. Rep. 247.

[46] This is the rule in New York and some other States. *Contra*, in Kentucky, Louisiana, Missouri and New Jersey. Day *v.* Hammond, 57 N. Y. 479.

In a common law arbitration an oath may be expressly waived, even though required under the terms of the submission. Southern Live Stock Ins. Co. *v.* Benjamine, 113 Ga. 1088.

One who was present and participated in the arbitration could not complain of the failure to give notice of the time or place of the hearings. Tennesee Coal, etc., Co. *v.* Roussell, 155 Ala. 435, 46 So. Rep. 866, 130 Am. St. Rep. 56.

But it seems that the words "or otherwise" contained in § 2369 of the Code of Civil Procedure relating to the necessity of an oath indicates a legislative intent to extend the requirement of the arbitrator's oath to those selected under a common law arbitrament. A waiver of the oath must therefore be in writing, signed by the parties or their attorneys. Hinckle *v.* Zimmerman, 184 N. Y. 114, 76 N. E. Rep. 1080.

[47] Myers *v.* Dixon, 2 Hall, 456.

[48] Rosc. N. P. 471.

[49] Bloomer *v.* Sherman, 5 Paige, 575, affi'g 2 Edw. 452.

[50] Morse on Arb. 83, 173.

7. Making Award.

The execution of a written award may be proved like that of other deeds or writings.[51] If the submission was to several, the concurrence of all must be shown; [52] unless the statute,[53] or the terms of submission,[54] sanction a decision by a less number; in which case oral evidence is competent to show that the one not signing, had jointly with the others, heard the case.[55]

If the submission required the award to be ready for delivery at a time named, it is sufficient to prove that all the formalities, if any, were completed at that time, so that it was ready to be delivered to defendant (if he was entitled to delivery),[56] on request,[57] and on payment of fees, if any.[58] A

[51] Rosc. N. P. 472, see Chapter XXI, paragraph 4 of this vol.

[52] Green *v.* Miller, 6 Johns. 39, and cases cited.

Where counsel for the parties to an arbitration agreed that the arbitrators might later draw up a formal award embodying the terms of an informal statement which all the arbitrators had signed at the close of their hearings in the presence of one another and counsel for the parties, the fact that they did not sign the award at the same time and place did not constitute a vital defect. Mississippi Cotton Oil Co. *v.* Buster, 84 Miss. 91, 36 So. Rep. 146.

[53] 2 N. Y. R. S. 542, § 7.

[54] Isaacs *v.* Beth Hamedash Soc., 1 Hilt. 469.

Originally an agreement to arbitrate, executed in triplicate, provided for the signatures of only two of three arbitrators. Later it was agreed that all the arbitrators should sign the award. This change was indicated on two of the three copies of the agreement, but through the fraud of the defendant's agent the plaintiff's copy was not so altered. The award signed by only two of the arbitrators was set aside, even though the plaintiff's copy of the agreement required the signatures of only two. McCurdy *v.* Daniell (Mich.), 97 N. W. Rep. 52.

[55] Schultz *v.* Halsey, 3 Sandf. 405.

[56] Pratt *v.* Hackett, 6 Johns. 14.

[57] Burnap *v.* Losey, 1 Lans. 111, Morse on Arb. 279.

An award is not invalid because it was discussed and agreed upon on Sunday, where it was made, published and delivered on the following day. Ehrlich *v.* Pike, 53 Misc. 328, 104 N. Y. Supp. 818.

[58] Ott *v.* Schroeppel, 7 Barb. 431.

Where no time was fixed for the delivery of the award, the court held that in legal contemplation, it took effect when ready for delivery, and since authority to exact fees and expenses necessarily followed from the employ-

tardy date to the award is not alone enough to rebut the presumption of timely completion.[59] A waiver of delivery by the defendant may be proved by parol.[60] Under an allegation that the award was duly made or published on, etc., readiness to deliver may be proved.[61] Unless publication to the party is required by the submission, plaintiff need not prove that defendant had notice of the award.[62]

Objections to the award which do not show it to be positively illegal, or absolutely void under the statute, may be cured by evidence of its ratification by the parties.[63]

8. Presumptions in Favor of Awards.

All presumptions and intendments are in favor of an award,[64] as in case of a judgment,[65] and for this purpose

ment of arbitrators, they might, after notice to the parties, hold the award as security for such fees without impairing its force and effect. New York Lumber, etc., Co. *v.* Schneider, et al., 119 N. Y. 475, 24 N. E. Rep. 4.

[59] Owen *v.* Boerum, 23 Barb. 187.

An objection that judgment was not entered within ten days after the hearing, pursuant to a requirement of the submission, was deemed to have been waived where such objection was not raised at the time the judgment was entered. West Chicago Park Comrs. *v.* Riddle, 245 Ill. 168, 91 N. W. Rep. 1060.

[60] Perkins *v.* Wing, 10 Johns. 143; Warren *v.* Haight, 65 N. Y. 169; Sellick *v.* Addams, 15 Johns. 197. But compare Buck *v.* Wadsworth, 1 Hill, 321.

[61] Munro *v.* Alaire, 2 Cai. 320.

[62] Rosc. N. P. 471, Morse on Arb. 285. *Contra*, Id. 290.

[63] Morse on Arb. 530.

A party could not be heard to object to mere irregularities in the proceedings, taken on a submission which did not go to the merits, when complained of more than six weeks after proofs had been made and the matter finally submitted to the arbitrators. Britton *v.* Hooper, 25 Misc. 388, 55 N. Y. Supp. 493.

[64] Morewood *v.* Jewett, 2 Robt. 496; Morse on Arb. 179; Eureka Pipe Line Co. *v.* Simms, 62 W. Va. 628, 59 S. E. Rep. 618; Tyblewski *v.* Svea Fire Assur. Co., 121 Ill. App. 528; Vincent *v.* German Ins. Co., 120 Iowa, 272, 94 N. W. Rep. 458; Caldwell *v.* Brooks El. Co., 10 N. D. 575, 88 N. W.

[65] Lowenstein *v.* Mackintosh, 37 Barb. 251; Morse on Arb. 446, and cases cited.

Where by a condition in a policy of insurance, two arbitrators were selected by the parties, their ap-

arbitrators are presumed to have performed all their duties.[66] They are presumed to have considered every subject brought before them within the submission,[67] and nothing

Rep. 700; Hoit *v.* Berger Crittenden Co., 81 Minn. 356, 84 N. W. Rep. 48; Kaplan *v.* Niagara Fire Ins. Co., 73 N. J. L. 780, 65 Atl. Rep. 188.

Whoever assails an award has the burden of clearly establishing its invalidity. Bishop *v.* Valley Falls Mfg. Co., 78 S. C. 312, 58 S. E. Rep. 939; Ridgell Bros. *v.* Dupree, 85 S. W. Rep. (Tex. Civ. App.) 1166; Jensen *v.* Deep Creek Farm, etc., Co., 27 Utah, 66, 74 Pac. Rep. 427.

"It is proper . . . to say . . . that as a general rule the courts are very liberal in the construction of awards. All reasonable presumptions will be made in their favor. No unreasonable intendment will be made to overturn them, but every reasonable intendment will be made to uphold them." Fooks *v.* Lawson, 15 Del. 115, 40 Atl. Rep. 661.

"The award was as general as was the submission, and every reasonable intendment must be made to sustain it. New York Lumber, etc., Co. *v.* Schneider, 119 N. Y. 475, 24 N. E. Rep. 4. See also Coons *v.* Coons, 95 Va. 434, 28 S. E. Rep. 885, 64 Am. St. Rep. 804.

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pointment was not by rule of court and was therefore a common law arbitrament. "By the common law the award of the arbitrators is like a judgment. Courts of common law cannot listen to suggestions contradicting the award or impeaching the conduct of the arbitrators." Kaplan *v.* Niagara F. Ins. Co., 73 N. J. Law, 780, 65 Atl. Rep. 188.

[66] Owen *v.* Boerum, 23 Barb. 187; and see Butler *v.* Mayor, &c. of N. Y. 1 Hill, 489, rev'd in 7 Id. 329; see also 1 Barb. 325.

"An award of arbitrators must be final and certain, and so determine the matter submitted that an action between the same parties will not afterwards lie in regard to it, or the award is void." Hoit *v.* Berber-Crittenden Co., 81 Minn. 356, 84 N. W. Rep. 48.

"Arbitrations are . . . not governed by the strict rules as to the admissibility of evidence in force in courts of law." Roberts *v.* Consumers' Can Co., 102 Md. 362, 62 Atl. Rep. 585, 111 Am. St. Rep. 377.

The court is bound to presume that the proceedings were valid in the absence of evidence to the contrary. Kaplan *v.* Niagara F. Ins. Co., 73 N. J. Law, 780, 65 Atl. Rep. 188.

[67] Smith *v.* Clark, 22 Tex. Civ. App. 485, 54 S. W. Rep. 1052; Morewood *v.* Jewett, 2 Robt. 496.

"All the demands of both parties against each other embraced within the submission were money demands," accordingly, "when the

more,[68] unless the terms of the award affirmatively show that they did not.[69] The award, although appearing less extensive in its terms than the submission, is presumed to embrace every question before the arbitrators.[70] If the submission expressly or by just implication makes it a condition that all matters submitted be determined, the same presumption applies, if there are general words in the award which can give any support to it. But this presumption is not conclusive.[71]

arbitrators found a certain sum in money was due 'one party' and awarded him that sum, such award was of itself indicative of a full and complete execution of the submission. This is so whether the demands are a result of contractual relations or of litigation between the parties." Jensen *v.* Deep Creek Farm, etc., Co., 27 Utah, 66, 74 Pac. Rep. 427.

When an award is made, the arbitrators are presumed to have done the duty for which they were selected and to have considered every matter submitted to them by the agreement to arbitrate, unless evidence to the contrary is offered and where it is claimed that they have omitted or failed or refused to consider any matter submitted to them, this fact must appear on the face of the award or by other evidence. In the absence of proof of the omission or refusal to consider, it will be presumed that all matters submitted were considered and passed upon. Fooks *v.* Lawson, 15 Del. 115, 40 Atl. Rep. 661.

[68] Solomons *v.* McKinstry, 13 Johns. 27, affi'g 2 Id. 57; Pierce *v.* Morrison, 6 Hun, 235.

"An award must conform to the submission. That is the limit of the authority of the arbitrators, and any excess of it is void. . . . It may be good as to the residue, if that which is good and bad so disconnected that the one is not dependent on or does not enter into the consideration of the other." Citations, Brown, Adm. *v.* Mize, 119 Ala. 10, 24 So. Rep. 453.

The award must strictly conform to the agreement. Smith *v.* Clark, 22 Tex. Civ. App. 485, 54 S. W. Rep. 1052.

[69] Wright *v.* Wright, 5 Cow. 197; Backus *v.* Forbes, 20 N. Y. 204.

Where the arbitrators were selected only to appraise the amount of damage to property, it was held that they were not required to take testimony. Vincent *v.* German Ins. Co., 120 Iowa, 272, 94 N. W. Rep. 458.

[70] Ott *v.* Schroeppel, 5 N. Y. 482, rev'g 7 Barb. 431.

An award must be construed according to common sense and popular understanding. Certainty to a given intent is all that is required. Poggenburg *v.* Connif, 67 S. W. Rep. 845, 23 Ky. L. 2463.

[71] Morse on Arb. 342–350, 363.

For the purpose of setting aside the award, one of the parties

9. Extrinsic Evidence to Vary.

An award apparently uncertain, may, like a deed, be aided by extrinsic evidence of undisputed facts, or documents referred to in it, for the purpose of showing what it is that was referred to;[72] but the terms of a written award cannot be varied by parol,[73] nor uncertainty in it aided by testimony of the arbitrator, or evidence of his declarations, as to what was intended;[74] but oral evidence of an award is not necessarily excluded by the fact that the arbitrator delivered a memorandum on its face incomplete.[75]

10. Effect of Award.

The award unimpeached is conclusive as a judgment.[76]

offered affidavits to show that at the time of signing the submission it was agreed that certain matters were not to be considered by the arbitrators. But it was ruled that inasmuch as the submission contemplated a general settlement of all matters in dispute, neither party could come into court and by *ex parte* affidavits establish what it was agreed should or should not be submitted. Patrick *v.* Batten, 123 Mich. 203, 81 N. W. Rep. 1081.

There is a presumption, subject to rebuttal, that the appointment of an umpire was valid, but when it is shown that there was no disagreement between the arbitrators, the appointment of an umpire and the fact of his acting as such can have no legal significance. Kaplan *v.* Niagara F. Ins. Co., 73 N. J. Law, 780, 65 Atl. Rep. 188.

[72] Jackson *v.* Ambler, 14 Johns. 96; Morse on Arb. 411–413, 445.

"Declarations made by arbitrators as to what was before them, or as to the legal effect of an award, called for no reply from either of the parties, and their silence cannot be construed into an assent to the truth of the statement. The award itself is the evidence of their finding and conclusion." Collier *v.* White, 97 Ala. 615, 618, 12 So. Rep. 385.

Under a statute providing for amendment of the award as to matters of form, it is not proper to allow an amendment in material matters vital to its validity. Bigler *v.* Sweitzer, 127 Ill. App. 14.

[73] Cobb *v.* Dostch, 52 Geo. 548. See also Scott *v.* Green, 89 N. C. 278.

Arbitrators were not allowed to testify that they had disposed of a matter in a manner different from that stated in their award, on the ground that their oral evidence to that effect would impeach their written award. Schmidt *v.* Glade, 126 Ill. 485, 18 N. E. Rep. 762.

[74] Morse on Arb. 435, 563.

[75] See Becker *v.* Boon, 61 N. Y. 324.

[76] Brazell *v.* Isham, 12 N. Y.

11. Competency of Arbitrator as Witness.

An arbitrator may be required to testify to facts upon which his legal power depended; but not to the propriety or impropriety of his exercise of it. To illustrate this distinction:—he is a competent witness in a legal proceeding in which it is sought to enforce his award;[77] and like any other witness, may testify to the extent of an oral submission,[78] or to what passed before him at a hearing of the parties,[79] what matters were presented for consideration,[80] and what were

9; Lowenstein *v.* McIntosh, 37 Barb. 251; and see Coleman *v.* Wade, 6 N. Y. 44; Mayer *v.* Phœnix Assur. Co., 124 N. Y. App. Div. 241, 108 N. Y. Supp. 711; Ehrlich *v.* Pike, 53 Misc. 328, 104 N. Y. Supp. 818. But not more so. Morse *v.* Osborn, 64 Barb. 546. The burden of alleging and proving the contrary is upon the party seeking to impeach it. Connecticut Fire Ins. Co. *v.* O'Fallon, 49 Neb. 740, 69 N. W. Rep. 118.

But it has been held that a judgment or decree must first be entered on an award to entitle a party to a lien on land or an execution. A mere return of the award to the clerk's office is insufficient to give the award the force of a judgment. Turner *v.* Stewart, 51 W. Va. 493, 505, 41 S. E. Rep. 924.

The fact that the court has no means of enforcing a part of the award does not invalidate it. Gandy *v.* Tippett, 155 Ala. 296, 46 So. Rep. 463.

[77] Duke of Buccleuch *v.* Metropolitan Board of Works, L. R. 5 Ho. of L. 418, s. c., 2 Moak's Eng. 448; Mayor, &c. of N. Y. *v.* Butler, 1 Barb. 325.

In determining whether the arbitrators mistook or misunderstood the law, the court may not take into consideration the written separate statement of one of the arbitrators. White Star Min. Co. *v.* Hultberg, 220 Ill. 578, 77 N. E. Rep. 527.

[78] Birbeck *v.* Burrows, 2 Hall, 51

[79] Duke of Buccleuch *v.* Metropolitan Board of Works (above); Cole *v.* Blunt, 2 Bosw. 116.

It often becomes necessary to show by parol evidence what took place before the referee, what was in controvery before him, and what matters entered into his decision. The referee is a competent witness himself to establish these facts. Evans *v.* Clapp, 123 Mass. 165, 25 Am. Rep. 52.

[80] Id.

While the transcript of the testimony taken before the arbitrators and the evidence of the arbitrators themselves is not admissible to vary or control the terms of the written award, still such proof is admissible for the purpose of showing that all the matters included in the submission were considered and adjudicated by the

or were not considered,[81] and what was openly decided in the presence of the parties;[82] as well as other incidents of the proceedings; such, for instance, as delivery of the award. He is thus competent, even when the object of the testimony is to avoid the award in which he joined,[83] unless by showing mistake, bad faith, misconduct or other irregularity, in making it,[84] for which purpose he is not competent, unless he declared his dissent at the time of the irregularity.[85] Nor can he be asked any questions as to what passed in his own mind when exercising his discretionary or judicial power on the matters submitted to him.[86]

One who signed cannot testify that in fact he did not concur;[87] nor is it relevant to prove that one who signed afterwards dissented;[88] unless there be evidence of fraud or misconduct, or misrepresentation practiced upon him and inducing signature.[89] In an action to set aside an award, it

arbitrators. Jensen *v.* Deep Creek Farm, etc., Co., 27 Utah, 66, 74 Pac. Rep. 427.

[81] Butler *v.* Mayor, &c. of N. Y. (above).

But after an arbitrator had made his award and his duties were ended, his admission to the effect that he had not examined certain evidence alleged to have been offered at the hearings before him could not be considered, since they were declarations of a third person against the interest of another, without authority. Manson *v.* Wilcox, 140 Cal. 206, 73 Pac. Rep. 1004.

[82] Cole *v.* Blunt (above), and Boughton *v.* Seamans, 9 Hun, 392, 394, where the arbitrators testified to their oral award.

An arbitrator can also testify to what matters "entered into the decision" of the arbitrators. Jensen *v.* Deep Creek Farm, etc., Co., 27 Utah, 66, 74 Pac. Rep. 427.

[83] Briggs *v.* Smith, 20 Barb. 409.

[84] Newland *v.* Douglass, 2 Johns. 62.

The testimony of an arbitrator showing that he alone had been guilty of misconduct is not admissible to impeach an award. Stone *v.* Baldwin, 226 Ill. 338, 80 N. E. Rep. 890.

[85] Jackson *v.* Gager, 5 Cow. 383.

[86] Duke of Buccleuch *v.* Metropolitan Board of Works (above).

[87] Campbell *v.* Western, 3 Paige, 124.

It is improper to admit testimony of an arbitrator to impeach his own award. Mississippi Cotton Oil Co. *v.* Buster, 84 Miss. 91, 36 So. Rep. 146.

[88] Winship *v.* Jewett, 1 Barb. Ch. 173.

[89] Wellington *v.* Warren, 10 Metc. 431.

is competent for one of the arbitrators (who refused to join in the award) to testify as to the acts of partiality and misconduct on the part of the other arbitrators.[90]

12. Defenses; Pleading.

A denial that an award was made of and concerning the premises, etc., does not put in issue the making, but only the fitness of the award to the submission.[91] A denial of award admits evidence that there was none in fact; but if there was one in fact, there should be an allegation of the irregularity,[92] departure from submission,[93] subsequent *vacatur*,[94] or other

[90] Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. Rep. 855.

It was held that though arbitrators cannot by testimony impeach their own award, yet an affidavit of one who did not sign an award disclosing the alleged misconduct of his associates was admissible. Republic Natl. Bank *v.* Darragh, 30 Hun (N. Y.), 29.

[91] Id.

[92] Knowlton *v.* Mickles, 29 Barb. 465. Evidence tending to impeach an award actually made and published, in accordance with the agreement of submission, is inadmissible under a general denial. Connecticut Fire Ins. Co. *v.* O'Fallon, 49 Neb. 740, 69 N. W. Rep. 118. Failure to deliver within the time limited was not, at common law, available under a denial of award. Perkins *v.* Wing, 10 Johns. 143; Morse on Arb. 284. *Contra*, Dresser *v.* Stansfield, 14 Mees. & W. 822.

[93] Bean *v.* Farnum, 6 Pick. 269. *Contra*, Rosc. N. P. 473.

"The power of arbitrators is confined strictly to the matters submitted to them for determination, and any award made on any other subject is void." Cullen *v.* Shipway, 78 N. Y. App. Div. 130, 79 N. Y. Supp. 627.

Where all of the matters involved are money demands, it is not necessary that all matters separately stated in the submission should be specifically mentioned in the award. Jensen *v.* Deep Creek Farm, etc., Co., 27 Utah, 66, 74 Pac. Rep. 427.

Where the submission contemplates that "there should be 'a full and complete adjustment of all accounts in controversy between the partners,' but the award fails

[94] Rosc. N. P. 472.

"If a board of arbitrators exceeds its jurisdiction to the injury of property rights of any party to the proceedings before it, and there is no other way of reaching the matter, a court of equity will take jurisdiction to afford such relief as it is capable of." Bartlett *v.* Bartlett, etc., Co., 116 Wis. 450, 93 N. W. Rep. 473.

ground of invalidity relied on,[95] to admit evidence of the objection. Under the new procedure proper allegations may admit as a defense whatever is a ground for application to the equitable power of the court to vacate the award.[96]

13. Omissions; Excess of Authority.

If defendant relies on the objection that the arbitrators omitted to pass upon a matter within the submission and brought before them by the parties, or that they considered a matter not submitted, the burden is on him to show the fact. It may be shown by parol unless it contradicts the terms of a written award, or unless the omission was caused

to adjust and settle all . . . matters and after dissolving the firm provides for a partnership ownership of the accounts due the firm, and also fails to provide for the manner of collecting the accounts," the award does not conform to the submission and therefore is not valid and binding. Bigler *v.* Sweitzer, 127 Ill. App. 14.

"When the submission requires the matters to be determined to be tested by a practical rule . . . the adoption by the arbitrators of a different rule or a disregard of the rule and decision of the matter according to the notions of the arbitrators of what is just in the premises, is a departure from the submission." Bartlett *v.* Bartlett, etc., Co., 116 Wis. 450, 93 N. W. Rep. 473.

[95] Morewood *v.* Jewett, 2 Robt. 496; Morse on Arb. 594.

"The rule is that an award to be sufficient, must settle the amount to be paid, and not leave it to be determined by another tribunal." Poggenburg *v.* Conniff, 67 S. W. Rep. 845, 23 Ky. L. Rep. 2463.

An award is not void for uncertainty even though it does not definitely fix the amount to be paid to one of the parties by the other so long as it indicates the rule by which such amount can be determined. Eureka Pipe Co. *v.* Simms, 59 S. E. Rep. 618, 62 W. Va. 628.

An umpire and appraisers selected to determine the amount of a fire loss on a stock of merchandise were held at liberty to arrive at a conclusion in regard to the value of the articles they were called upon to estimate in such way as they thought proper. Tyblewski *v.* Svea Fire & Assur. Co., 121 Ill. App. 528.

[96] Day *v.* Hammond, 57 N. Y. 484, 489.

"Actions in equity to set aside an award, and if that be done to recover the amount of the loss, are not infrequent, and have been quite uniformly sustained." Mayer *v.* Phœnix Assur. Co., 124 N. Y. App. Div. 241, 108 N. Y. Supp. 711.

by defendant himself.[97] The fact that matters not considered were brought before the arbitrator, may be shown by parol, or by recitals in the award.[98] The fact that they were not considered or determined cannot be shown by extrinsic evidence if the award is in terms adequate to conclude the parties as a judgment would.[99] It may always be shown by parol evidence, in defense or avoidance of an award, that the arbitrators acted in excess of their jurisdiction.[1] But excess

[97] Morss *v.* Osborn, 64 Barb. 546.

"The burden of proof was upon the defendants to show some fatal omission, if they wished to avoid the conclusiveness of the award." Jensen *v.* Deep Creek Farm, etc., Co., 27 Utah, 66, 74, 74 Pac. Rep. 427.

The omission from the award of an item in controversy between the parties cannot be shown by parol where no misconduct on the part of the arbitrators is charged. Kaplan *v.* Niagara F. Ins. Co., 73 N. J. Law, 780, 65 Atl. Rep. 188.

It was stated in affidavits on a motion to vacate an award because of a refusal to hear pertinent evidence that one of two books which were alleged not to have been considered by the arbitrator was withdrawn and that the other contained no material matter. The court held therefore that there was no merit in the contention that there had been a refusal to hear pertinent evidence. Manson *v.* Wilcox, 140 Cal. 206, 73 Pac. Rep. 1004.

[98] Morse on Arb. 359, 361.

An allegation that the arbitrators had failed to consider certain matters embraced in the submission was defective, since there should also have been the further averment that the arbitrators had been notified of these matters and that an offer had been made to prove them. Seely *v.* Pelton, 63 Ill. 101.

[99] Lowenstein *v.* Mackintosh, 37 Barb. 251.

An offer which did not tend to prove a defect apparent on the face of an award was held to be in effect one to contradict its terms. An award could not be impeached at law for an erroneous judgment upon the facts, nor for the omission of items of account within the terms of the submission. Kaplan *v.* Niagara F. Ins. Co., 73 N. J. L. 780, 64 Atl. Rep. 188.

Where an award showed clearly on its face that it was not necessary to make further inquiry in order to ascertain a sum of money to be paid, and that no further act was required of either party to the submission, the award was sufficient in itself. Fulmore *v.* McGeorge, 91 Cal. 611, 28 Pac. Rep. 92.

[1] Dodds *v.* Hakes, 114 N. Y. 260, 263, 21 N. E. Rep. 398; Briggs *v.* Smith, 20 Barb. 409; Butler *v.* Mayor, etc., of N. Y., 7 Hill, 329; People *v.* Schuyler, 69 N. Y. 247.

of authority must be clearly shown; it is not enough that it may have occurred.[2]

14. Other Objections.

An award may be proved void, without showing corruption or bad faith, by evidence, under proper allegation, that the arbitrator's oath, required by statute, was not taken; [3]

"The determination of the regularly constituted tribunals of a voluntary association, regularly made, on a subject within their jurisdiction, are not open to judicial scrutiny. The court, however, may look into the proceedings of such a tribunal to the extent of seeing whether, to the injury of the complainant, it exceeded its jurisdiction the same as in case of a *quasi* judicial body." Bartlett *v.* Bartlett, etc., Co., 116 Wis. 450, 93 N. W. Rep. 473.

[2] Solomons *v.* McKinstry, 13 Johns. 27, affi'g 2 Id. 57; Bacon *v.* Wilber, 1 Cow. 117; Morse on Arb. 443, 445.

Arbitrations are favored by the courts and he who seeks to annul an award on the ground that the arbitrators exceeded their authority must show, by clear and convincing proof, his right to have the same vacated. Patrick *v.* Batten, 123 Mich. 203, 81 N. W. Rep. 1081.

The burden of proof is on the party seeking to set aside an award, and the proof must be clear and strong. Brush *v.* Fisher, 70 Mich. 469, 38 N. W. Rep. 446, 14 Am. St. Rep. 510.

A special plea which averred that the arbitrators had passed upon matters not embraced in the submission was defective in not setting out in what particulars they had exceeded their jurisdiction. Seely *v.* Pelton, 63 Ill. 101.

[3] Day *v.* Hammond, 57 N. Y. 483. Unless the oath was waived. Id. See Tennessee Coal, etc., Co. *v.* Roussell, 155 Ala. 435, 46 So. Rep. 866, 130 Am. St. Rep. 56; Matter of Grening, 74 Hun, 62, 26 N. Y. S. 117.

Where arbitrators, in a statutory submission, have taken an oath materially different from that prescribed by the statute, the variance is fatal to the award, if proper exceptions are taken. Sisson, Adm., *v.* Pittman, 113 Ga. 166, 38 S. E. Rep. 315.

Where it appears from the evidence that arbitrators were duly sworn, the fact that the oath as reduced to writing may have been technically defective is immaterial. Caldwell *v.* Brooks El. Co., 10 N. D. 575, 88 N. W. Rep. 700.

Where a justice of the peace administered an oath to a referee, his certificate of oath was held amendable by adding the words "Justice of the Peace" after his signature. Dorr *v.* Hill, 62 N. H. 506.

Although the New York Code requires arbitrators to be sworn, submissions may, nevertheless, be made under the common law or

that the arbitrators took evidence or heard argument at a meeting of which defendant had no notice; [4] or made award before defendant had closed his proofs; [5] that they resigned,

special rules in which case the failure of the arbitrators to take an oath does not invalidate the proceedings. Britton *v.* Hooper, 25 Misc. 388, 55 N. Y. Supp. 495.

Where the parties were present and made no objection, the fact that witnesses were not sworn before testifying does not constitute reversible error. Gandy *v.* Tippett, 155 Ala. 296, 46 So. Rep. 463.

[4] Elmendorf *v.* Harris, 23 Wend. 628, rev'g 5 Id. 516; Knowlton *v.* Michles, 29 Barb. 465. Compare Mosely *v.* Simpson, L. R. 16 Eq. 226, s. c., 6 Moak's Eng. 728; Day *v.* Hammond, 57 N. Y. 487. See also Canfield *v.* Watertown F. Ins. Co., 55 Wis. 419, 13 N. W. Rep. 252.

A failure to prove that one of the parties to a submission had been notified of the meetings of the board of arbitrators or had attended the same was held sufficient to set aside the award. Vessel Owners' Touring Co. *v.* Taylor, 126 Ill. 250, 18 N. E. Rep. 663.

But the court refused to set aside the award where it appeared from the records that the failure to consider the proof which the plaintiff alleged he wished to offer was due to his own neglect to appear, and offer whatever evidence he had pertinent to the controversy. The court said: "It was not the duty of the arbitrators to send to the plaintiff from time to time for such evidence as he might desire to submit." Van Winkle *v.* Continental F. Ins. Co., 55 W. Va. 286, 47 S. E. Rep. 82.

Where two arbitrators had the power to appoint a third to decide matters on which they had failed to agree, it was incumbent on them to inform the parties in interest of his appointment and give them a reasonable time to produce evidence on matters pertaining to the controversy. One of the parties was not charged with such notice, though he casually learned the facts a short time prior to the announcement of the award. Coons *v.* Coons, 95 Va. 434, 28 S. E. Rep. (Va.) 885, 64 Am. Rep. 804.

The absence of a party from the hearing is immaterial where he had been notified and had declared his intention not to be present. Ehrlich *v.* Pike, 104 N. Y. Supp. 818.

The parties may waive the right that they be heard by the arbitrators in each others presence. Couch *v.* Harrison, 68 Ark. 580, 60 S. W. Rep. 957.

Where the arbitrators asked a party to the award to attend the arbitration and he said he would not do so, he waived notice of the arbitration. Vincent *v.* German Ins. Co., 120 Iowa, 272, 94 N. W. Rep. 458.

[5] Garvey *v.* Carey, 4 Abb. Pr. N. S. 159, s. c., 7 Robt. 286. But evidence that there was a heated discussion between the arbitrators,

even by parol, before award, and their resignation was accepted;[6] that before award the submission was revoked by operation of law, or by act of a party, notified to the other, in a form equally solemn as the submission;[7] that defendant, being entitled to the award on a day named, then demanded it and was refused;[8] or that they had made an award[9] previous to the award sued on.

If the submission, and the conformity of the award with it, are not impeached, nothing extrinsic to the award can be

ending in a refusal of the majority to discuss the question further, does not impeach the award. Roberts *v.* Old Colony R. R. Co., 5 Reporter, 175.

An answer that the arbitrators refused to consider evidence offered for their consideration states a defense tending to impeach the award on equitable considerations. Caldwell *v.* Brooks El. Co., 10 N. D. 575, 88 N. W. Rep. 700.

The court will not presume fraud in the arbitrators, from the fact that they rejected evidence in relation to an issue before them, but will presume that other evidence had so far settled that inquiry as to render further proofs unnecessary. Tyblewski *v.* Svea Fire Co., 121 Ill. App. 528.

A party does not waive his right to assail the award by failing to withdraw his submission when the arbitrators refuse to receive or consider the depositions offered on his behalf. Roberts Bros. *v.* Consumers' Can Co., 102 Md. 362, 62 Atl. Rep. 585, 111 Am. St. Rep. 377.

[6] Relyea *v.* Ramsay, 2 Wend. 602.

[7] Morse on Arb. 230–232.

It has been held, however, that at any time before the award has been made either party to a submission may revoke, without the consent of the other, the agreement of such submission, but such revocation must be proved by clear, convincing, competent and satisfactory evidence. Fooks *v.* Lawson, 15 Del. 115, 40 Atl. Rep. 661.

A plea of revocation of the authority conferred upon the arbitrators was overruled, where it appeared that the defendants attended the arbitration and submitted evidence, since such acts constituted a waiver of their notice not to be bound by the award. Seely *v.* Belton, 63 Ill. 101. Cited in West Chicago Park Comrs. *v.* Riddle, 245 Ill. 168, 91 N. W. Rep. 1060.

[8] Morse on Arb. 283.

But an award was held to be valid, though not filed within the time specified in the arbitration agreement, where the agreement did not also provide that the award should be void if not made at the time appointed. Patrick *v.* Batten, 123 Mich. 203, 81 N. W. Rep. 1081.

[9] Doke *v.* James, 4 N Y. 568.

proved against it except corruption or misconduct in the arbitrators,[10] and (under the new procedure) such mistake of fact,—as, for instance, a miscalculation of figures, or the like,—as is a proper ground for equitable relief. Mistake of law is available only when it appears expressly or by inference, from the face of the award; [11] or in some connected paper delivered with it.[12] An allegation of corruption or

[10] See In re Burke, 191 N. Y. 437, 84 N. E. Rep. 45; Herrick *v.* Blair, 1 Johns. Ch. 101, and cases cited. In the arbitrators personally, as distinguished from injustice in their award. Perkins *v.* Giles, 50 N. Y. 228, affi'g 53 Barb. 342.

One cannot complain of partiality or interest on the part of an arbitrator as a ground of setting aside an award, when he knew of this situation before the award was made or at the time of the submission. Indiana Ins. Co. *v.* Brehm, 88 Ind. 578.

[11] Bissell *v.* Morgan, 56 Barb. 369; Campbell *v.* Western, 3 Paige, 124; Fudickar *v.* Guardian Mut. Ins. Co., 62 N. Y. 392, 401, affi'g 37 Super. Ct. (J. & S.) 358; White Star Min. Co. *v.* Hultberg, 220 Ill. 578, 77 N. E. Rep. 327. See also Kaplan *v.* Niagara F. Ins. Co., 73 N. J. L. 780, 65 Atl. Rep. 188.

In general the court will not look into the merits of the matter and review the findings of law or fact made by the arbitrators, nor substitute its opinion or judgment for theirs. Roberts *v.* Consumers' Can Co., 102 Md. 362, 62 Atl. Rep. 585, 111 Am. St. Rep. 377.

Where an arbitrator honestly proceeds according to his interpretation of the law, equity will not interfere with his award on the ground of mistake in such interpretion. Dobson *v.* New Jersey Cent. R. Co., 38 Misc. 582, 78 N. Y. Supp. 82.

"When the parties have expressly or by a reasonable implication submitted the questions of law as well as the questions of fact arising out of the matter in controversy, the decision of the arbitrators on both subjects is final." White Star Min. Co. *v.* Hultberg, 220 Ill. 578, 77 N. E. Rep. 327.

But an award may be set aside for "error of law, when the question of law is stated on the fact of the award and it appears that the arbitrators meant to decide according to the law, but did not. In this case the award is not what the arbitrators themselves intended. It is not, in fact, their judgment." Fudickar *v.* Guardian Mut. L. Ins. Co., 62 N. Y. 392. See also Dobson *v.* New Jersey Cent. R. R. Co., 38 Misc. 582, 78 N. Y. Supp. 82.

[12] Morris Run Coal Co. *v.* Salt Co. of Onondaga, 58 N. Y. 667.

A mistake in the draft of the award may be reformed so as to conform to the one actually made by the arbitrators. Pulliam *v.* Pensoneau, 33 Ill. 375; White

partiality must be clearly made out,[13] but evidence that the award was grossly excessive will entitle the defendant to go to the jury on the question.[14]

Star Min. Co. *v.* Hultberg, 220 Ill. 578, 77 N. E. Rep. 327.

[13] Wood *v.* Auburn, &c. R. R. Co., 8 N. Y. 168; Perkins *v.* Giles, 50 N. Y. 232; Vincent *v.* German Ins. Co., 120 Iowa, 272, 94 N. W. Rep. 458. "Partiality and some improper conduct of the arbitrators in making the award will not impeach it, unless the party benefited thereby be implicated in that misconduct." Duvall *v.* Sulzner, 155 Fed. Rep. 910.

But see Mayer *v.* Phœnix Assur. Co., 124 N. Y. App. Div. 241, 108 N. Y. Supp. 711, where it is said that "where an appraisal in behalf of several insurance companies is fraudulently had, one company, innocent of the fraud, is not protected by it, because the award is for the benefit of all and is vitiated by the fraud of one."

[14] Smith *v.* Cooley, 5 Daly, 401. "The favor which the courts accord to awards and arbitrators is however predicated upon the assumption that in the conduct of the arbitration the parties to the controversy had a full and fair hearing, and that the award is the honest decision of the arbitrators and involves no mistake so gross as to work manifest injustice or furnish evidence of misconduct on their part." Roberts *v.* Consumers' Can Co., 102 Md. 362, 62 Atl. Rep. 585, 111 Am. St. Rep. 377.

"Mistake of judgment on the part of the arbitrators is not ground for setting aside an award, unless such mistake be so great as to indicate partisan bias." Vincent *v.* German Ins. Co., 102 Iowa, 272, 94 N. W. Rep. 458.

"The inadequacy of an award may be, under certain circumstances, an important factor and entitled to consideration where it is palpable and produces a conviction that the award was the result of corruption or bias." Tyblewski *v.* Svea Fire & Life Assur. Co., 121 Ill. App. 528.

CHAPTER XXV

ACTIONS ON GUARANTIES

1. Oral contract.
2. Promise to answer for debt, &c. of another.
3. Execution of the contracts.
4. Consideration.
5. Rules of interpretation.
6. Oral evidence to vary.
7. Transactions under the guaranty.
8. Non-payment or non-performance.
9. Admissions and declarations of the principal debtor.
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1. Oral Contract.

The fact that a promise was in form to pay the debt, etc., of another, does not conclusively require evidence such as satisfies the statute of frauds.[15] Evidence of the surrounding circumstances is competent to enable the jury to determine whether ambiguous words were a guaranty of payment or performance by another, or were an original undertaking.[16]

[15] Emerson *v.* Slater, 22 How. U. S. 28.

See also R. & L. Co. *v.* Metz, 165 N. Y. App. Div. 533, 150 N. Y. Supp. 843.

Where one furnished goods to another upon the request of a third person and upon the latter's credit, it was held not to be a promise within the statute. Lush *v.* Throop, 189 Ill. 127, 59 N. E. Rep. 529. See also Brown *v.* Reinberger, 177 Ill. App. 297.

When one promised to pay the debt of another but made the promise to the latter and not to his debtor, it was held not to be within the statute. Reid, Murdock & Co. *v.* The Northern Lumber Co., 146 Ill. App. 371.

One who verbally guaranteed the genuineness and validity of township warrants and their payment was not allowed to set up the statute of frauds as a defense, since, as the warrants were void, he had never promised to answer for the debt of another, but had made an original undertaking, the consideration for which was the benefit derived from the sale of the warrants to the plaintiff. Voris *v.* Star City Bld. & Loan Ass'n, 20 Ind. App. 630, 50 N. E. Rep. 779.

[16] Brandt on Sureties & G. 82, §§ 63, 64.

"The question whether the defendant's promise is within our statute of frauds . . . cannot be determined by the words alone in

For this purpose plaintiff's evidence must be clear and satisfactory.[17]

2. Promise to Answer for Debt, &c., of Another.

If the contract is within the statute of frauds,[18] plaintiff should be prepared with written evidence, if the making of the contract is in issue.[19] If the making is admitted, or if the terms only are in issue, the statute of frauds is not available unless the want of a memorandum is pleaded.[20] The neces-

which it was made. There are cases where the words, 'I will see you paid,' have been construed, in the light of the pertinent facts, to be an original undertaking, and other cases where the same words have been construed to be a collateral undertaking and within the statute. . . . The words are not important in ascertaining the intent, . . . but the circumstances of the transaction and not the words alone, determine whether the promise is within the statute." Gable *v.* Graybill, 1 Pa. Super. Ct. 29, 31.

It has been held competent for the plaintiff to offer in evidence entries charging goods to a third person where it appeared that they had been delivered to that person, but this evidence was not conclusive and when the defendant offered evidence tending to establish an original promise to pay for these goods, it was for the jury to finally decide whegher the promise was original or collateral. Lusk *v.* Throop, 189 Ill. 127, 135.

[17] Haverly *v.* Mercur, 78 Penn. St. 257.

When a change of relation (as in this instance, that the promisor became the employer) is alleged for the purpose of taking a case out of the statute of frauds, it lies upon the plaintiff to prove it by clear and indubitable testimony. Gable *v.* Graybill, 1 Pa. Super. Ct. 29, 36.

For a case holding the evidence sufficient to establish an original promise, see C. Kenyon Co. *v.* Sutton, 50 Pa. Super. Ct. 445.

[18] 2 N. Y. Rev. St., 135, § 2, sub. 2.

[19] Lewin *v.* Stewart, 10 How. Pr. 509.

Where the defendants relied upon a promise which the plaintiff alleged would be one to answer for the debt of another and required some writing to be binding, it was held that certain letters and checks which were produced sufficiently satisfied this requirement. Yawger *v.* Backs, 119 App. Ill. 61.

The alleged promise of the defendants to pay orders drawn on them by their agent out of what they owed him at the end of his employment was held to be one to pay the debt of another and unenforcible in the absence of a written memorandum. Barto *v.* Phillips, 28 Wash. 482, 68 Pac. Rep. 895.

[20] Sanger *v.* French, 157 N. Y. 213.

sary writing is admissible under a general allegation of the promise, without mentioning a writing.[21] The form of the instrument is not material; but if made out by several papers, they must refer to each other in such a manner as to show that they are parts of the same contract, requiring nothing to be supplied for this purpose, by verbal evidence, except the identity of the documents.[22] The statute precludes resort to oral evidence to supply any substantial element lacking in the writing and necessary to constitute a contract;[23] except the consideration,[24] the delivery and acceptance, and

Where the answer failed to deny the allegations of the complaint or set up a contract different from that alleged by the plaintiff, it was held that the mere allegation that the contract was within the statute was of no avail to the defendant, since he admitted the only contract alleged. R. & L. Co. *v.* Metz, 165 N. Y. App. Div. 533, 150 N. Y. Supp. 843.

[21] Brandt on Sur. & G. 102, § 77; De Colyar (by Morgan), 178, 209.

"The general rule of pleading is that when a statute makes a writing necessary in a common law matter, it is not necessary to state that it is in writing, although it must be proved in evidence." Wilkinson-Gaddis Co. *v.* Van Riper, 63 N. J. Law, 394, 43 Atl. Rep. 675.

[22] Peirce *v.* Corf, L. R. 9 Q. B. 210; Broom's Phil. of L., § 90, chapter XVI, paragraph 6, of this vol. Compare Lee *v.* Dick, 10 Pet. 482.

Where several written instruments together embody an agreement, all papers *in pari materia* are to be read together, as constituting the entire contract. Ewen *v.* Wilbor, 70 Ill. App. 153.

It has been held that a note referred to in the guaranty thereof must be read into the guaranty as if part of the latter instrument, and the whole document must then be examined to discover the intent of the parties. McNeal *v.* Gossard, 6 Okl. 363, 50 Pac. Rep. 159.

[23] Holmes *v.* Mitchell, 7 C. B. N. S. (Scott), 361, L. J. 28 C. P. 301; Williams *v.* Lake, 2 El. & El. 349, L. J. 29 Q. B. 1.

Where one sold a fourth interest in a partnership business and executed a guaranty that the vendee would realize his purchase money out of the sale of the stock on hand, the court held that this guaranty could not be varied by introducing parol evidence showing that expenditures made by the vendee after the purchase of his interest were also guaranteed, and likewise the good faith and honesty of the vendor's partner. Ford *v.* Fix, 112 Ark. 1, 164 S. W. Rep. 726.

[24] 2 N. Y. Rev. St. 135, § 2, as am'd by L. (1863), p. 802, c. 464,

such matters as may be necessary under any contract to show a *quantum meruit* arising upon facts specified in the writing; these may be shown by parol. An instrument inadequate under the statute cannot be helped by parol evidence of mistake on the part of the writer only.[25]

3. Execution of the Contracts.

Production and proof of execution of the guaranty indorsed on [26] or correctly describing [27] the evidence of debt

dispensing with expression of consideration. Speyer *v.* Lambert, 1 Sweeny, 335, s. c., 6 Abb. Pr. N. S. 309, 37 How. Pr. 315. *Contra*, Castle *v.* Beardsley, 10 Hun, 343. So at common law, and under some earlier statutes. Leonard *v.* Vredenburgh, 8 Johns. 29; Packard *v.* Richardson, 17 Mass. 122, 144; Reed *v.* Evans, 17 Ohio, 128, 133. *Contra*, Deutsch *v.* Bond, 46 Md. 164; Palmor *v.* Haggard, 78 Ill. 607. Under statutes requiring the consideration to be stated, the words "for value received" are sufficient. Mosher *v.* Hotchkiss, 3 Abb. Ct. App. Dec. 326.

When the contract of guaranty and the principal obligation were concurrently executed, the consideration for the guaranty contract, it was held, could be shown by parol and need not be expressed. Cahill Iron Works *v.* Pemberton, 48 App. Div. 468, 62 N. Y. Supp. 944, aff'd 168 N. Y. 649, 61 N. E. Rep. 1128.

Even where no consideration was expressed in a letter containing an acknowledgment of a previous oral promise to guaranty another's note, it was held that the consideration could be supplied by oral evidence. Dunlap *v.* Hopkins, 95 Fed. Rep. 231, 37 C. C. A. 52. See also Stern *v.* Deutsch, 9 Kan. App. 218, 59 Pac. Rep. 687.

It has been held that acceptance of a guaranty may be inferred without a formal express acceptance. Hickox *v.* Fels, 86 Ill. App. 216.

[25] Grant *v.* Naylor, 4 Cranch, 224.

[26] Cooper *v.* Dedrick, 22 Barb. 516.

In a suit upon a guaranty indorsed upon a note, it was held that, as the note was referred to in the guaranty and essentially made a part of the latter instrument, the confession of the execution of the guaranty necessarily carried with it admission of the note, and therefore the objection that the execution of the note was not proved was not well taken. Martin *v.* Butler, 111 Ala. 422, 20 So. Rep. 352.

Parol evidence was held ad-

[27] Forman *v.* Stebbins, 4 Hill, 181.

Where an officer of a corporation wrote "O. K." on an order given

guaranteed, with production of the latter, is sufficient without other proof of execution of the latter. The authority of an agent, subscribing, need not be in writing; [28] and slight evidence is *prima facie* sufficient.[29] A guaranty written over an indorsement of a bill or note is presumed to have been written at the time of making the indorsement,[30] even though in a different hand.[31] A guaranty is conclusive against the guarantors as to the power of the principal debtors to make their contract,[32] and as to its validity in respect to formalities required by foreign law.[33]

Production of an instrument transferable by delivery, with the guaranty indorsed or annexed, is *prima facie*,[34] but

missible to show that one who indorsed his name on the back of a note did so as a guarantor thereof. Peterson *v.* Russell, 62 Minn. 220, 64 N. W. Rep. 555, 54 Am. St. Rep. 634, 29 L. R. A. 612.

One who placed his signature below and to the left of that of the party making a contract was held to be bound as a guarantor of the contract without additional words. Joseph & Co. *v.* Levy, 191 Ill. App. 595.

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by the corporation, but refused to sign a form guaranteeing the payment of the order, and an unauthorized clerk of the corporation wrote a letter stating that the "O. K." would have to go as a guaranty, it was held that no contract of guaranty was established. Popper *v.* Spelz, 184 Ill. App. 35.

[28] De Colyar (by Morgan), 189.

So, too, it was held that when one, after indorsing his name only on the back of a note, delivered it to the payee he thereby authorized the latter to write a contract of guaranty expressing the consideration thereof over his signature, and the authority of such agent need not be expressly given in writing. Peterson *v.* Russell, 62 Minn. 220, 64 N. W. Rep. 555, 54 Am. St. Rep. 634, 29 L. R. A. 612.

[29] Pow. Ev. 261; 2 Greenl. Ev. 13th ed. 52; Watkins *v.* Vince, 2 Stark. 368.

Partners doing a banking business were held to be members of a commercial partnership, and therefore one partner had authority to sell and re-discount notes and execute a guaranty of payment of the same. McNeal *v.* Gossard, 6 Okl. 363, 50 Pac. Rep. 159.

[30] Gilman *v.* Lewis, 15 Me. 452.

[31] Small *v.* Sloan, 1 Bosw. 352.

[32] Remsen *v.* Graves, 41 N. Y. 471.

[33] Smeltzer *v.* White, 92 U. S. (2 Otto) 392; and it seems, also, of validity generally, unless positively illegal. Id.

[34] Smith *v.* Schanck, 18 Barb.

not conclusive,[35] evidence of plaintiff's title to both contracts. A parol assignment of guaranty may be proved.[36]

4. Consideration.

If it appear that the guaranty was executed at or before delivery of the principal contract, the consideration of the latter is enough.[37] If execution of the guaranty after delivery is shown, the burden is on plaintiff to show a new consideration.[38] The date is not conclusive.[39]

344; Cooper *v.* Dedrick, 22 Id. 516. See also Ellsworth *v.* Harmon, 101 Ill. 274.

Where the action is upon a guaranty the production of the note with the signature of the guarantor upon its back makes a *prima facie* case. Ewen *v.* Wilbor, 99 Ill. App. 132.

[35] Gallagher *v.* White, 31 Id. 92.

"A general guaranty is assignable with the obligation secured thereby, and it goes with the principal obligation, and is enforceable by the same persons who can enforce the obligation. The rule is, as to general guaranty, that the transfer of a note carries with it all security, even if there is no formal assignment or delivery, or mention of the guaranty. The rule is so because a general guaranty is one open for acceptance by the whole world." Pingrey, Suretyship & Guaranty (2nd Ed.), § 357, quotation approved in Home Savings Bank *v.* Shallenberger, 95 Nebr. 593, 601, 146 N. W. Rep. 993.

[36] Gould *v.* Ellery, 39 Id. 163.

[37] Toppan *v.* Cleveland, &c. R. R. Co., 4 West. Law Month. 67, and cases cited; Petrie *v.* Barkley, 47 N. Y. 653. A re-delivery pursuant to an original stipulation for security is enough within this rule. McNaught *v.* McClaughry, 42 N. Y. 22.

When a contract of guaranty for the payment of rent was indorsed upon a lease at the time of the execution of the lease, the former became part of the contract of lease and as such needed no other consideration than that of the lease. Bullen *v.* Morrison, 98 Ill. App. 669.

Where a note was guaranteed before delivery "no obligation or liability was incurred by any party to the note until it was delivered, and hence . . . (after its delivery) . . . there was good consideration for the guaranty." Kennedy, etc., Lumber Co. *v.* S. S. Const. Co., 123 Cal. 584, 56 Pac. Rep. 457. See also Duncanson *v.* Kirby, 90 Ill. App. 15, holding that "the consideration for the note (was) the consideration for the guaranty." For other cases see 9 Dec. Dig. "Guaranty," § 16 (2).

[38] Klein *v.* Currier, 14 Ill. 237;

[39] Draper *v.* Snow, 20 N. Y. 331, affi'g 6 Duer, 662.

A guaranty was held to be presumed to have been made at the time of the execution of the guaranteed contract in the absence of

A seal,[40] or words in the guaranty importing a consideration,—such as "value received," [41]—are sufficient *prima facie* evidence of consideration. If the statement of consideration is general,[42] nominal,[43] or ambiguous,[44] or consideration is only presumed from a seal,[45] the par-

Dreyer *v.* Kadish, 70 Ill. App. 76.

Whenever it is shown that the defendant executed the guaranty after the delivery of the note, in pursuance of some subsequent arrangement, the original consideration for the note will not support the guaranty, and the burden of proof is again thrown upon the plaintiff to to show and express consideration for the guaranty. Featherstone *v.* Hendrick, 59 Ill. App. 497. Cited with approval in Holmes *v.* Williams, 69 Ill. App. 114, 115. For other cases see 9 Dec. Dig. "Guaranty," § 16 (3).

When a contract guaranteeing the payment of rent was made at a time subsequent to the execution and delivery of a lease, the consideration for the lease was held not to support the contract of guaranty. Bullen *v.* Morrison, 98 Ill. App. 669.

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any date on the instrument of guaranty. McDonald *v.* Harris, 75 Ill. App. 111.

Parol evidence is admissible to show when the guaranty was executed and delivered, leaving it for the jury to decide whether this occurred before or after the execution of the contract guaranteed. Klosterman *v.* United Electric, etc., Co., 101 Md. 29, 60 Atl. Rep. 251.

[40] 2 N. Y. Rev. Stat. 406, § 77.

A guaranty under seal presumes consideration and is binding, whether executed at the same time as or later than the instrument guaranteed. Roth *v.* Adams, 185 Mass. 341, 70 N. E. Rep. 445.

[41] Quimby *v.* Morrill, 47 Me. 470.

The words, "for value received," shown upon the face of a guaranty are *prima facie* evidence of a valuable consideration. White *v.* Western State Bank, 119 Ill. App. 354.

[42] Sterns *v.* Marks, 35 Barb. 565; Quimby *v.* Morrill, 47 Me. 470.

[43] Redfield *v.* Haight, 27 Conn. 31, 40.

[44] Goldshede *v.* Swan, 1 Exch. 154; Haigh *v.* Brooks, 10 Ad. & E. 309, 323, 334; Walrath *v.* Thompson, 4 Hill, 200. Compare Parker *v.* Bradley, 2 Hill, 584.

It was held that an extension of time for the payment of certain guaranteed notes could be inferred as consideration for the guaranty from the expression in the guaranty that the guarantor would be responsible for payment "within a reasonable time." Union Natl. Bank, Pa. *v.* Leary, 77 N. Y. App. Div. 332, 79 N. Y. Supp. 217.

[45] Morgan *v.* Smith, 7 Hun, 244.

In Bullen *v.* Morrison, 98 Ill. App. 669, it was held that even

ticular consideration may be shown by oral evidence not contradictory of the writing.[46] Words in the past tense are not conclusive evidence that the consideration was past.[47] If the particular consideration is specified in a written guaranty, it cannot be varied by parol,[48] but may be contradicted by defendant. Inadequacy of consideration is irrelevant; [49] and so is evidence that even a nominal consideration remains unpaid.[50]

5. Rules of Interpretation.

In order to apply the rule that the words of guaranty are to be construed as strongly against the guarantor as the sense will admit,[51] it is proper to admit evidence of surround-

though a contract of guaranty for the payment of rent was under seal and stated that it was "for value received," it was nevertheless competent to show that there was no consideration.

[46] De Colyar (by Morgan), 177. Compare, for a freer rule, the chapters on actions affecting REAL PROPERTY and CREDITORS' ACTIONS.

[47] For instances, see Agawam Bank *v.* Strever, 18 N. Y. 502; Williams *v.* Marshall, 42 Barb. 524, and cases above cited. *Contra*, Parker *v.* Bradley, 2 Hill, 584.

[48] De Colyar (by Morgan), 179. *Contra*, Morgan *v.* Smith, 7 Hun, 244.

When the consideration is expressly stated in the contract of guaranty, want of consideration is not a sufficient ground on which to grant a non-suit. Rattelmiller *v.* Stone, 28 Wash. 104, 68 Pac. Rep. 168.

[49] De Colyar (by Morgan), 34. But where the defense is the want or failure of consideration, or where it is sought to contradict a mere receipt of money, parol evidence is admissible. Squire *v.* Evans, 127 Mo. 514, 30 S. W. Rep. 143.

[50] Childs *v.* Barnum, 11 Barb. 14, affi'g 1 Sandf. 58.

[51] Drummond *v.* Prestman, 12 Wheat. 515; Wood *v.* Prestner, L. R. 2 Exch. 66. See Bridgeport Malleable Iron Co. *v.* Iowa Cutlery Works, 130 Iowa, 736, 107 N. W. Rep. 937.

Where four persons guaranteed "to the plaintiff, each to the amount of $5000, the payment" of a note, the court remarked that contracts of guaranty "are frequently prepared by persons unacquainted with the requirements of technical accuracy: hence (in construing a guaranty) the rule obtains that the obligation of a guarantor is neither to be enlarged nor diminished by giving to the language employed a strained meaning, but in each instance the

ing circumstances at the time of the transaction, to discover the subject-matter the parties had in view, and thus ascertain the scope and object of the guaranty.[52]

6. Oral Evidence to Vary.

A written guaranty, like any other contract, excludes oral

instrument is to be given effect according to the apparent intention and understanding of the parties as obtained from its context." The contention, therefore, that the obligation was joint was held untenable, since the word "each" necessarily imported severalty. Delaware County Natl. Bank *v.* King, 47 Misc. 447, 95 N. Y. Supp. 954.

In construing a contract of guaranty, any doubts must be resolved in favor of the guarantee, for the guarantor himself wrote the contract. Ford *v.* Fix, 112 Ark. 1, 164 S. W. Rep. 726.

The contract of guaranty should be construed as favorably to the creditor as other written contracts. Swisher *v.* Deering, 204 Ill. 203, 68 N. E. Rep. 517.

Where the contract of guaranty is ambiguous, it should be most strongly construed against the guarantor. Bridgeport Malleable Iron Co. *v.* Iowa Cutlery Works, 130 Iowa, 736, 107 N. W. Rep. 937.

[52] Sheffield *v.* Meadows, L. R. 4 C. P. 595; Smeltzer *v.* White, 92 U. S. (2 Otto) 392. As to the different rules of interpretation dependent on such evidence, compare Russell *v.* Clark, 7 Cranch, 69; Ludlow *v.* Simond, 2 Cai. Cas. 1; Gates *v.* McKee, 13 N. Y. 232; Rochester City Bk. *v.* Elwood, 21 Id. 88; Benjamin *v.* Hillard, 23 How. (U. S.) 149; Mauran *v.* Bullus, 16 Pet. 528; Belloni *v.* Freeborn, 63 N. Y. 388, and cases cited.

"The intention of the parties is the test to be applied, but where the intention is ambiguous, it is to be determined from the surrounding circumstances balancing the doubt in favor of the guarantee." U. S. Rubber Co. *v.* Silverstein, 161 N. Y. Supp. 369. This case also approved of the following quotation from Powers *v.* Clarke, 127 N. Y. 417, 28 N. E. Rep. 402. "A contract of guaranty, as all the authorities agree, should receive a reasonable interpretation, according to the intent of the parties as disclosed by the writing, which, in a case of ambiguity, may be read in the light of the surrounding circumstances. . . . Some of the cases go farther and hold that if the doubt is not thus dispelled it should be resolved against the guarantor, because the words are his own, and he is responsible for the ambiguity."

The following statement from Cambria Iron Co. *v.* Keynes, 56 Ohio St. 501, 47 N. E. Rep. 548 was quoted with approval in Bank *v.* Garn, 23 Ohio Cir. Rep. 447, 454. "In construing a contract

evidence of its terms,[53] upon principles already stated.[54] But extrinsic evidence of all the surrounding circumstances and the pre-existing relation between the parties, is admissible to enable us to see what they mean by the language used; [55] to show, for instance whether equivocal language

of guaranty, the object should be to ascertain the intention of the parties; and, as in construing all contracts, the words employed by the parties should be construed in the light afforded by the circumstances surrounding them at the time it was made."

[53] Laurie *v.* Scholfield, L. R., 4 C. P. 622; Ellmaker *v.* Franklin, 5 Barr. 183, 190.

The court held that the signature of a payee of a note written on the back thereof made a binding written contract of indorsement, and parol evidence was inadmissible to change this contract or vary its terms; but when the indorser was a third person oral evidence was properly admissible to rebut a presumption of guaranty and to show what was the real agreement between the parties. Kingsland *v.* Koeppe, 137 Ill. 344, 28 N. E. Rep. 48, 13 L. R. A. 649. See also Featherstone *v.* Hendrick, 59 Ill. App. 497.

The defendant by her answer admitted that the contract sued upon was one of guaranty and sought to prove in her defense that she agreed only to pay any deficiency after the principal's property had been sold to satisfy the plaintiff's claims. It was held, however, that as the language of the contract was clear and precise, to have admitted the defendant's evidence would not only have allowed her to vary the terms of the written contract, but even to have substituted an entirely new agreement. Adams *v.* Wallace, 119 Cal. 67, 51 Pac. Rep. 14.

A traveling salesman under a yearly contract secured two indorsers to his written guaranty to refund all excess of advances over the amounts due him under his contract of employment. It was held that it was not competent for the indorsers to limit their liability to that for advances made within thirty days from the date of the guaranty contract, since the terms of the written contract would thereby be varied by parol in a case where there was no ambiguity in the written instrument. West-Winfree Tobacco Co. *v.* Waller, 66 Ark. 445, 51 S. W. Rep. 320.

[54] Chapter XVI, paragraph 8, of this vol.

[55] Spencer *v.* Babcock, 22 Barb. 326. The instrument may be reformed where it is the subject of fraud or mutual mistake. Prior *v.* Williams, 3 Abb. Ct. App. Dec. 624.

Thus where it appeared that a creditor of the guarantor's son wrote the latter a letter asking that he have his father write him (the creditor) a letter guaranteeing payment of his son's debt, and sub-

contemplated past or future transactions; [56] and a limit of amount,[57] or time,[58] or person; [59] or a continuing guaranty.[60]

sequently the father did so, it was held that this letter of the creditor to the son was admissible as tending to establish a contract of guaranty and to show that no notice of the acceptance of the guaranty was necessary, when it was shown that the father had either read the creditor's letter or that knowledge of its contents had been communicated to him. Nelson Mfg. Co. *v.* Shreve, 94 Mo. App. 518, 68 S. W. Rep. 376.

[56] Bainbridge *v.* Wade, 16 Q. B. 89, 98, s. c., 20 L. J. N. S. 7; Broom *v.* Batchelor, 1 H. & N. 255; Hoad *v.* Grace, 7 Id. 494, s. c., L. J. 31 Exch. 98.

So, parol evidence of surrounding circumstances was held to be admissible to show that the word "account" in the contract of guaranty referred to an indebtedness about to be incurred. Waldheim *v.* Miller, 97 Wis. 300, 72 N. W. Rep. 869.

[57] Laurie *v.* Scholfield (above).

In all cases where the guaranty is for an indefinite sum of money, parol evidence is necessary and admissible to prove the amount of the debt incurred. Heyman *v.* Dooley, 77 Md. 162, 26 Atl. Rep. 117, 20 L. R. A. 257.

[58] Id.

Unless the language of a guaranty is broad enough to show that the intention of the parties was to create a continuing guaranty, the tendency of the courts has been against such construction. Bank *v.* Garn, 23 Ohio Cir. Rep. 447, 453.

[59] Lowry *v.* Adams, 22 Vt. 160; and see Drummond *v.* Prestman, 12 Wheat. 515; Leathy *v.* Speyer, L. R. 5 C. P. 595.

[60] Agawam Bank *v.* Strever, 18 N. Y. 502; Wood *v.* Priestner, 4 H. & C. 681; Heffield *v.* Meadows, L. R. 4 C. P. 595. A guaranty is presumed to be not a continuing guaranty, in the absence of anything in it or in extrinsic evidence to indicate that it was such. Fellows *v.* Prentiss, 3 Den. 512; Whitney *v.* Groot, 24 Wend. 82. *Contra*, Rosc. N. P. 457.

Evidence of the fact that the principal was a painter who would use the goods purchased from the plaintiff in his business was held competent on the question of whether the guaranty covered a single purchase by the principal or was a continuing one. Sullivan *v.* Arcand, 165 Mass. 364, 43 N. E. Rep. 198.

Guaranties, like the contracts, must be construed so as to give effect to the intention of the parties, and if upon their face the intention be doubtful, resort may be had to parol evidence of the situation and surroundings of the parties in order to solve the difficulty. Accordingly, the court properly admitted parol testimony to determine whether the guaranty was continuing in operation, limited only by the amount intended to be secured, or was to apply to the

7. Transactions Under the Guaranty.

Evidence of usage is not competent to bring within the effect of the guaranty a transaction not within its terms,[61] but a transaction within its terms having been shown, evidence of usage is competent to explain subsequent dealings with the debtor which might, unexplained, exonerate the defendant.[62] The original bill of sale given by plaintiff on delivery of the goods, &c., is conclusive against him as to whether the terms of credit conformed to the guaranty.[63] Otherwise of a bill subsequently delivered, which is a mere admission.[64]

The fact that the plaintiff acted on the credit and faith of the guaranty, may be proved by parol,[65] by his testimony or that of a witness cognizant of the fact.[66] He may be asked the question whether he acted on the faith of the guaranty.[67]

8. Non-payment or Non-performance.

Plaintiff should usually be prepared with some evidence of a breach by the principal debtor.[68]

first credit in the amount specified. Gardner *v.* Watson, 76 Tex. 25, 13 S. W. Rep. 60. See also Callender, etc., Co. *v.* Flint, 187 Mass. 104, 72 N. E. Rep. 345.

[61] See Carkin *v.* Sarony, 14 Gray, 528.

[62] See Fox *v.* Parker, 44 Barb. 541.

[63] Per Lord Ellenborough, Bacon *v.* Chesney, 1 Stark. 192; and see Leeds *v.* Dunn, 10 N. Y. 469.

[64] Bacon *v.* Chesney (above).

[65] Douglas *v.* Reynolds, 7 Pet. 113, 118.

[66] Chapter XII, paragraph 5, and chapter XIII, paragraph 19, of this vol.

A cashier of the plaintiff bank was allowed to testify that he made loans, relying upon a guaranty even though his testimony was in the nature of a conclusion. Farmers' Natl' Bank *v.* Hatcher, 157 N. W. Rep. (Iowa) 876.

[67] Worcester Coal Co. *v.* Utley, 167 Mass. 558, 559, 560, 46 N. E. Rep. 114; Douglass *v.* Reynolds, 7 Pet. 113.

[68] See Schlesinger *v.* Hexter, 34 Super. Ct. (J. & S.) 499.

"It needs no citation of authority to sustain the rule that in a suit against a surety the principal obligation and its non-payment must be clearly set forth because the surety's liability is only conditional." Stockton Savings Bank *v.* McCown, 170 Cal. 600, 602, 150 Pac. Rep. 985.

If request or other condition is expressed or fairly implied in the contract of guaranty, it must be alleged and proved.[69] A condition only in the contract of the principal debtor, does not require proof against the guarantor unless it would as against the former,[70] except where the fact is peculiarly in plaintiff's knowledge. Under a guaranty of collection, the due exhaustion of remedy by judgment and execution unsatisfied, is *prima facie* enough.[71] Where absolute insolvency excuses, an adjudication in bankruptcy is conclusive.[72]

9. Admissions and Declarations of Principal Debtor.

The admissions and declarations of the principal debtor are competent against the guarantor, when made in the transaction of the business for which the guarantor is bound, so as to be part of the *res gestæ*,[73] or when made in a transac-

[69] Nelson *v.* Bostwick, 5 Hill, 37, and cases cited; Douglass *v.* Rathbone, Id. 143. For conflicting opinions on the necessity of demand, notice, &c. see Central Savings Bank *v.* Shine, 48 Me. 456, s. c., 8 Am. Rep. 112; Safford *v.* Stevens, 2 Wend. 158, 164; McMillan *v.* Bull's Head Bank, 32 Ind. 11, s. c., 1 Am. Rep. 323; Clay *v.* Edgerton, 19 Ohio St. 549.

Failure to prove a compliance with a condition expressed in a contract of guaranty, whereby the plaintiff was to give notice "by postal card if the (principal debtor) does not pay $5 each week," vitiated the judgment. Waldheim *v.* Sonnenstrahl, 8 Misc. 219, 28 N. Y. Supp. 582.

[70] Douglass *v.* Howland, 24 Wend. 35, citing conflicting cases.

[71] Backus *v.* Shepherd, 11 Wend. 629. As to what are such guaranties, see Alb. L. J. 1878, p. 360, and cases cited.

[72] First Natl. Bank of Charlotte *v.* Natl. Exchange Bank of Baltimore, 92 U. S. (2 Otto) 122.

It appeared that the plaintiff sold wood to a party retaining title thereto until the wood was paid for. The buyer sold the wood and used the proceeds for his own use. It was held that the debt for the wood was founded upon contract and therefore could be discharged by the bankruptcy of the buyer, and since the discharge was sufficient to release the buyer from a *capias* his sureties on the capias bond were likewise released. Bryant *v.* Kinyon, 127 Mich. 152, 86 N. W. Rep. 531, 53 L. R. A. 801.

[73] Lancashire Ins. Co. *v.* Callahan, 68 Minn. 277, 71 N. W. Rep. 261.

Acts and omissions of the prin-

tion subsequent to the guaranty, and which the guaranty contemplated and authorized;[74] but other admissions and declarations, such as subsequent acknowledgment of having had goods or the like, are not competent,[75] unless brought home to the guarantor.[76]

cipal, when constituting parts of the *res gestæ*, may be evidence against the surety. McConnell *v.* Poor, 113 Iowa, 133, 84 N. W. Rep. 968, 52 L. R. A. 312.

Where a bond has been given to secure an employer from loss occasioned by the misconduct of the employee, the latter's "entries, reports, and statements made in the course of his duties in the guaranteed employment are admissible against the surety." Goldman *v.* Fidelity, etc., Co., 125 Wis. 390, 104 N. W. Rep. 80.

In an action on a surety bond guaranteeing the employer from loss through the embezzlement of the employee, since the contract of employment provided that the employee should render an account of the money collected previously, or "O. K." a statement compiled from statements which he rendered, it was held that his admissions of withholding certain accounts, made after his resignation, constituted part of the *res gestæ*, and were admissible against the surety. United American Fire Ins. Co. *v.* American Bonding Co., 146 Wis. 573, 131 N. W. Rep. 994, 40 L. R. A. N. S. 661.

[74] Hatch *v.* Elkens, 65 N. Y. 489; and see Brandt on Sur. & G. 655, &c.

See Singer Mfg. Co. *v.* Reynolds, 168 Mass. 588, 47 N. E. Rep. 438, 60 Am. St. Rep. 417, in which it was held that an admission of a default by the principal debtor was binding upon the party who was surety for loss occasioned by the misconduct of the principal, even though the action was a joint suit against both.

[75] Evans *v.* Beattie, 5 Esp. 26. While books and entries made by county treasurer, or his agent, are *prima facie* evidence against him and his sureties, yet entries made by the agent after the termination of his agency by the death of the treasurer are not binding on him or his sureties, and are not admissible in evidence against them. Coleman *v.* Pike County, 83 Ala. 326, 3 Am. St. Rep. 746, 3 So. Rep. 755.

Where the surety guaranteed the payment for goods furnished to his principal, statements made by the latter to the plaintiff in the absence of the surety, after the conclusion of the transaction between the principal and the plaintiff, were held to be no part of the *res gestæ* and not admissible against the surety. Strobel, etc., Co. *v.* Wiesen, 144 N. Y. App. Div. 149, 128 N. Y. Supp. 798. See also Cook County Liquor Co. *v.* Brown, 31 Okl. 614, 122 Pac. Rep. 167.

[76] Griffith *v.* Turner, 4 Gill (Md.), 111.

10. Judgments.

A judgment against the principal debtor is in all cases evidence against the guarantor, of the fact of its recovery,[77] but not of the indebtedness, etc., unless recovered on notice to him,[78] or unless his guaranty binds him by the result of the proceeding.[79]

[77] Clark *v.* Carrington, 7 Cranch, 308.

"Indeed, the general rule is that a judgment against a principal, instead of being conclusive, is only *prima facie* evidence against the surety to show the breach of the contract and liability thereunder. Ordinarily the judgment against the principal is received in evidence for such *prima facie* purposes and the surety is permitted to defend, as was done in this case, by showing a good defense to the action which might have been asserted by the principal." Calhoun *v.* Gray, 150 Mo. App. 591, 597, 131 S. W. Rep. 478.

In McConnell *v.* Poor, 113 Iowa, 133, 84 N. W. Rep. 968, 52 L. R. A. 312, the court held that a judgment for damages for breach of a building contract recovered against a principal was not *res adjudicata* against the surety, even when the latter had notice of the action against his principal, since he was not privy to the building contract and had no right to interpose any defense.

[78] Compare Drummond *v.* Prestman, 12 Wheat. 515.

When it was settled by a decree in a former action between the plaintiff and the guarantor's principal that the latter owed the plaintiff an amount greater than that guaranteed by the present defendant who was sued upon his guaranty, it was held that the binding force of the decree could not be questioned in the later action. Citizens' Bank *v.* Oaks, 184 Mo. App. 598, 170 S. W. Rep. 679.

Prior to the suit upon a guaranty, it seems that the principal had brought suit for the return of the note guaranteed, claiming that a certain transaction amounted to payment of the said obligation, but the decision was adverse to him. It was held that the guarantor could not, in the later action, set up as his plea the identical claim of his principal in the former suit, especially as he had been a witness for the principal on the trial of that cause. Beh *v.* Bay, 127 Iowa, 246, 103 N. Y. Rep. 119, 109 Am. St. Rep. 385.

[79] Douglass *v.* Howland, 24 Wend. 35, 54, &c.; Rapelye *v.* Prince, 4 Hill, 119.

"The only ground on which sureties on official bonds generally may be regarded as bound by the judgments against their principals is that the sureties by the terms of their bond agree, expressly or impliedly, to abide the result of litigation against their principals. . . . The better opinion and the voice

11. Defenses.

The fact that there was no writing is available under the general issue.[80] The fact that his principal was indebted to the guarantor, or forbade him to fulfill his guaranty, is no defense.[81] Fraud of the principal is not available against a creditor who innocently parted with value on the faith of the guaranty.[82] Evidence that the principal delivered money

of authority is . . . (that) a judgment against the principal is entitled to no consideration as against the surety, unless by the terms of the contract the surety is to be bound thereby." McConnell *v.* Poor, 113 Iowa, 133, 84 N. W. Rep. 968, 52 L. R. A. 312.

[80] Brandt on Sur. & G. 103, § 77; Rosc. N. P. 459.

The defense of the statute of frauds is available to defendant under the general issue, but it was held to be an affirmative defense which is waived if not distinctly asserted; and when a contract within the statute is fully established by oral evidence without objection, it is too late at the close of the evidence to then set up an objection. Young *v.* Ledford, 99 Mo. App. 565, 74 S. W. Rep. 443. See also New York Third Natl. Bank *v.* Steel, 129 Mich. 434, 88 N. W. Rep. 1050, 64 L. R. A. 119; Indiana Trust Co. Ex. *v.* Finitzer, 160 Ind. 647, 67 N. E. Rep. 520, holding that the statute may be invoked under a general denial.

[81] East River Bank *v.* Rogers, 7 Bosw. 493.

[82] McWilliams *v.* Mason, 31 N. Y. 294.

"A surety who has been misled by the principal, as to the character and extent of an obligation, signed and assumed at the request of the latter, can not make the fraud of the principal available as a defence, unless he can show that the payee or obligee participated in, or had knowledge of, the fraud or deception." Lucas *v.* Owens, 113 Ind. 521, 16 N. E. Rep. 196.

Where a cashier of a bank executed, as an individual and a treasurer of a company, certain notes payable at his bank, and subsequently renewed the same with the bank as guarantor thereof, it was held, in an action upon the guaranty, that the plaintiff was charged with notice that a cashier could not deal with himself in a way adverse to his principal in a matter within the scope of his agency. City Natl. Bank *v.* Jordan, 139 Iowa, 499, 117 N. W. Rep. 758.

Guarantors were not permitted to avoid their obligations under the contract of guaranty, by claiming that their principal had secured the execution of the same by fraud, and had fraudulently filled in the blanks in the instrument after its execution, when it appeared that the one suing upon the contract was innocent of these

or property to plaintiff is not sufficient to prove payment, without evidence which may sustain an inference that it was applied to the debt.[83]

frauds. Knapp *v.* Wilks, 105 Ark. 243, 151 S. W. Rep. 280. See also Saginaw Medicine Co. *v.* Batey, 179 Mich. 651, 146 N. W. Rep. 329, in which the following quotation from Davis Sewing Mach. Co. *v.* Buckles, 89 Ill. 237, was approved. "A surety or guarantor cannot interpose the fraudulent or false representations of his principal as a defense to the payment of a note or bond, without connecting the payee with such representations."

If a party actually signed the paper, though procured to do so by fraud, and is chargeable with negligence, he is liable to an innocent party who acted to his prejudice upon the faith of the instrument. Page *v.* Krekey, 137 N. Y. 307, 33 N. E. Rep. 311, 33 Am. St. Rep. 731, 21 L. R. A. 409.

[83] Tyler *v.* Stevens, 11 Barb. 465.

It was held that where, on the maturity of a guaranteed note, the principal had on deposit with the defendant bank a sum more than sufficient to pay the obligation, the fact that the bank did not apply the deposits to the payment of the note did not avail the sureties as a discharge. Bank *v.* Elliott, 9 Kan. App. 797, 56 Pac. Rep. 1102.

It was held that in the absence of directions as to the application of payments made by the principal subsequent to the date of the execution of a guaranty, the creditor had a right to apply the payment to that debt existing at the time the guaranty was executed. Wanamaker *v.* Powers, 102 N. Y. App. Dic. 485, 93 N. Y. Supp. 19.

CHAPTER XXVI

ACTIONS ON CONTRACTS OF INSURANCE

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I. GENERAL RULES

1. Action on Preliminary Agreement.

An oral contract of insurance is valid,[84] unless the charter

[84] Commercial Union Assur. Co. *v.* Urbansky, 113 Ky. 624, 68 S. W. Rep. 653; Posey County Fire Assoc. *v.* Hogan, 37 Md. App.

forbids; but it must not be indefinite as to time, and rate of premium, etc.[85] The plaintiff is not required to prove by clear and conclusive proof that such contract was made, but, so far as the weight of testimony is concerned, stands in the same position as any litigant having the burden of proof in matters where the question of proof is submitted to the jury.[86] The evidence must justify the inference of a completed contract; and, if the language contemplated a policy, that none was made.[87] A general agent has implied authority

573, 77 N. E. Rep. 670; Relief Fire Insurance Co. *v.* Shaw, 94 U. S. (4 Otto) 574; Firemen's Fund Ins. Co. *v.* Norwood, 32 U. S. App. 490, 499, 69 Fed. Rep. 71; First Baptist Ch. *v.* Brooklyn Fire Ins. Co., 19 N. Y. 305; Commercial Fire Ins. Co. *v.* Morris, 105 Ala. 498, 18 So. Rep. 34. For the English usage compare Fisher *v.* Liverpool Marine Ins. Co., L. R. 8 Q. B. 328, s. c., 7 Moak's Eng. 82, affi'd in L. R. 9 Q. B. 418, s. c., 9 Moak's Eng. 352. As to mode of proving terms of agreement, see Fabri *v.* Phœnix Ins. Co., 55 N. Y. 129. Mode of proof of contract by correspondence, see chapter XVI, paragraph 6, of this vol., and May on Ins., 45.

If the contract is oral, it may be presumed to contain the conditions usually found in such contracts. Vining *v.* Franklin Ins. Co., 89 Mo. App. 311.

Or the law may read the standard fire insurance policy into the contract. Hicks *v.* British Am. Assur. Co., 162 N. Y. 284, 56 N. E. Rep. 743, 48 L. R. A. 424.

Therefore in an action upon an oral contract, the plaintiff should set forth, by inference, the terms of the standard or usual policy. Van Tassel *v.* Greenwich Ins. Co., 151 N. Y. 130, 45 N. E. Rep. 365.

[85] Strohn *v.* Hartford Fire Ins. Co., 37 Wis. 625, s. c., 19 Am. Rep. 777, s. p., 28 N. Y. 153.

No contract exists where there is no definite understanding between the parties as to the time of the commencement of the risk. Whitman *v.* Milwaukee Fire Ins. Co., 128 Wis. 124, 107 N. W. Rep. 291, 5 L. R. A. N. S. 407, 116 Am. St. Rep. 25.

"A parol contract of insurance must have all the requisites of a written contract, to wit, subject-matter, the risks insured against, the amount insured, the duration of the risk, and the premium of insurance." Posey County Fire Assoc. *v.* Hogan, 37 Ind. App. 573, 77 N. E. Rep. 670.

Provided the terms of the oral contract are definitely fixed, it is immaterial that no premium had been paid. Stehlick *v.* Milwaukee Mechanics' Ins. Co., 87 Wis. 322, 58 N. W. Rep. 379.

[86] Waldron *v.* Home Mut. Ins. Co., 16 Wash. 193, 47 Pac. Rep. 425.

[87] Insurance Co. *v.* Lyman, 15

to make a preliminary agreement,[88] and his usual course of business to make such contracts for defendants is evidence of his authority.[89]

A witness cannot be asked whether the facts stated were in his opinion a completed contract.[90] To allow him to explain ordinary terms used in the negotiation, it should appear that they are terms of art, or employed in the particular business, and that the witness has qualifications for interpreting not equally possessed by the judge and jury.[91]

Where the preliminary agreement rests in writing,—as, for instance, a written application, a note for premium and a receipt therefor,—parol evidence is not admissible to show that it was to take effect contrary to the terms so expressed.[92] In an action on an agreement to issue a policy in a form used by a specified company, a blank form of that company is admissible.[93] The amount agreed to be insured may be recovered.[94]

Wall. 664. And see Audubon *v.* Excelsior Ins. Co., 27 N. Y. 216.

But it seems that a suit to enforce the liability of the insurer may be brought on the contract of insurance as well as upon the policy. Fire Ins. Co. *v.* Sinsabaugh, 101 Ill. App. 55.

[88] Ellis *v.* Albany City Fire Ins. Co., 50 N. Y. 402; Angell *v.* Hartford Fire Ins. Co., 59 Id. 171.

Although he may not possess authority to issue, in form, a written policy binding on the insurer. Loomis *v.* Jefferson Co. Patron's Fire Relief Assoc., 92 N. Y. App. Div. 601, 87 N. Y. Supp. 5. But see Baldwin *v.* Connecticut Mut. Life Ins. Co., 182 Mass. 389, 65 N. E. Rep. 837.

A preliminary contract to insure is mutually binding on the parties and gives the insured the right to recover for loss occurring before the issuance of the policy and the payment of the premium. Continental Ins. Co. *v.* Roller, 101 Ill. App. 77.

[89] Putnam *v.* Home Ins. Co., 123 Mass. 324.

[90] Lindauer *v.* Delaware Ins. Co., 13 Ark. 461, 470.

[91] Baptist Ch. *v.* Brooklyn Fire Ins. Co., 28 N. Y. 153, affi'g 23 How. Pr. 448.

[92] Winnesheik Ins. Co. *v.* Holzgrafe, 53 Ill. 516, s. c., 5 Am. Rep. 64. Compare Livingston *v.* Delafield, 1 Johns. 522.

[93] Van Tuyl *v.* Westchester Fire Ins. Co., 55 N. Y. 657.

It is not the policy which neces-

[94] Angell *v.* Hartford Fire Ins. Co., 59 N. Y. 171.

2. Execution of Policy.

The policy, unless admitted,[95] should be produced or accounted for, and the signatures (including countersigning) proved.[96] Physical delivery is *prima facie* evidence of a binding contract.[97] Where the facts connected with the delivery of the policy show that the insured was called on to manifest by some act that he accepted the policy, it is not binding without proof of some such act;[98] mere silence will not alone suffice, but it will in connection with evidence that he was in substance told he would be considered as accepting unless he refused.[99] Payment, with delivery, is merely conclusive evidence of consummation of the contract. Payment, without delivery, is ambiguous. If made at time of application it is of little weight, except as throwing light on other acts.[1] Lack of delivery is not conclusive.[2] Even the fact that there was

sarily constitutes the contract. The conduct of the parties, including the retention of the insured's money and the execution of the application, may be sufficient to establish the contract. Alliance Co.-op. Ins. Co. *v.* Corbett, 69 Kan. 564, 77 Pac. Rep. 108.

[95] Hunter *v.* Am. Pop. Life Ins Co., 4 Hun, 794.

[96] A condition in the policy requiring the defendant's agent to countersign the policy before it should become binding is a valid stipulation, and the failure of the agent to countersign before the happening of the contingency insured against will vitiate the contract. Fidelity, etc., Co. *v.* Walton, 24 Okl. 671, 104 Pac. Rep. 909.

As to mode of proving handwriting, see chapter XXI. As to effect of charter provisions on mode of executing, see 24 Ohio St. 345, s. c., 15 Am. Rep. 612; May on Ins. 65.

[97] Bliss on Life Ins. 253, § 163, May on Ins. 58, § 56.

A policy having been executed and delivered, the burden is on the company to show that it was not in force. Page *v.* Virginia Life Ins. Co., 131 N. C. 115, 42 S. E. Rep. 543.

[98] Id., Rey *v.* Equitable Life Assur. Society, 16 N. Y. App. Div. 194, 44 N. Y. Supp. 745; Waters *v.* Security Life, etc., Co., 144 N. C. 663, 57 S. E. Rep. 437, 13 L. R. A. N. S. 805; May on Ins. 55. Such, for instance, as payment of premium; or, if this be waived, some other affirmative act of acceptance. Bliss on Life Ins. 253, § 163.

[99] Id.

[1] Id.

[2] Fried *v.* Royal Ins. Co., 50 N. Y. 243, affi'g 47 Barb. 127. Authentication as "signed, sealed and delivered," without physical delivery, held conclusive evidence

neither payment nor delivery is only *prima facie*, not conclusive, evidence that there was no contract.[3] A policy, although expressed to be made in consideration of representations made in the application, is competent without the application, if it does not, in any other manner, refer to it, and is itself a complete contract.[4] The fact that there was no application,[5] or that it was not signed,[6] does not affect the competency of the policy, though it refer to an application.

If subscribed by agent, his handwriting and authority must be proved. If the authority was in writing, it should generally be produced; but it may also be proved by showing that defendants had recognized the act of the agent in this instance, or in other similar instances in which he had subscribed policies for them.[7]

of contract. Xenos *v.* Wickham, L. R. 2 H. L. 296.

A contract of insurance may be consummated without actual delivery of the policy, as by an unconditional written acceptance of the application by the company. Therefore, where the insurer, having accepted the application, sends the policy to its agent with instructions to deliver it to the insured and the agent fails to do so, such receipt by the agent has been held equivalent to delivery to the insured. Phillips *v.* Union Central Life Ins. Co., 101 Fed. Rep. 33 reversed on other grounds, 102 Fed. Rep. 19, 41 C. C. A. 263.

And the same has been held notwithstanding that a receipt, given to the insured on the payment of the premium, contained a stipulation to the effect that the company should not be liable until delivery of the policy. New York Life Ins. Co. *v.* Babcock, 104 Ga. 67, 30 S. E. Rep. 273, 69 Am. St. Rep. 134, 42 L. R. A. 88.

But where actual delivery is made an express condition in the contract of insurance, the signing of the policy and forwarding it to the agent to be delivered to the insured is not tantamount to an absolute delivery. Devine *v.* Fed. Life Ins. Co., 250 Ill. 203, 95 N. E. Rep. 174.

[3] May on Ins. 57, § 56.

But delivery in the absence of fraud is sufficient proof of a completed contract, and an acknowledgment that the premium was paid during good health. Rayburn *v.* Pennsylvania Casualty Co., 138 N. C. 379, 50 S. E. Rep. 762, 107 Am. St. Rep. 548.

[4] Edington *v.* Mut. Life Ins. Co., 67 N. Y. 185, rev'g 5 Hun, 1.

[5] May on Ins. 174, § 169.

[6] Bohringer *v.* Empire Mut. Life Ins. Co., 2 Supm. Ct. (T. & C.) 610.

[7] Rosc. N. P. 403, s. p., Putnam

If defendants, having possession of the contract, refuse to produce it on notice, parol evidence of its contents may be given; and all inferences arising from necessary ambiguities in the secondary evidence may be taken most strongly against the company.[8]

The usual blank form of the company is competent secondary evidence, in the absence of the actual policy.[9]

3. Delivery.

Possession by the plaintiff is *prima facie*, but not conclusive, evidence of delivery.[10] Delivery, in legal effect, may be proved by any act manifesting the intent of the parties that the instrument should have present vitality, although not physically handed over.[11] Delivery is not proved by admissions even of a general agent, made after loss.[12] The

v. Home Ins. Co., 123 Mass. 324. Thus, for instance, where a witness stated that he was authorized by power of attorney, but added that defendants had been in the habit of paying losses upon policies which the witness had subscribed in their name, the power need not be produced. Rosc. N. P. 403.

[8] Caken *v.* Continental Life Ins. Co. of N. Y., 69 N. Y. 300, 305, rev'g 41 Super. Ct. (J. & S.) 296. The refusal to produce does not supply the place of secondary evidence so as to raise a presumption that the fact is as alleged; but it aids the secondary evidence by a presumption in favor of the construction of it most adverse to the party refusing.

[9] Van Tuyl *v.* Westchester Fire Ins. Co., 55 N. Y. 657.

[10] Berliner *v.* Travellers' Ins. Co., 121 Cal. 451, 53 Pac. Rep. 922.

"The fact that the deceased had possession of the policy at the time of his death, made out a presumption of payment of the premium." Cole *v.* Preferred Acc. Ins. Co., 40 Misc. 260, 81 N. Y. Supp. 901.

Possession of a policy reciting on its face that it was not to be delivered until the first premium had been paid is *prima facie* evidence of payment. Page *v.* Virginia Life Ins. Co., 131 N. C. 115, 42 S. E. Rep. 543.

The presumption of delivery from possession may be rebutted as by showing that the policy had been delivered to the insured for examination only. Richardson *v.* N. W. Mutual Life Ins. Co., 143 Ill. App. 279.

[11] May on Ins. 61, § 60.

[12] *Contra*, Insurance Co. *v.* Woodruff, 26 N. J. L. (2 Dutch.) 541; disapproved by Redfield, in 1 Greenl. Ev. 135, n.

But statements by the agent, *prior* to the loss, to third persons,

date in the policy raises a legal though not conclusive presumption of the time of the execution and delivery of the instrument.[13]

4. The Application.

In an action on a policy, the slip, or application for insurance, unless referred to in the policy, or annexed, as a part of it,[14] is inadmissible to show the intention of the parties; [15] except on an application to reform the policy,[16] or on an issue of fraud or misrepresentation in obtaining it.[17] Verbal

to the effect that he had insured the plaintiff's husband, that the latter "had taken out insurance," and that he "had written a policy" for the plaintiff's husband, are admissible, the agent having testified for the defendant and denied the delivery. Jones *v.* New York Life Ins. Co., 168 Mass. 245, 47 N. E. Rep. 92.

[13] St. John *v.* Am. Mut. Life Ins. Co., 2 Duer, 419, s. c., less fully, 12 N. Y. Leg. Obs. 265, affi'd 13 N. Y. 31.

But evidence is admissible to show that the date of the actual delivery was different from the date on the policy. Haughton *v.* Ætna Life Ins. Co., 165 Ind. 32, 73 N. E. Rep. 592, 74 N. E. Rep. 613.

[14] Murdock *v.* Chenango Mut. Ins. Co., 2 N. Y. 210.

By statutes in some states it is required that in order to introduce the application in evidence, or to give evidence of a rule or by-law of the company, an exact (Nugent *v.* Greenfield Life Assoc., 172 Mass. 278, 52 N. E. Rep. 440) copy of such application, rule or by-law should be annexed or attached to the policy, and failure thus to attach bars evidence of such application, rule, or by-law, even though referred to in the policy or made a part thereof by reference. Johnson *v.* American Natl. Life Ins. Co., 134 Ga. 800, 68 N. E. Rep. 731; Pickett *v.* Insurance Co., 144 Pa. St. 79, 22 Atl. Rep. 871, 27 Am. St. Rep. 618, 13 L. R. A. 661; Mahan *v.* Pacific Mut. L. Ins. Co., 144 Pa. 409, 22 Atl. Rep. 876.

[15] Ewer *v.* Washington Ins. Co., 16 Pick. 502; Dow *v.* Whetten, 8 Wend. 160; Vandervoort *v.* Smith, 2 Cai. 155. *Contra*, Ionides *v.* Pacific Ins. Co., L. R., 7 Q. B. 517, 6 Id. 674, s. c., 6 Am. L. Rev. 297.

[16] Dow *v.* Whetten, 8 Wend. 160.

[17] Folsom *v.* Mercantile Ins. Co., 9 Blatchf. 201; Rawls *v.* Am. Mut. Life Ins. Co., 27 N. Y. 282, affi'g 36 Barb. 357. See also Valton *v.* National Loan Fund Assurance Co., 4 Abb. Ct. App. Dec. 437, s. c., 1 Keyes, 21, rev'g 17 Abb. Pr. 268.

On an issue of fraud, the application is admissible even though not annexed or attached to the policy as required by the statute.

representations are equally incompetent. A written application is presumed to contain the representation which induced the contract, and renders evidence of prior or subsequent oral representations incompetent,[18] in the absence of fraud; for their admission would vary the written contract by parol; and if they be relied on as showing fraud or a collateral warranty, the fact must be specially pleaded as such in order to be admissible.[19] If the policy refers to an application, it

Johnson *v.* American Natl. Life Ins. Co., 134 Ga. 800, 68 S. E. Rep. 731.

[18] Jennings *v.* Chenango County Mut. Ins. Co., 2 Den. 75; Gates *v.* Madison County Mutual Ins. Co., 5 N. Y. 469; May on Ins. 202, § 192. A statement in the application for the policy as to the age of the insured is presumed to be true; and any different or contradictory statements as to his age in applications for other policies, or at other times, are hearsay, and cannot overcome such presumption. Yore *v.* Booth, 110 Cal. 238, 42 Pac. Rep. 808.

But in Home Benefit Assoc., No. 3 of Coleman County *v.* Webster, 146 S. W. (Tex. Civ. App.) 1022, it was held that declarations of the insured as to his age, made long prior to the issuance of the policy, were not inadmissible because self-serving.

"Where insurance is applied for and afterwards a policy is issued and delivered, it is based on the status of the insured at the time of the application, and the company assumes the risk after the date of the policy." Rayburn *v.* Pennsylvania Casualty Company, 50 S. E. Rep. 762, 138 N. C. 379, 107 Am. St. Rep. 548.

[19] Mayor, &c. of N. Y. *v.* Brooklyn Fire Ins. Co., 3 Abb. Ct. App. Dec. 251. Answers, in an application for life insurance, in respect to the personal habits of the insured and diseases with which he and his relatives have been afflicted, though stated to be warranties and the basis of the contract, need not be proved by the plaintiff, the administrator of the insured, in an action upon the policy, but the defendant must establish their untruthfulness if it relies thereon. Guiltinan *v.* Metropolitan Life Ins. Co., 69 Vt. 469, 38 Atl. Rep. 315. See also O'Connell *v.* Supreme Conclave, 102 Ga. 143, 28 S. E. Rep. 282.

Where the issue of fraud is raised, evidence of the conduct, declarations, acts and relation of the parties to the policy is freely admissible. Therefore declarations of the insured, not too remote in point of time, as to his state of health, etc., are competent. Haughton *v.* Ætna Life Ins. Co., 165 Ind. 32, 73 N. E. Rep. 592, 74 N. E. Rep. 613.

Evidence of the declarations of a decedent, the insured, as to the condition of her health, is admissible against her executor. Finn *v.*

may be identified by parol; and the usual printed questions and written answers made before an insurance is effected are presumed, until the contrary is shown, to be those referred to.[20] The application is admissible in evidence if pleaded;[21] but its effect depends on the privity of the parties with it, and the intent manifested by its language and that of the policy. The policy is admissible without it unless it is in plaintiff's possession.[22]

The law presumes that the applicant understood the application signed by him, though drawn up by the insurer's agent.[23] Still, where the alleged false warranty is an ambiguous answer, plaintiff may prove that before applying he stated the facts fully to the agent, who advised him that his answer should be as made in the application; and that he believed the answer to be truthful, and would not have signed the application but for such advice.[24] The purpose of such evidence is not to vary or contradict the contract of the parties, but to preclude the party who framed it from relying upon incorrect recitals to defeat it, when he, himself, had drafted those recitals, and was morally responsible for

Prudential Ins. Co., 98 N. Y. App. Div. 588, 90 N. Y. Supp. 697.

But it is otherwise, if the declarations are inconsistent with the statements in the application and do not form part of the *res gestæ*. Johnson *v.* Fraternal Reserve Ass'n, 136 Wis. 528, 117 N. W. Rep. 1019.

[20] Clark *v.* Manufacturers' Ins. Co., 2 Woodb. & M. 472.

[21] Weed *v.* Schenectady Ins. Co., 7 Lans. 452.

Similarly, in those states where it is required by statute to be annexed to the policy to be admissible, provided it is so annexed. Johnson *v.* American Nat. Life Ins. Co., 134 Ga. 800, 68 S. E. Rep. 731.

[22] Mut. Ben. Life Ins. Co. *v.* Robertson, 59 Ill. 123, s. c., 14 Am. Rep. 8.

[23] Geib *v.* International Ins. Co., 1 Dill. C. Ct. 443, and in Mass. & R. I. May on Ins. 148, § 145.

"The mere fact that the answers to the questions contained in the application were written out by the agent of the insurance company did not relieve plaintiff's agent from the duty or necessity of examining the same, and of seeing to it that the statements in the application were true." Deming Inv. Co. *v.* Shawnee Fire Ins. Co., 16 Okl. 1, 83 Pac. Rep. 918, 4 L. R. A. N. S. 607.

[24] Ætna Live Stock, Fire & Tornado Ins. Co. *v.* Olmstead, 21 Mich. 246, s. c., 4 Am. Rep. 483.

their truthfulness.[25] So parol evidence is admissible that such agent who filled out the application was, at the time of application, answered truly by the insured, but inserted the answer alleged to be false, or omitted answers which should have been inserted, without the knowledge of the latter, even though the answer written was thereupon read to and signed by the latter.[26] Facts relied on as establishing such fraud on the part of the agent must be clearly and satisfactorily established.[27]

[25] North American Fire Ins. Co. *v.* Throop, 22 Mich. 146, s. c., 7 Am. Rep. 638.

An application signed in blank with a request by the insured to the agent to fill it in with the same answers as had been given by him in a previous application, is binding on the insured only in so far as the answers therein inserted by the agent were identical with those in the first. He was not bound by the other answers which were incorrect. "We think it a sound rule of law that an application for life insurance, signed in blank by one desiring insurance and filled in by the company or its agents, should be construed more favorably to the applicant." Hewey *v.* Metropolitan L. Insurance Co., 100 Me. 523, 62 Atl. Rep. 600.

[26] Insur. Co. *v.* Mahone, 21 Wall. 155; Union Mut. Ins. Co. *v.* Wilkinson, 13 Id. 222. *Contra*, Ryan *v.* World Mut. Life Ins. Co., 41 Conn. 168, s. c., 19 Am. Rep. 490. Parol evidence is admissible to show that answers written by an insurance agent in an application which had been first signed in blank were incorrectly written by the agent, and were not the true answers made by the assured. Brown *v.* Metropolitan Life Ins. Co., 65 Mich. 306, 8 Am. St. Rep. 894, 32 N. W. Rep. 610.

"In the case of life insurance policies, it is the doctrine of many modern decisions, that where the application is drawn by the authorized agent of the insurer, and the answers to the interrogations contained therein, are written by him in filling the application, without fraud or collusion on the part of the applicant, the insurer is estopped from controverting the truth of such statements in an action upon the instrument between the parties thereto." Marston *v.* Kennebec Mut. Life Ins. Co., 89 Me. 266, 36 Atl. Rep. 389, 56 Am. St. Rep. 412.

[27] Geib *v.* International Ins. Co., 1 Dill. C. Ct. 443. "A written instrument may be shown to be void by parol evidence. It may be attached and overthrown for fraud, illegality, want of consideration or other vice going to the existence of the contract. And where the fraud and false representation are made with the knowledge and upon the advice and instruction of the party seeking to take advantage

5. Authority and Scope of Agency.

Neither the fact nor the scope of agency can be proved by the agent's acts, representations, declarations or admissions.[28] The agency must first be established; and either a specific authority or one of so general a nature as to give him authority to do the act in question, or a subsequent ratification with full knowledge, or a holding out to the world, must be proved.[29] But the agent's course may be proved in connection with evidence that the company tacitly assented to it or held the agent out to the world as such,[30] or repeatedly

thereof, he will be estopped from setting up his own fraud as contrary to good faith, and parol evidence of such fraud will be admissible to establish an estoppel. This rule is equally applicable to insurance contracts as to any other, and it has been so held in many adjudicated cases. The ground upon which such evidence is admitted is not that it does not tend to violate the terms of the written contract by parol, but that the recitals in the application are not, when viewed in the light of the evidence offered, the representations of the applicant, but the statements of the insurer himself. Wherever the courts have held facts to constitute an estoppel, which precluded an insurance company from taking advantage of the alleged false answers, it has been assumed or expressly held that evidence was admissible showing what these facts were." Marston *v.* Kennebec Mut. Life Ins. Co., 89 Me. 266, 273–274, 36 Atl. Rep. 389.

[28] An agent may testify that when he wrote the policy, his agency had not terminated, where the fact of the termination of the agency is in controversy. Int'l Fire Ins. Co. *v.* Black, 179 S. W. Rep. (Tex.) 534.

[29] Stringham *v.* St. Nicholas Ins. Co., 4 Abb. Ct. App. Dec. 315; Miller *v.* Phœnix Ins. Co., 27 Iowa, 203, s. c., 1 Am. Rep. 262.

Where an agent had no authority to bind the company by a certain contract of insurance, the subsequent statement of the president of the company, upon being asked as to the authority of the agent, that what he did would "be all right," is a ratification of the agent's unauthorized contract. Cameron *v.* Mutual Life, etc., Co., 96 N. W. Rep. 961, 121 Iowa, 477.

If the evidence of the agency rests in parol, the existence of the agency is a question for the jury. U. S. Life Ins. Co. *v.* Lesser, 126 Ala. 568, 28 So. Rep. 646; Firemen's Ins. Co. *v.* Horton, 170 Ill. 258, 48 N. E. Rep. 955.

[30] As, for instance, by circulars, even though at the time unknown to plaintiff. Walsh *v.* Ætna Life Ins. Co., 30 Iowa, 133, s. c., 6 Am. Rep. 664.

Where a minister applied for

adopted, with knowledge, similar acts of his in other dealings, either with plaintiff or third persons.[31] The court may take judicial notice of the way in which contracts for insurance are usually negotiated, and that the application of the insured is usually drawn up by the agent of the insurer.[32] In proof of general agency, the possession of blank policies and renewal receipts is relevant.[33] Where the act of a subagent is within the scope of the authority of the superior agent, ratification by the principal is not necessary.[34]

insurance on a church and the Company mailed him a policy "subject to acceptance by the board of trustees of the church," the minister is the agent of the company to lay the policy before the board and where the board accepted it when laid before it by the minister, the minister's knowledge of its acceptance was the company's knowledge so as to create a binding contract of insurance from that moment. Natl. Mut. Church Ins. Co. *v.* Trustees of M. E. Church, 105 Ill. App. 143.

[31] Bunten *v.* Orient Ins. Co., 4 Bosw. 254, 2 Greenl. Ev. 13th ed. 51. As to ratification by apparent officer, see Buchanan *v.* Exchange Fire Ins. Co., 61 N. Y. 26.

[32] North American Fire Ins. Co. *v.* Throop, 22 Mich. 146, s. c., 7 Am. Rep. 638.

Where a person applies to an agent of several insurance companies to write him a policy in a good company, the agent in selecting the company is acting as the agent of the company and not of the insured, and hence having selected a company and written insurance therein, cannot cancel the policy without the consent of the insured. Commercial Union Assur. Co. *v.* Urbansky, 113 Ky. 624, 24 Ky. Law Rep. 462, 68 S. W. Rep. 653.

"If an insurance company will make a person agent for it, who at the same time holds commissions from other companies, they must be held to know, from general observation, that it is the practice of such agencies to make selections of the insurer who is to assume a particular risk, and after loss they cannot be heard to deny that such agent had authority to do so." Fire Ins. Co. Philadelphia County *v.* Sinsabaugh, 101 Ill. App. 55.

[33] Carroll *v.* Charter Oak Ins. Co., 40 Barb. 292; May on Ins. 126, § 126.

Where an agent of an insurance company is merely a soliciting agent soliciting applications to be submitted to the company for acceptance or rejection, and is not furnished with blank policies to issue to whom he chooses, he cannot bind the company by a preliminary contract of insurance prior to the delivery of the policy. Bell *v.* Peabody Ins. Co., 49 W. Va. 437, 38 S. E. Rep. 541.

[34] Excelsior Fire Ins. Co. *v.*

Restrictions of authority, though expressed in the policy, are not conclusive; but a waiver of them by parol may be shown, and may be inferred from the company's course of dealing.[35] To sustain an unratified act in excess of express authority, the evidence must show, if not a succession of cases, at least several, in which the agent had done acts similar to those for which authority is claimed, and the subsequent acquiescence of the principal therein, upon their coming to his knowledge.[36]

Royal Ins. Co. of Liverpool, 55 N. Y. 343.

Likewise where a general agent employs a clerk or subagent to do certain acts within his general authority, such acts bind the company. Manufacturers', etc., Mut. Ins. Co. *v.* Armstrong, 45 Ill. App. 217.

[35] Insurance Co. *v.* Norton, 96 U. S. (6 Otto) 234.

A person who has been allowed to solicit business by underwriters, has been deemed the agent of the insurer, notwithstanding a provision in the policy stating: "In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of the underwriters." Bini *v.* Smith, 36 N. Y. App. Div. 463, 55 N. Y. Supp. 842. But see More *v.* N. Y. Bowery F. Ins. Co., 130 N. Y. 537, 29 N. E. Rep. 757.

The question as to whether the person soliciting the insurance is the agent of the insurer or the insured is sometimes difficult of solution. Where his acts have been ratified or adopted by the company, he is generally held the agent of the insurer. Queen Ins. Co. *v.* Union Bank, etc., Co., 111 Fed. Rep. 697, 49 C. C. A. 555; Lehmann *v.* Hartford Fire Ins. Co., 183 Mo. App. 696, 167 S. W. Rep. 1047; Citizens' Ins. Co. *v.* Stoddard, 197 Ill. 330, 64 N. E. Rep. 355; Gude *v.* Exchange Fire Ins. Co., 53 Minn. 220, 54 N. W. Rep. 1117.

Where, under a standard policy of fire insurance containing express stipulations with respect to the authority of agents, it is within the power of the insured to produce the policy for written indorsement permitting additional insurance, an oral promise by the agent that he will attend to obtaining such an indorsement, is his individual promise and is not binding upon the company. Perry *v.* Caledonian Ins. Co., 103 N. Y. App. Div. 113, 93 N. Y. Supp. 50.

[36] Bunten *v.* Orient Mutual Ins. Co., 4 Bosw. 254, and see further decision in 8 Id. 448, 2 Greenl. Ev., 13th ed. 51.

On the question as to whether the agent had authority to extend the time of payment of premiums, evidence of the company's practice in allowing its agents to make such extensions, is admissible. U.

The authority of a person to do acts within the ordinary duty of a clerk, such as to receive payments and give receipts, and respond to inquiries for information, may be inferred from evidence that he was behind defendant's counter, and assumed to act as clerk.[37]

Letters written by agents of an insurance company are admissible in evidence in an action on a policy, where they show the history of the negotiations between the parties, or contain admissions made in the line of their duty, by which their principal is bound.[38]

Notice to the agent is notice to the company, if given while the agency exists, and referring to business then within the scope of his authority,[39] or if he is one whose duty it is to communicate such notice to the company.[40] If given

S. Life Ins. Co. *v.* Lesser, 126 Ala. 568, 28 So. Rep. 646.

[37] Leslie *v.* Knickerbocker Life Ins. Co., 63 N. Y. 27, affi'g 2 Hun, 616, s. c., 5 Supm. Ct. (T. & C.) 193; and see Buchanan *v.* Exchange Fire Ins. Co., 61 N. Y. 26.

It has even been held that the clerk of a local agent may, in the absence of the agent from his home or office, issue and deliver a bond of indemnity under the liquor tax law and waive a written condition of its issue. The presumption is that the clerk acted pursuant to instructions. Cullinan *v.* Bowker, 40 Misc. 439, 82 N. Y. Supp. 707.

[38] Ruthven *v.* American Fire Ins. Co., 102 Iowa, 550, 71 N. W. Rep. 574.

Such communications are deemed to be acts of the company, and if they negative the intention on the part of the company to insist upon a condition respecting the time at which proofs of loss should be furnished, a waiver of such condition may be presumed. Citizens' Ins. Co. *v.* Stoddard, 197 Ill. 330, 64 N. E. Rep. 355.

[39] Hayward *v.* Natl. Ins. Co., 52 Mo. 181, 14 Am. Rep. 400; Sparkman *v.* Supreme Council A. L. H., 57 S. C. 16, 35 S. E. Rep. 391.

Thus a provision in the policy to the effect that an indisclosed incumbrance against the property insured would invalidate the contract, was held waived where it appeared that the agent had been notified of such incumbrance but had failed to communicate it to the company. Firemen's Ins. Co. *v.* Horton, 170 Ill. 258, 48 N. E. Rep. 955.

But the agent must be the agent of the company and not a mere broker. Gude *v.* Exchange Fire Ins. Co., 53 Minn. 220, 54 N. W. Rep. 1117.

[40] May on Ins. 156.

before the agency or authority, it must be shown to have been so near that he must be presumed to have recollected it.[41] The principal is not chargeable with knowledge on part of the agent, as towards one acting in collusion with the agent.[42]

6. Payment of Premium.

A recital in the policy that the premium has been paid is *prima facie*, but not conclusive [43] evidence of payment.

[41] Hayward *v.* Natl. Ins. Co. (above).

[42] Natl. Life Ins. Co. *v.* Minch, 53 N. Y. 144, rev'g 6 Lans. 100.

Knowledge on the part of the agent, in the absence of such collusion, is chargeable to the principal, according to the view taken by some courts. See Benton *v.* Farmers' Mut. F. Insurance Co., 102 Mich. 281, 60 N. W. Rep. 691, 26 L. R. A. 237.

"It is a general rule that the knowledge of an agent of an insurance company as to all matters which come within the scope of his general employment is the knowledge of the company. Insurance companies like other corporations, necessarily act through their agents. The agents are the eyes and ears of the company, through which it must receive information, if at all. Knowledge which comes through these avenues to the company is its knowledge, as a legal entity, the only information or knowledge it can acquire is through these agencies. As the knowledge of the agent is the knowledge of the company it is bound thereby." Funk *v.* Anchor F. Insurance Co., 171 Iowa, 331, 153 N. W. Rep. 1048.

The authorities, however, are no entirely in harmony on this point. For instance, in New York it has been held that a false statement by the insured to the effect that he had not been rejected by another insurance company, was a breach of a warranty and that neither the knowledge of the company's agent of the falsity of the statement, nor the belief of the insured in its truth, was material. Clemans *v.* Supreme Assembly Royal Society of Good Fellows, 131 N. Y. 485, 30 N. E. Rep. 496, 16 L. R. A. 33, and note.

[43] See Page *v.* Virginia Life Ins. Co., 131 N. C. 115, 42 S. E. Rep. 543; Baker *v.* Union Mut. Ins. Co., 43 N. Y. 283, rev'g 6 Robt. 393, s. c., 6 Abb. Pr. N. S. 144; Sheldon *v.* Atlantic Fire & Marine Ins. Co., 26 N. Y. 460. *Contra*, Basch *v.* Humboldt Mut. F. &. M. Ins. Co., 6 Vroom, 429; Prov. Life Ins. Co. *v.* Fennell, 49 Ill. 180; Rosc. N. P. 70.

The payment of all premiums except the first being conditions subsequent, the burden of proving non-payment rests upon the in-

If the agent giving receipt is interested in the insurance, a receipt given by him in his capacity of agent is not sufficient without some additional evidence of payment.[44]

7. Waiver of Non-payment; Excuse for Failure.

Waiver of a condition in an insurance policy requiring payment to make the policy valid, may be inferred from delivery without payment; [45] and a general agent [46] has au-

surer. Thomas *v.* Northwestern Mut. Life Ins. Co., 142 Cal. 79, 75 Pac. Rep. 665.

In an action on an accident policy, payment of the premium is a material part of plaintiff's case and must be proved by him. O'Connell *v.* Fidelity, etc., Co., 87 N. Y. App. Div. 306, 84 N. Y. Supp. 315.

[44] Nuendorff *v.* World Mut. Life Ins. Co., 69 N. Y. 392. Compare Norton *v.* Phœnix Life Ins. Co., 36 Conn. 303.

[45] Boehen *v.* Williamsburgh Ins. Co., 35 N. Y. 131; Healy *v.* Pennsylvania Insurance Co., 50 N. Y. App. Div. 327, 63 N. Y. Supp. 1055.

Forfeitures for non-payment of premiums are not favored by the law. In Washburn *v.* Union Central Life Ins. Co., 143 Ala. 485, 39 So. Rep. 1011, the rule is broadly stated by the court in the following words: "It has been frequently said, forfeitures for the non-payment of premiums are not favored in law, and the courts are always prompt to seize hold of any circumstances that indicate an election to waive the forfeiture, or an agreement to do so, on which the party has relied and acted." . . . "Though the conduct of the insurer may not have actually misled the insured to his prejudice, or into an altered position, yet, if, after knowledge of all the facts its conduct has been such as to reasonably imply a

[46] Peck *v.* Washington Life Ins. Co., 91 N. Y. App. Div. 597, 87 N. Y. Supp. 210, affirmed, 181 N. Y. 585, 74 N. E. Rep. 1122. Otherwise of a local agent (see Bush *v.* Westchester Fire Ins. Co., 63 N. Y. 531, rev'g 2 Supm. Ct. [T. & C.] 629), and of a clerk authorized to collect maturing premiums only (Kolgers *v.* Guardian Life Ins. Co., 9 Abb. Pr. N. S. 91, s. c., 58 Barb. 185, 2 Lans. 480).

A "general agent" of an insurance company for one district has no apparent authority to make a contract for the company in another district, especially where the contract is an unusual one, such as an oral agreement for life insurance to take effect immediately before a medical examination or payment of premium except by promissory note. Baldwin *v.* Conn. Mut. Life Ins. Co., 182 Mass. 389, 65 N. E. Rep. 837.

thority to waive pre-payment, whatever his secret instructions.[47] Evidence of a prior dealing by plaintiff with the company for years, and that he was in the habit of getting policies without paying for them at the time, is competent, but not controlling evidence of the intention of the agent to waive payment.[48] The fact that on a single occasion credit

purpose not to insist upon a forfeiture, the law, leaning against forfeitures will apply the peculiar doctrine of waiver, invented probably to prevent them, and will hold the insurer irrevocably bound as by an election to treat the contract as if no cause of forfeiture had occurred."

An agreement for the extension of the time of payment of the premium is a valid waiver of a condition in the policy imposing forfeiture for non-payment of premium. It is not void for want of consideration. Michigan Mutual Life Ins. Co. *v.* Custer, 128 Ind. 255, and cases cited. Mallette *v.* British Am. Assoc. Co., etc., 91 Md. 471, 46 Atl. Rep. 1005.

If a company makes a policy complete in form and sends it out for delivery to the insured, and after such delivery and before a loss by fire treats the policy as a valid and binding contract, payment or a waiver may be presumed. Mauck *v.* Merchants, etc., Ins. Co., 4 Pennewill (Del.), 325, 54 Atl. Rep. 952.

The insurer cannot, in the absence of fraud or mistake, defeat the policy by showing that a premium, which is acknowledged on the face of the policy to have been paid has not in fact been paid. Home Ins. Co. *v.* Gilman, Executor, et al., 112 Ind. 7; *Contra*, Union Bldg. Assoc. *v.* Ins. Co., 83 Iowa, 649.

[47] Sheldon *v.* Atlantic Fire & Marine Ins. Co., 26 N. Y. 460; Wood *v.* Poughkeepsie Mut. Ins. Co., 32 Id. 619; and see Bodine *v.* Exchange Fire Ins. Co., 51 N. Y. 117. Proof that the agent was given credit for the payment of premium, and the company demanded subsequent premiums without insisting on forfeiture, held not, as a matter of law, a payment. Wright *v.* Equitable Life Assur. Co., 41 Super. Ct. (J. & S.) 1.

Or notwithstanding that the policy contained a stipulation to the contrary. Home Ins. Co. *v.* Gilman, 112 Ind. 7, 13 N. E. Rep. 118.

[48] Church *v.* Lafayette Fire Ins. Co., 66 N. Y. 222.

Evidence that the company on previous occasions waived prompt payments of premiums is competent and tends to show a waiver of the prompt payment of a note of the insured for an over-due installment. Illinois Life Assoc. *v.* Wells, 200 Ill. 445, 65 N. E. Rep. 1072.

An agreement to receive the premium within a reasonable time after it is due may be inferred from

was given for the premium, upon the present,[49] or even on a prior policy,[50] is relevant on the question of waiver. Evidence of a general usage of insurance companies to receive payment after the day, is competent [51] in aid of other evidence of a waiver.[52]

To prove excuse for non-payment, evidence of an oral agreement prior to the policy, that the company should give the plaintiff notice of the time when each payment should be due, and that they failed to do so, which caused the de-

the dealings of the parties. Kelly *v.* Security Mutual Life Ins. Co., 106 N. Y. App. Div. 352, 94 N. Y. Supp. 601.

The plaintiff need not allege and prove the payment of premiums. Non-payment is a defense to be pleaded and proved by the defendant, if relied on. De Frece *v.* National L. Ins. Co., 136 N. Y. 144, 32 N. E. Rep. 556.

Defendant cannot prove non-payment under a general denial. Natl. Mut. Fire Ins. Co. *v.* Sprague, 40 Colo. 344, 92 Pac. Rep. 227.

[49] Id. A "general agent" with power to "perform such acts and things as are necessary to build up the interests of the company" has power to bind the company by an oral agreement with the insured to extend the time for payment of premiums. Pointer *v.* Industrial Life Assoc. 131 Ind. 68, 30 N. E. Rep. 876.

[50] Bowman *v.* Agricultural Ins. Co., 59 N. Y. 521, affi'g 2 Supm. Ct. (T. & C.) 261.

Whether an extension of credit on the renewal of an accident policy may be inferred from the fact that the company, having given credit before, sent a bill for the second premium, without repudiating the policy at the end of the period, is a question of fact for the jury. Cornell *v.* Travelers' Ins. Co., 120 N. Y. App. Div. 459, 104 N. Y. Supp. 999.

[51] Helme *v.* Philadelphia Life Ins. Co., 61 Penn. St. 107; Pino *v.* Merchants' Mut. Ins. Co., 19 La. An. 214, 233.

Where the evidence showed that it was the practice of the company to grant indulgence for payment of premiums past due, that the insured was ill and unconscious on the day the premium fell due, and that shortly after his death his widow tendered the amount of the premium, the company was liable on the policy because it was not shown that the company had elected to cancel the policy for non-payment of premiums on the very day due. Ætna Life Ins. Co. *v.* Hartley, 24 Ky. Law Rep. 57, 68 S. W. Rep. 1081, 67 S. W. Rep. 19.

[52] It is not alone enough to vary the contract. Howell *v.* Knickerbocker Life Ins. Co., 3 Robt. 232, s. c., 19 Abb. Pr. 217, and cases cited.

fault, is not competent.[53] But evidence of the course of dealing of the company after the issue of the policy, revoking the authority of the agent who first collected premiums, and notifying the insured from time to time where and to whom to pay, will show that he was entitled to rely on receiving such notice, and will estop them from claiming a forfeiture in consequence of their omitting to give it.[54] So evidence that the insured, not having other means of knowledge, applied at the company's office for information as to time of payment, and was told by an apparent clerk behind their desk that they would send notice, is sufficient to excuse delay in waiting for notice.[55] Evidence that the general agent to whom premiums had been paid, without objection from the company, received a renewal premium on the day when due, is sufficient and conclusive as against the company, unless previous to such payment the assured had notice that the agent's authority had been revoked or qualified.[56] Evidence that the company refused to receive the premiums and repudiated the contract, wholly dispenses with the necessity of proving the offer of subsequent premiums.[57]

[53] Insurance Co. *v.* Mowry, 96 U. S. (6 Otto) 544.

Nor can non-payment of premium be excused by evidence that the insurance company, contrary to a usage of giving notice of the time when such payment became due, omitted to give the notice pursuant to such custom. Thompson *v.* Knickerbocker L. Insurance Co., 104 U. S. 252, 26 L. ed. 765. *Contra*, Knoebel *v.* North Am. Acc. Ins. Co., 135 Wis. 424, 115 N. W. Rep. 1094, 20 L. R. A. N. S. 1037.

And a verbal agreement by the insurer to the effect that the policy should not become void for non-payment of premium except at the express election of the company, which election however had never been made, was held to be void because in direct contradiction to the express terms of the policy. Thompson *v.* Knickerbocker L. Ins. Co., Id.

[54] Insurance Co. *v.* Eggleston, 96 U. S. (6 Otto) 572.

[55] Leslie *v.* Knickbocker Life Ins. Co., 63 N. Y. 27, affi'g 2 Hun, 616, s. c., 5 Supm. Ct. 193.

[56] Insurance Co. *v.* McCain, 96 U. S. (6 Otto) 84.

[57] Shaw *v.* Republic Life Ins. Co., 69 N. Y. 286, affi'g, with modification, 67 Barb. 586.

Where the circumstances render it obvious that if any premium had been tendered it would have been rejected by the company, the insured need not prove a

8. Renewal.

A renewal may be proved by parol, unless the charter forbids oral contract.[58] A witness may state generally that there was or was not a renewal,[59] subject to cross-examination, but not whether specified facts amounted to a renewal.[60] A request for renewal is evidence that the representations on which the policy originally issued were adopted or assented to by the one making the request.[61]

tender. "It is well settled that where a liability is repudiated altogether and the defendant takes the position that no contract relations exist or will be recognized, the plaintiff seeking to enforce an obligation is relieved from the mere performance of an idle ceremony which would result in nothing." Van Tassel *v.* Greenwich Ins. Co., 28 N. Y. App. Div. 163, 51 N. Y. Supp. 79.

[58] First Baptist Church *v.* Brooklyn Fire Ins. Co., 19 N. Y. 305, 18 Barb. 69.

The courts are not entirely in harmony as to the weight of testimony required to prove such a renewal contract. In some jurisdictions such oral negotiations for renewals are given a liberal interpretation in favor of the insured. Baker *v.* Commercial Union Assur. Co., 162 Mass. 358, 38 N. E. Rep. 1124.

But in Abel *v.* Phœnix Ins. Co., 47 N. Y. App. Div. 81, 62 N. Y. Supp. 218, where the renewal agreement rested wholly upon a conversation between the plaintiff and the company's agent, and the latter distinctly denied such agreement, it was held that the plaintiff should be corroborated or the agent discredited by clear and unequivocal facts. "While it is well settled that a contract to insure may be made by parol, and will be enforced against the company though made by an agent, if he has authority to insure, yet it is manifest that the contract is of such a character that the proof by which it is sought to be established should be closely scrutinized, and nothing short of a clear preponderance of evidence should be allowed to prevail."

[59] Baptist Church *v.* Brooklyn Fire Ins. Co., 23 How. Pr. 448, aff'd on the merits in 28 N. Y. 153. A custom of the agent of the company to renew policies without further notice from the insured when they expired, cannot, alone, be the basis of a recovery against the company. American Central Ins. Co. *v.* Hardin, 148 Ky. 246, 146 S. W. Rep. 418.

[60] See Lindauer *v.* Delaware Ins. Co., 13 Ark. 461, 470.

[61] Clark *v.* Manuf. Ins. Co., 2 Woodb. & M. 472.

By force of the term "renew," the company, as well as the property to be insured and the terms of the policy, were sufficiently designated and agreed upon. Abel

9. Ordinary Course of Proof; Prima Facie Case.

In ordinary cases plaintiff makes out a *prima facie* case by proving the policy, the renewal receipts, if any relied on, the loss, the giving proof of loss as required by the policy, and, if on property not valued, the value of the property destroyed.[62]

10. Warranties.

Even when warranties are proved or admitted, plaintiff is not bound to prove their truth, unless it is put in issue.[63] In that case the burden of proof is on him to show performance of the warranty,[64] whether material or immaterial;[65]

v. Phœnix Ins. Co., 47 N. Y. App. Div. 81, 62 N. Y. Supp. 218.

[62] Geib *v.* International Ins. Co., 1 Dill. C. Ct. 443; Mut. Benefit Life Ins. Co. *v.* Robertson, 59 Ill. 123, s. c., 14 Am. Rep. 8. See New Eng. Fire, &c. Ins. Co. *v.* Wetmore, 32 Ill. 221.

And where the application is an essential part of the contract, it must be introduced in evidence with the policy. Rogers *v.* Cedar Rapids Ins. Co., 72 Iowa, 448, 34 N. W. Rep. 202.

[63] Boos *v.* World Mut. Fire Ins., 6 Supm. Ct. (T. & C.) 364; Jones *v.* Brooklyn Life Ins. Co., 61 N. Y. 79.

"In the absence of any express declaration on the subject, whether a particular representation or promise in a policy of insurance amounts to a warranty depends, it may be said, upon its materiality, as determined by the court in which the question is litigated." Germier *v.* Springfield Fire Ins. & Marine Co., 33 So. Rep. 361, 109 La. 341.

[64] McLoon *v.* Commercial Mut. Ins. Co., 100 Mass. 472, s. c., 1 Am. Rep. 129, May on Ins. 192, §183.

[65] Id., § 184; Ripley *v.* Ætna Ins. Co., 30 N. Y. 136, 160, rev'g 29 Barb. 552; Jeffries *v.* Life Insurance Co., 22 Wall. 47. Compare Mut. Life Ins. Co. *v.* Snyder, 4 Cent. L. J. 106.

Many states, including New York, Ohio, Missouri, Kentucky and Tennessee have passed statutes declaring that statements by the insured, in the absence of fraud, shall not work a forfeiture unless they relate to matters material to the risk. Kenton Ins. Co. *v.* Wigginton, 89 Ky. 330, 12 S. W. Rep. 668, 7 L. R. A. 81; Keller *v.* Home Life Ins. Co., 198 Mo. 440, 95 S. W. Rep. 903 and statutes of various states. The question of materiality thus becomes one of fact for the jury. Keller *v.* Home Life Ins. Co., above. A stipulation in the policy that all statements are material does not make them so if they are not. Fidelity Mutual L. Assoc. *v.*

past or promissory;[66] or acted on by the insurers or not;[67] and even though this require plaintiff to prove a negative.[68]

But plaintiff has not the burden of proving the truth of representations as distinguished from warranties.[69] Evidence that the insurer's agent had notice that the fact was not according to the condition is not alone competent.[70]

Miller, 92 Fed. Rep. 63, 34 C. C. A. 211. Even independently of statute, the courts, in interpreting warranties, lean most favorably toward the insured, always with a view to avoiding a forfeiture, if possible. Thus where the language and circumstances warrant it, statements will be construed as representations rather than warranties, King Brick Mfg. Co. *v.* Phœnix Ins. Co., 164 Mass. 291, 41 N. E. Rep. 277. Likewise statements of opinion or belief, though in form warranties, will not be construed as such. Henn *v.* Met. Life Ins. Co., 67 N. J. L. 310, 51 Atl. Rep. 689. And answers to questions regarding the existence of latent diseases, though expressly made warranties have been construed as opinions. Knights of Pythias *v.* Rosenfeld, 92 Tenn. 508, 22 S. W. Rep. 204. A statement of present use is not a warranty of continuance. Smith *v.* Mechanics' Fire Ins. Co., 32 N. Y. 399. Nor can a breach of warranty be predicated upon an incomplete answer or an unanswered question. Phœnix Mut. Life Ins. Co. *v.* Raddin, 120 U. S. 183, 7 S. Ct. 500, 30 L. ed. 644.

A few courts have sought to distinguish promissory warranties from those which are affirmative, by holding that a *substantial* compliance with such warranties is sufficient. Ætna Ins. Co. *v.* Johnson, 127 Ga. 491, 56 S. E. Rep. 643, 9 L. R. A. N. S. 667, 9 Ann. Cas. 461; Germania Ins. Co. *v.* Rudwig, 80 Ky. 223, 234; Scottish Union, etc., Ins. Co. *v.* Moore, 36 Tex. Civ. App. 312, 81 S. W. Rep. 573.

[66] Wilson *v.* Hampden Fire Ins. Co., 4 R. I. 159, 172; Ripley *v.* Ætna Ins. Co. (above).

[67] Brennan *v.* Security Life Ins. Co., 4 Daly, 296.

[68] McLoon *v.* Commercial Mut. Ins. Co. (above). *Contra*, Piedmont Life Ins. Co. *v.* Ewing, 92 U. S. (2 Otto) 378.

[69] A statement in the application, designated therein as a warranty, must be construed as a representation, where the application is not made a part of the policy. Lebanon Mutual Ins. Co. *v.* Losch, 109 Pa. St. 100.

[70] Dewees *v.* Manhattan Ins. Co., 6 Vroom (N. J.), 366.

Where the agent of the insurance company knew at the time of writing the policy that the premises were unoccupied and would remain so, his knowledge is imputable to the company, and the latter will be held to have waived a provision in the policy that the same should be void if the premises were

A literal and strict compliance with an express warranty must be proved; it is not sufficient to show something tantamount to a performance, unless it be a waiver or dispensation of performance;[71] which must be pleaded as such, and not as a compliance.[72] But indirect evidence is competent from which to infer strict performance. In proportion as the warranty is general or in the nature of a legal conclusion, general evidence is sufficient until some doubt is raised.[73] Evidence of usage,[74] or a prior oral agreement,[75] is not competent to show that what is not strictly a compliance was so regarded.

11. General Rule as to Oral Evidence to Vary Policy.

The general principles[76] that words must have the sense in which the parties understood them; and, that to understand them as the parties understood them, the nature of the contract, the objects to be attained, and all the circum-

unoccupied. De Soto *v.* American Guaranty Fund Mut. Fire Ins. Co., 74 S. W. Rep. 1, 102 Mo. App. 1.

Doubtless this is the sound general principle, but see Benton *v.* Farmers' Mut. F. Insurance Co., 102 Mich. 281, 60 N. W. Rep. 691, 26 L. R. A. 237.

[71] Natl. Life Ins. Co. *v.* Minch, 53 N. Y. 144, rev'g 6 Lans. 100.

Answers to ambiguous questions are regarded as representations and not as warranties. Thus it has been held that a negative answer to the question: "Is there any fact relating to your physical condition, personal or family history, or habits, which has not been stated in the answers to the foregoing questions, and with which the company ought to be made acquainted," is nothing more than an expression of opinion and a mere representation, and the company cannot on the ground that the insured failed to disclose that he had previously attempted suicide, predicate a breach of warranty from his answer to the above question. Louis *v.* Connecticut Mutual Life Ins. Co., 58 N. Y. App. Div. 137, 68 N. Y. Supp. 683.

[72] Rosc. N. P. 409.

[73] Pacific Ins. Co. *v.* Catlett, 4 Wend. 75, affi'g 1 Id. 561; Rosc. N. P. 410, 414.

[74] Ripley *v.* Ætna Ins. Co. (above). Compare Crocker *v.* People, &c. Ins. Co., 8 Cush. 79. As to limits of this principle, chapter XVI, paragraph 9, and chapter XIX, paragraph 16, of this vol.

[75] Hovey *v.* American Mutual Ins. Co., 2 Duer, 554.

[76] Discussed in chapter XVI, paragraph 8 of this vol.

stances must be considered, are freely applied to these contracts.[77] The intention is to be ascertained, except in cases of latent ambiguity, by a development of the circumstances under which the instrument was made. Mere declarations are not admissible for the purpose, but the state of the party's knowledge of facts is competent. Thus, notice to the insurers that a change had been made in the use of the property, is competent to explain the intention of an ambiguous policy in respect to rates of hazard. Such evidence is to be received as will place us, as nearly as may be, in the position of the author of the instrument, and enable us to consider the facts surrounding him, with his knowledge or ignorance, and his belief as to the facts.[78]

[77] Reed *v.* Ins. Co., 95 U. S. (5 Otto) 31. Compare Van Schoick *v.* Niagara Fire Ins. Co., 68 N. Y. 434, 438, and cases cited; Insurance Co. *v.* Wright, 1 Wall. 454 (an extreme case in excluding oral evidence); and Insurance Co. *v.* Wilkinson, 13 Wall. 222. Parol evidence that enlargement of building insured was contemplated at the time the insurance was effected is inadmissible to vary the terms of the written contract of insurance relative to the enlargement of insured buildings. Frost's Detroit Lumber Works *v.* Millers' &c. Mut. Ins. Co., 37 Minn. 300, 5 Am. St. Rep. 846, 34 N. W. Rep. 35. One who accepts a policy of insurance issued to him upon the life of another will not be permitted to allege and prove a state of facts dehors the writing to control its legal effect. Burton *v.* Connecticut Mut. Life Ins. Co., 119 Ind. 207, 12 Am. St. Rep. 405, 21 N. E. Rep. 746. For the purpose of upholding a contract of insurance, its provisions will be construed strictly against the underwriter (McMaster *v.* Ins. Co. of North America, 55 N. Y. 222, affi'g 64 Barb. 536; compare Rann *v.* Home Ins. Co., 59 N. Y. 387), and liberally in favor of the insured (Rolker *v.* Great Western Ins. Co., 4 Abb. Ct. App. Dec. 76, rev'g 8 Bosw. 222; and see Reed *v.* Ins. Co., 95 U. S. [5 Otto], 23, 30).

Evidence of the meaning of the words "lying at anchor," as a technical phrase, was properly excluded on the ground that those words as used in the policy plainly bore no other than their ordinary meaning. Reid *v.* Lancaster Fire Ins. Co., 90 N. Y. 382.

[78] Reynolds *v.* Commerce Fire Ins. Co., 47 N. Y. 597.

Parol evidence is admissible to explain the intent with which delivery of the policy was made. Waters *v.* Security Life, etc., Co., 144 N. C. 663, 57 S. E. Rep. 437, 13 L. R. A. N. S. 805.

Ambiguity may arise either from inconsistent provisions or from equivocal terms; and an equivocal term exists alike when a word has, in ordinary use, two or more meanings, or applications, or when it may have been used technically in a sense different from its ordinary meaning or application. Extrinsic evidence is competent to show the existence of the technical meaning in a trade or business involved in the transaction, and thus, at once, to manifest and to cure the ambiguity.[79] An ambiguity, whether apparent in the ordinary meaning of the language, or introduced by extrinsic evidence either of a technical use of language, or of the existence of several objects corresponding to the designation, may be explained by oral evidence identifying the thing referred to.[80] Where, by reason of omission or ambiguity,

[79] This is the sound general principle, though some cases ignore it; see, for instance, Ins. Co. *v.* Wright, 1 Wall. 456.

Doubtful language will ordinarily be construed in favor of the insured. Jones *v.* Pennsylvania Casualty Co., 140 N. C. 262, 52 S. E. Rep. 578, 111 Am. St. Rep. 843, 5 L. R. A. N. S. 932; Rayburn *v.* Pennsylvania Casualty Co., 138 N. C. 379, 50 S. E. Ry. 762, 107 Am. St. Rep. 548.

[80] For instance, to show what building was meant by the words, "known as D. & Co.'s car factory" (Blake *v.* Ins. Co., 12 Gray, 265, 270); or by a statement that the things insured were in plaintiff's "barn or barns" (Bowman *v.* Agricultural Ins. Co., 59 N. Y. 521, affi'g 2 Supm. Ct. [T. & C.] 261). But where the building is defined, the fact that the insurer indorsed on the policy a simple consent that a communication opened into an adjoining building should not prejudice the insurance does not let in parol evidence to show that the parties intended thereby to extend the insurance over such building. Liddle *v.* Market F. Ins. Co., 4 Bosw. 179, affi'd in 29 N. Y. 184. So, again, under a policy on timber in a specified building, parol evidence is not admissible to show intent to include such timber piled in the adjoining yard (North American Fire Ins. Co. *v.* Throop, 22 Mich. 146, s. c., 7 Am. Rep. 638), for here is no ambiguity; but under a policy on a stock of "ship-timber in a shipyard," bounded by streets, &c., evidence of usage of language is competent to show that "shipyard," as used by the parties, means the yard, as in fact used, thus embracing timber on the sidewalks (Webb *v.* National Fire Ins. Co., 2 Sandf. 497). So if there are two buildings, each nearly but neither precisely answering the designation, parol evidence to identify

in the written policy the time when such instrument becomes operative is left in doubt, parol evidence is admissible for the purpose of supplying such omission.[81]

But the rule that parol testimony may not be given to contradict a written contract is applied only in suits between the parties or their privies. It does not apply to prevent a party from proving the truth contrary to the instrument, in a contention with a stranger to it.[82]

the intent of the parties is admissible. Burr *v.* Broadway Ins. Co., 16 N. Y. 267. Where the language of a policy, descriptive of the property insured is ambiguous, parol evidence is admissible in order to enable the court or jury to determine, as a question of fact, the intent and meaning of the parties in the use of such language. Rickerson *v.* German-American Ins. Co., 6 N. Y. App. Div. 550. It is not necessary, in order to justify the admission of such evidence, that the action be one in equity for the reformation of the contract, but such evidence may be received upon the trial of an action at law to recover the amount of a loss under such policy. (Id.) Where the identity of the building insured is disputed, and the policy accurately describes one building, extrinsic evidence tending to show that a building other and different from that described was intended is inadmissible. Sanders *v.* Cooper, 115 N. Y. 279, 22 N. E. Rep. 212. Where it appears by extrinsic evidence that the words used in the policy to designate the beneficiary fail to correctly describe any person related to or known by the insured, further extrinsic evidence may be received to aid in determining who is the intended beneficiary. Hogan *v.* Wallace, 166 Ill. 328, 46 N. E. Rep. 1136. In an action upon a fire insurance policy, a representative of the insurer cannot testify against the objection of the insured what he meant or intended by ambiguous words describing the insured premises, inserted by him in the policy. Rickerson *v.* Hartford Fire Ins. Co., 149 N. Y. 307, 43 N. E. Rep. 856.

So it has been held that evidence, tending to show that the words "rags" and "old metals" have, through a usage of the trade, acquired a broader significance than is commonly accorded to them, is admissible. Mooney *v.* Howard Ins. Co., 138 Mass. 375, 52 Am. Rep. 277.

[81] Modern Woodmen Acc. Assoc. *v.* Kline, 50 Neb. 345, 69 N. W. Rep. 943.

But where there is no such omission or ambiguity and the policy bears the date, evidence is inadmissible to show that a different date should have been written. Pierce *v.* Charter Oak L. Ins. Co., 138 Mass. 151.

[82] McMaster *v.* Ins. Co. of North America, 55 N. Y. 222, affi'g

An insurance policy, like any other written contract, may be impeached by either party thereto for fraud or mistake, and parol testimony is competent to reform the policy so as to make it recite the actual agreement between the parties.[83]

12. Circular or Prospectus.

To render a circular or prospectus issued by the company, competent against them as qualifying the contract, it is not enough to show that it was publicly circulated before the policy issued.[84] There should be evidence tending to show that the insured or the plaintiff had knowledge of the statement and acted on it.[85]

64 Barb. 536; Condit *v.* Cowdrey, 123 N. Y. 469.

[83] Slobodisky *v.* Phenix Ins. Co., 52 Neb. 395, 72 N. W. Rep. 483. "A subsequent clause irreconcilable with a former clause and repugnant to the general purpose and intent of the contract, will be set aside." Jones *v.* Pennsylvania Casualty Co., 140 N. C. 262, 52 S. E. Rep. 578, 5 L. R. A. N. S. 932, 111 Am. St. Rep. 843.

[84] Rosc. N. P. 436.

[85] Whether this is enough is disputed. Steel *v.* St. Louis Life Ins. Co., 5 Cent. L. J. 158; Ruse *v.* Mut. Benefit Life Ins. Co., 23 N. Y. 518, 24 Id. 653; and see 16 Alb. L. J. 175, and cases cited. According to settled general principles, it should be enough, if subsequent to the policy, thus bringing the case within the rules as to waiver and estoppel. See paragraph 22.

Thus where a pamphlet, given by the company to the insured prior to the execution of the contract, stating, among other things, that "Thirty days grace will be allowed on all payments after the first" and—"During these thirty days the policy is held good and valid," was set up by plaintiff as an excuse for non-compliance with a warranty in the policy providing for payments of interest on a certain day, there being no evidence that the insured had been misled or misinformed, the court (reversing 41 Hun, 357) held, that the statements in the pamphlet did not modify the strict terms of the policy and applied the rule that "a written contract merges all prior and contemporaneous negotiations in reference to the same subject, and that the whole engagement of the parties and the extent and manner of their undertaking is embraced in the writing." Fowler *v.* Metropolitan Life Ins. Co., 116 N. Y. 389, 22 N. E. Rep. 576, 5 L. R. A. 805, apparently *contra* Southern Mutual Life Ins. Co. *v.* Montague, 84 Ky. 653, 2 S. W. Rep. 443, 4 Am. St. Rep. 218.

13. Mistake.

Under the new procedure, if the complaint alleges facts constituting a mistake, though without the formal allegation of mistake, and demands a reformation of the policy, parol evidence is competent to show that both the insurer and the insured meant to insure the thing lost, and meant to put into the policy no expression as to its character or situation different from the facts, but, by misconception as to language, they used terms expressing that which they did not, and failing to express that which they did intend.[86] Under allegations permitting him to prove mistake, plaintiff may show that he was thrown off his guard and dissuaded from a correction of the language of the policy by the acts or declarations of the agent of the insurer.[87]

14. Usage.

Ambiguous words in a policy may be construed by extrinsic evidence of accompanying circumstances and the usage of the business in which the property insured was employed; [88] but evidence of usage is not competent to vary

[86] Maher *v.* Hibernia Ins. Co., 67 N. Y. 283, affi'g 6 Hun, 353.

But the evidence, to make out a case of mutual mistake, must be "clear, unequivocal and convincing." United States *v.* Budd, 144 U. S. 154.

A mere preponderance of evidence is not sufficient. St. Clara Female Academy *v.* Delaware Ins. Co., 93 Wis. 57, 66 N. W. Rep. 1140.

But as to whether the case must be established "beyond a reasonable doubt, see Wall *v.* Meilke, 89 Minn. 232, 94 N. W. Rep. 688; Southard *v.* Curley, 134 N. Y. 148, 31 N. E. Rep. 330, 30 Am. St. Rep. 642, 16 L. R. A. 561.

[87] Id. As to ignorance of fine print clause, see Ervin *v.* N. Y. Central Ins. Co., 3 Supm. Ct. (T. & C.) 213.

Where the agent is apprised of a mistake or error in the policy and promises to rectify it but fails to do so until after the loss has occurred, the insured may maintain an action for the reformation of the policy and to recover the amount of the loss. McCoubray *v.* St. Paul F. & M. Ins. Co., 50 N. Y. App. Div. 416, 64 N. Y. Supp. 112.

[88] N. Y. Belting Co. *v.* Washington Fire Ins. Co., 10 Bosw. 428; Cogswell *v.* Chubb, 1 N. Y. App. Div. 93, 95. Thus, it has been held competent to receive evidence as to the meaning, in the business of insurance, of the term "harbor

or contradict what is expressed, nor even what is necessarily implied,[89] in unambiguous language. Yet it is competent, to show the course of trade and business to which the parties refer; and when that is ascertained, the court must apply the language of the policy. To justify departure from the ordinary meaning of its language, a usage of language must be shown, from which the court may see that the phraseology used had, in the intent of the parties adopting it, a special or technical meaning. When this is shown, the court will apply the language of the policy, but apply it as thus understood.[90] When, however, the language, properly interpreted,

of New York." Petrie *v.* Phenix Ins. Co., 132 N. Y. 137, 144, 30 N. E. Rep. 380. Or the meaning of the words "under policy No. 7522" contained in a "rider" attached to a memorandum. St. Paul Fire & Marine Ins. Co. *v.* Balfour, 168 Fed. Rep. 212, 93 C. C. A. 498. A custom or usage is a matter of fact, not of opinion, and must be shown by those who have observed the method of transacting the particular kind of business as conducted by themselves and others; questions calling for what a witness would do, and not for what he had done or seen done, are not competent to establish a custom. Rickerson *v.* Hartford Fire Ins. Co., 149 N. Y. 307, 43 N. E. Rep. 856.

[89] Hearne *v.* Marine Ins. Co., 20 Wall. 488; Van Tassel *v.* Greenwich Ins. Co., 28 N. Y. App. Div. 163, 51 N. Y. Supp. 79; Reid *v.* Lancaster Fire Ins. Co., 90 N. Y. 382. Such evidence will not be admitted to establish a custom, tending to defeat the express and unequivocal terms of a valid binding slip. Van Tassel *v.* Greenwich Ins. Co., 28 N. Y. App. Div. 163, 51 N. Y. Supp. 79.

[90] Thus, respecting the phrase "glassware in casks," usage of trade-language may be proved to show that it means open casks (Bend *v.* Georgia Ins. Co., 1 N. Y. Leg. Obs. 12; 1 Greenl. Ev. 13th ed. 344); "bundles of rods" may be shown to include, in trade usage, bar iron (Evans *v.* Commercial, &c. Ins. Co., 6 R. I. 47, 53); "cargo" to include live stock (Allegre's Admr. *v.* Maryland Ins. Co., 2 Gill & J. 136); "roots" not to include perishable roots such as sarsaparilla (Colt *v.* Com. Ins. Co., 7 Johns. 385); "skins" not to include furs (Astor *v.* Union Ins. Co., 7 Cow. 202); and that in a policy upon goods out, and upon their "proceeds" includes the same goods on the return voyage (Dow *v.* Whetten, 8 Wend. 160); and "brick buildings" may be shown to include buildings, the partitions separating which were of wood, filled in with brick (Mead *v.* Northwestern Ins. Co., 7 N. Y. 530). But, on the other hand, under a policy on tackle, apparel, "boats,"

calls for a certain thing, evidence of usage of trade to suffer or be satisfied with something else, under that language, is not competent.[91] In no case is usage competent to vary the settled rules of commercial law,[92] nor the meaning of words which have received a settled judicial interpretation.[93] Where the law is unsettled, the construction may be determined by the usage, but not by the opinion of witnesses.[94]

A general usage of trade may be judicially noticed.[95] Other usages must be proved; and it is better to be prepared with some evidence even of a general usage.[96] If the usage is that

etc., it is not admissible to show that boats slung outside the ship's quarter are not deemed to be included. Blackett *v.* Royal Exch. Assurance Co., 2 Cr. & J. 244.

Evidence of a usage respecting the meaning of the word "explosion" may be given. Hartford Steam Boiler Inspection, etc., Co., *v.* Pabst Brewing Co., 201 Fed. Rep. 617, 120 C. C. A. 45.

[91] Upon this distinction, nearly all the well-considered cases, however much apparent conflict they involve, arrange themselves in harmony.

Where the term of re-insuance was definitely fixed a custom to insure for the same term as the direct insurance cannot be shown. Milwaukee Mechanics Ins. Co. *v.* Palatine Ins. Co., 128 Cal. 71, 60 Pac. Rep. 518.

[92] Randall *v.* Smith, 63 Me. 105, s. c., 18 Am. Rep. 200, and cases cited. *Contra*, Fulton Ins. Co. *v.* Milner, 23 Ala. 423, 427.

[93] Bargett *v.* Orient Mutual Ins. Co., 3 Bosw. 385; Home Ins. Co. *v.* Continental Ins. Co., 89 N. Y. App. Div. 1, 85 N. Y. Supp. 262.

[94] Winthrop *v.* Union Ins. Co., 2 Wash. C. Ct. 7.

Opinion evidence is generally inadmissible as proof of usage. Greenwich Ins. Co. *v.* Waterman, 54 Fed. Rep. 839, 4 C. C. A. 600.

[95] Sleght *v.* Hartshorne, 2 Johns. 531.

Judicial notice, for instance, is taken of the custom to require a formal application and a medical examination of the applicant. Taylor *v.* Grand Lodge A. O. U. W., 101 Minn. 72, 111 N. W. Rep. 919, 118 Am. St. Rep. 606, 11 L. R. A. N. S. 92, 11 Ann. Cas. 260, and of the manner in which policies are prepared. Waters *v.* Security Life, etc., Co., 144 N. C. 663, 57 S. E. Rep. 437, 13 L. R. A. N. S. 805. Likewise of custom of insurers to forward policies to local agents for delivery. Francis *v.* Mut. L. Ins. Co., 55 Ore. 280, 106 Pac. Rep. 323.

[96] See chapter XVI, paragraph 9, of this vol.

If a local custom or usage is relied upon as forming part of a contract, it must be pleaded; but if the local custom is merely incidental to an implied contract and is

of the trade of the insured, the insurers are presumed to have known it.[97] If it is that of insurers, knowledge of it must be brought home to the insured.[98] Evidence of a known usage of trade is not objectionable merely because it shows only a usage in the particular trade in question.[99] The local usage of the insurers only, which does not prevail where the policy was executed, nor where the insured resided is not admissible, to countervail the local usage of the place where the policy was made.[1] A general usage of trade may be shown, although it is founded on the laws or edicts of the government of the place. The usage may be proved by parol, and its effects are the same, whether it originated in an edict or in instructions given by a government to its officers.[2] Usage is to be proved, as a fact, by evidence of usage, not by the opinion of the witness as to the effect or meaning of the contract.[3] The witness must be conversant with the

relied upon only as evidence of some fact in issue, it need not be pleaded. General customs need not be pleaded. Harrison *v.* Birrell, 58 Or. 410, 115 Pac. Rep. 141.

[97] Noble *v.* Kennoway, 2 Dougl. 513, see also 1 Abb. N. C. 470, note. Compare Ripley *v.* Ætna Ins. Co., 30 N. Y. 136.

The company cannot rebut this presumption by showing that its home office was not in the vicinity of the insured property. Barker *v.* Citizens' Mut. Fire-Ins. Co., 136 Mich. 626, 99 N. W. Rep. 866.

The insurer was presumed to have had knowledge of a usage whereby the words "rags" and "old metals" were accorded a broader significance than is commonly accorded to them. Mooney *v.* Howard Ins. Co., 138 Mass. 375, 52 Am. Rep. 277.

[98] Hill *v.* Hibernia Ins. Co., 10 Hun, 26.

"Or be so universal and established as to be presumed to be within his knowledge." International Salt Co. *v.* Tennant, 144 Ill. App. 30.

[99] Astor *v.* Union Ins. Co., 7 Cow. 202; Thompson *v.* Sloan, 23 Wend. 70. COWEN, J.

[1] Child *v.* Sun Mutual Ins. Co., 3 Sandf. 26.

[2] Livingston *v.* Maryland Ins. Co., 7 Cranch, 506, 539, 547.

[3] Steinbach *v.* La Fayette Fire Ins. Co., 54 N. Y. 90; and see Steinbach *v.* Ins. Co., 13 Wall. 183.

"It has sometimes been said that a witness to trade usage may state only specific instances, or must at least mention one or more in support of his statement of the general practice. This notion is traceable to some remarks of Lord

particular business, whether that of insurance or of another trade, the usage of which is sought to be proved as controlling.[4]

15. Ownership or Insurable Interest.

Interest need not be proved, unless put in issue.[5] It cannot be proved by the policy alone;[6] but plaintiff cannot

Mansfield and later judges, which do not justify it. There have indeed been judges who have refused, on all the facts of a case, to credit testimony to usage, which could not adduce instances in verification. But there is no rule of exclusion. The usage is itself a fact, and the opinion rule does not treat such testimony as an inference from data which can be adequately stated without the inference." 3 Wig. Ev., § 1954.

But in a recent case between master and servant, it was held that the plaintiff had the right to call for a conclusion on this point of custom, if material to the issue. Browning *v.* Aurora, 190 Mo. App. 477, 177 S. W. Rep. 685.

Whether a given state of facts establishes a usage is a question for the court. Chicago Pkg., etc., o. *v.* Tilton, 87 Ill. 547.

But whether or not such a state of facts has been proved, is a question for the jury. Dickinson *v.* Poughkeepsie, 75 N. Y. 65.

[4] Evans *v.* Commercial, &c. Ins. Co., 6 R. I. 47, 53.

[5] Rosc. N. P. 404.

Where a life insurance policy is made payable to the insured's wife her interest therein cannot be terminated except upon the terms stated in the policy, and an agreement between the husband and the company to terminate the policy does not destroy her interest therein. Washington Life Ins. Co. *v.* Berwald, 76 S. W. Rep. 442, 97 Texas, 111, 1 Ann. Cas. 682.

A clause making the loss under the policy payable to a person therein named gives such person an interest in the policy of which he cannot be deprived without his consent. German F. Ins. Co. *v.* Gibbs, 42 Tex. Civ. App. 407, 92 S. W. Rep. 1068, 98 S. W. Rep. 760.

It has been held that an affectionate relationship between insured and assignee may be the basis of an insurable interest and evidence is admissible to show the parental regard which the insured entertained for the beneficiary. In fact, a policy which is valid in its inception, may be assigned to a person not having an insurable interest, provided the assignment is made in good faith and is not a means of accomplishing a wagering transaction. Hardy *v.* Ætna L. Insurance Co., 154 N. C. 430, 70 S. E. Rep. 828.

[6] See Clendening *v.* Church, 3 Cai. 141, Rosc. N. P. 404. Compare Huth *v.* N. Y. Mut. Ins. Co., 8 Bosw. 538.

But the issurance of a policy of fire insurance has been deemed

contradict the language of the policy [7] or of his application [8] by proving a different interest from that stated.

Where it appears upon the face of the policy, by a fair interpretation, that there was an intention to insure the owner or owners, then extrinsic evidence may be given to show who such owner is, and the nature and extent of the interest covered.[8a] If the name of the one for whose benefit the insurance is made does not appear upon the face of the policy, or if the designation used is applicable to several persons, or so imperfect that it cannot be understood alone, extrinsic evidence may be resorted to, to ascertain the meaning of the contract.[9] The rules allowing oral proof to show the real party in interest [10] are now freely administered, so far as explaining the instrument is concerned; [11] but are subject to important qualification, resulting from the pe-

prima facie evidence of the plaintiff's insurable interest. American Fire Ins. Co. *v.* Landfare, 56 Nebr. 482, 76 N. W. Rep. 1068; Cash *v.* Concordia F. Ins. Co., 111 Minn. 162, 126 N. W. Rep. 524.

[7] Jennings *v.* Chenango Mut. Ins. Co., 2 Den. 72, 79.

Thus a beneficiary, who has assigned the policy for value, is estopped to show that the policy is void because he (the beneficiary) had no insurable interest. Farmers' etc., Bank *v.* Johnson, 118 Iowa, 282, 91 N. W. Rep. 1074. See also Lewis *v.* Phœnix Mutual Life Ins. Co., 39 Conn. 100.

[8] Birmingham *v.* Empire Ins. Co., 42 Barb. 457.

[8a] Mead *v.* Mercantile Mut. Ins. Co., 67 Barb. 519; Catlett *v.* Pacific Ins. Co., 1 Wend. 561; Foster *v.* United States Ins. Co., 11 Pick. 85; Bidwell *v.* Northwestern Ins. Co., 24 N. Y. 302.

The phrase "as interest may appear" is expressive of doubt and the uncertainty being as to the person who is to have the benefit of the insurance, evidence is admissible to show who such person is. Dakin *v.* Liverpool, etc., Ins. Co., 77 N. Y. 600. See also Graham *v.* Fire Ins. Co., 48 S. C. 195, 26 S. E. 323, 59 Am. St. Rep. 707.

[9] Clinton *v.* Hope Ins. Co., 45 N. Y. 454, affi'g 51 Barb. 647; Turner *v.* Burrows, 8 Wend. 144, affi'g 5 Id. 541; explained by Burrows *v.* Turner, 24 Wend. 276.

For instance, a policy payable to "Estate of O. Richards." Weed *v.* Hamburg-Bremen F. Ins. Co., 133 N. Y. 394, 31 N. E. Rep. 231.

[10] Chapter XVI, paragraph 10, of this vol.

[11] Pitney *v.* Glens Falls Ins. Co., 65 N. Y. 6.

Or to identify and describe the subject matter of the contract. Saunders *v.* Agricultural Ins. Co., 167 N. Y. 261, 60 N. E. Rep. 635.

culiar nature of insurance, and the usual clauses as to ownership requiring that the real interest must not be concealed.[12]

Under a general averment of interest in the entire subject of insurance, plaintiff may prove his particular interest.[13]

The amount and absolute or contingent character of the interest of the insured, or the validity of his title, are not material, except on the question of fraud or of wager policy, or amount of loss.[14]

16. Mode of Proving Ownership.

Evidence of possession and acts of ownership is *prima facie* evidence of title.[15]

Property in a ship may be proved by parol evidence of the possession, unless disproved by the production of the written documents of the ship under the register acts.[16] Property in goods may be shown by evidence that plaintiff bought and paid for them; [17] or by producing a bill of lading, stating the

[12] See, for instance, Solms *v.* Rutger's Fire Ins. Co., 4 Abb. Ct. App. Dec. 279.

[13] Murray *v.* Columbian Ins. Co., 11 Johns. 302.

[14] See May on Ins. 82, § 83, 105, § 109.

[15] Sprigg *v.* American Central Ins. Co., 101 Ky. 185, 40 S. W. Rep. 575, 19 Ky. L. 363; Thomas *v.* Foyle, 5 Esp. 88 (of a ship); Bartol, C. J., Franklin Fire Ins. Co. *v.* Chicago Ice Co., 36 Md. 102, s. c., 11 Am. Rep. 469 (of a building); Rosc. N. P. 405 (of goods).

Mere possession of the policy by the beneficiaries (the plaintiffs) *prima facie* entitles them to recover, although defendant has put plaintiff's interest in issue. The burden of showing absence of such interest rests on the defendant. Hartford Life, etc., Ins. Co. *v.* Wayland et al., 20 S. W. Rep. 199, 14 Ky. L. 243.

[16] And such parol evidence of ownership, arising from possession at a particular period, is not disproved by showing a prior register in the name of another and a subsequent register to the same person. Robertson *v.* French, 4 East, 130, 136. Compare Sharp *v.* United Ins. Co., 14 Johns. 201; Leonard *v.* Huntington, 15 Id. 298.

[17] Sturm *v.* Atlantic Mutual Ins. Co., 38 Supr. Ct. (6 J. & S.) 281. Compare Franklin Fire Ins. Co. *v.* Vaughan, 92 U. S. (2 Otto) 516. Where, to prove property in a cargo by purchase beyond seas, the plaintiff produced a bill of parcels of one G., at Petersburg, with his receipt to it, and proved his hand, Lee, C. J., admitted it as evidence against the insurers.

property to belong to plaintiff,[18] or directing delivery to him,[19] the captain proving that he received the goods under it.[20] And where the goods are made deliverable to the consignor, the bill indorsed by him, either specially or in blank, is evidence of interest in the indorsee or holder; [21] but such evidence is *prima facie* only, and not conclusive.[22] The word "consigned" implies agency, not ownership in the consignees.[23] In marine insurance, a common mode of proof is to call the captain or master, who will prove that he was appointed and employed by the parties in whom the interest is averred; and though it should appear, on cross-examination, that the plaintiff claims under a bill of sale, it is not, on that account, necessary for him to produce the bill or the ship's register, unless such further evidence should be rendered necessary in support of the *prima facie* proof of ownership, in consequence of proof to the contrary.[24] Where interest is in one who was never in possession, it may be proved by showing the ownership of the persons under whom he claims, and the derivative title from them, such as a bill of sale.[25]

The mere fact that a third person was in possession does not render his declarations that he was owner admissible against plaintiff.[26]

17. The Peril.

Insurers are presumed to be acquainted with the customs of the place where they transact their business, as well as with the usages of the trade to which their contract relates; [27]

Russell *v.* Boheme, 2 Str. 1127, Rosc. N. P. 405.

[18] Maryland Ins. Co. *v.* Ruden, 6 Cranch, 338.

[19] Rosc. N. P. 405.

[20] M'Andrew *v.* Bell, 1 Esp. 373.

[21] Lickbarrow *v.* Mason, 2 T. R. 71.

[22] Rosc. N. P. 405; Maryland Ins. Co. *v.* Ruden, 6 Cranch, 338; Blagg *v.* Phœnix Ins. Co., 3 Wash. C. Ct. 5.

[23] Rolker *v.* Great Western Ins. Co., 4 Abb. Ct. App. Dec. 76.

[24] Rosc. N. P. 405, citing Robertson *v.* French, 4 East, 136.

[25] Rosc. N. P. 405.

[26] Eureka Ins. Co. *v.* Robinson, 56 Penn. St. 256, 266.

[27] Hartshorne *v.* Union Mut.

but not necessarily with all the intelligence contained in the papers taken at their office; although the general presumption is, that the agents of a marine office will examine with some care those items of marine intelligence which are expressly designed speedily to diffuse information upon a subject so immediately interesting to them, especially in relation to vessels belonging to their own port.[28] To aid in the construction of the policy, it is competent to show that the defendants had insured the property for several years, and knew the uses to which it was applied, and generally the nature and extent of the risk; [29] but such evidence cannot vary explicit language in the policy.[30]

18. Loss.

The burden of proving a loss from a cause, and to an amount for which the insurers are liable, is upon the insured.[31] The preliminary proofs, being *ex parte*, are not

Ins. Co., 36 N. Y. 172, affi'g 5 Bosw. 538, paragraph 14, above.

Therefore it is no defense for the company that its home office was not in the vicinity of the place where the property insured is located and where the custom prevails. Barker *v.* Citizens' Mut. Fire Ins. Co., 136 Mich. 626, 99 N. W. Rep. 866.

[28] Green *v.* Merchants' Ins. Co., 10 Pick. 406.

The following cases contain references to Lloyd's Lists and treat of the extent to which underwriters are presumed to know their contents. Morrison *v.* Universal Mar. Ins. Co., L. R. 8 Exch. 40, 197; MacKintosh *v.* Marshall, 11 M. & W. 116, 152 Reprint, 739, and see 2 Duer, Mar. Ins. 555.

[29] Mayor, &c. of N. Y. *v.* Exchange Fire Ins. Co., 3 Abb. Ct. App. Dec. 261, affi'g 9 Bosw. 424, and 9 Abb. Pr. 243, note.

[30] Pindar *v.* Resolute Fire Ins. Co., 47 N. Y. 114, but compare 36 N. Y. 648.

[31] Howerton *v.* Iowa State Ins. Co., 105 Mo. App. 575, 80 S. W. Rep. 27; O'Connor *v.* Columbia Insurance Co., 169 Mo. App. 150, 152 S. W. Rep. 396; Cory *v.* Boylston Fire & Marine Ins. Co., 107 Mass. 140, s. c., 9 Am. Rep. 14, and cases cited. And see Ogden *v.* N. Y. Mutual Ins. Co., 4 Bosw. 447, 35 N. Y. 418. What is necessary to prove a total loss of machinery and other cargo, see Ins. Co. *v.* Fogarty, 19 Wall. 640, and cases cited. But where the defendant makes the allegation and tenders the issue that the fire was caused by the insured, it assumes

competent on this question,[32] unless connected with an admission on the part of the insurers.[33] The opinion of a witness to the effect that a loss has occurred of a nature and extent entitling the plaintiff to recover, is not competent;[34]

the burden of maintaining its allegations. Slocovich *v.* Orient Mut. Ins. Co., 108 N. Y. 56, 67, 14 N. E. Rep. 802.

For facts held to constitute a waiver of proof of loss by the insurer, see Condon *v.* Des Moines Mutual Hail Ass'n, 120 Ia. 80, 94 N. W. Rep. 477.

This does not mean, however, that plaintiff must prove how a fire originated. Traders' Ins. Co. *v.* Catlin, 71 Ill. App. 569.

An insurance agent in receiving and transmitting notices from the insured to the company respecting the loss, acts as the agent of the company and if his acts, in so doing, are inconsistent with an intention on the part of the company to insist upon a strict observance of the condition in the policy regarding presenting notice of loss within a given time, the company will be held to have waived such condition. Citizens' Ins. Co. *v.* Stoddard, 197 Ill. 330, 64 N. E. Rep. 355.

"Where the policy calls for appraisement, whereby the loss may be acted upon while yet recent, and the insurer declines to submit thereto, it is hardly in a position to complain of the doubt and uncertainty which subsequently arise and to which it contributed by the refusal of appraisement." Dunn *v.* Springfield Fire & Marine Ins. Co., 109 La. 520, 33 So. Rep. 585.

[32] Citizens' Fire Ins. Security & Loan Co. *v.* Doll, 35 Md. 89, s. c., 6 Am. Rep. 360; Yonkers & N. Y. Fire Ins. Co. *v.* Hoffman Fire Ins. Co., 6 Robt. 316.

"Neither appraisement nor the technically so called 'proof of loss' is of itself competent evidence of the fact or amount of loss except as against a party who has made it his own act by joining in it." Penn Plate Glass Co. *v.* Spring Garden Ins. Co., 189 Pa. St. 255, 42 Atl. Rep. 138, 69 Am. S.t Rep. 810, Harmon *v.* Stuyvesant Ins. Co., 170 Mo. App. 309, 316, 156 S. W. Rep. 87.

Such proofs, however, may be used to refresh the memory of a witness testifying to the cost. Bini *v.* Smith, 36 N. Y. App. Div. 463, 55 N. Y. Supp. 842.

Or to enable the court to determine as a preliminary matter whether there has been a compliance with a condition requiring such proofs to be furnished. Rosenberg *v.* Fireman's Fund Ins. Co., 209 Pa. St. 336, 58 Atl. Rep. 671; Pickett *v.* Metropolitan Life Ins. Co., 20 N. Y. App. Div. 114, 46 N. Y. Supp. 693.

[33] Insurance Co. *v.* Newton, 22 Wall. 32.

[34] Rider *v.* Ocean Ins. Co., 20 Pick. 259, 262.

The converse of this is also true. For instance, the opinion of witnesses tending to show a cause

but to explain obscure causes of injury, evidence of similar injuries to other property similarly situated may be relevant.[35]

19. Value; Damage.

In addition to general rules as to proving value and damage, elsewhere stated, it should be observed that the invoice, or bill of parcels showing the cost, are competent *prima facie* evidence of value; [36] and its correspondence with the books

which will defeat a recovery. Travelers' Ins. Co. *v.* Mitterhouse, 11 Ind. App. 155, 38 N. E. Rep. 1110.

The testimony of expert witnesses, however, is always competent to show the extent or value of the damage. Reed *v.* Washington F. & M. Insurance Co., 138 Mass. 572; Hall *v.* U. S. Fidelity Co., 77 Minn. 24, 79 N. W. Rep. 590, etc.

[35] Bradford *v.* Boylston Fire & Marine Ins. Co., 11 Pick. 162.

[36] Graham *v.* Pennsylvania Ins. Co., 2 Wash. C. Ct. 113. *Contra*, De Groot *v.* Fulton Fire Ins. Co., 4 Robt. 504; Wolf *v.* Nat. Marine and Fire Ins. Co., 20 La. Ann. 583. In an action on an insurance policy, the original cost of the property destroyed, the cost of a like building at the time of the trial and the difference in value between the house burned and a new one by reason of age and use are proper subjects of inquiry in determining the value at the time of the loss. Holter Lumber Co. *v.* Firemen's Fund Ins. Co., 18 Mont. 282, 45 Pac. Rep. 207. Evidence of the cost of a building is not usually evidence of its value at the particular time, but witnesses who are not architects, builders, or contractors, may be allowed to state their opinions as to the worth of a building from a general knowledge of it without being able to estimate the value of any of the materials entering into its construction; such inability affecting the weight, but not the competency, of the evidence. Springfield Fire Ins. Co. *v.* Payne, 57 Kans. 291, 46 Pac. Rep. 315.

The measure of damages in an action on a contract insuring growing crops is the market value of the crops when matured less the expense of fitting them for market from the time of the injury. Barry *v.* Farmers' Mut. Hail Ins. Co., 110 Iowa, 433, 81 N. W. Rep. 690.

The measure of damages where a vessel moored in the harbor has been partially destroyed by fire, is the depreciation in the value of the vessel and not what it would cost to repair it. Detroit *v.* Grummond, 121 Fed. Rep. 963, 58 C. C. A. 301.

"The full amount of the loss is the gross value of the building less the value saved, that value to be estimated on the basis of its

of the party producing it need not be shown.[37] Price or value of similar property is not competent without evidence of identity in quality or value.[38]

In an action against an insurance company for the value of a stock of merchandise destroyed by fire, day-books, ledgers, and other books of account, kept in the usual course of business, showing the amount and value of the goods, are competent evidence, when properly verified or authenticated.[39]

use at the same place and for the same purpose as originally used." Burkett *v.* Georgia Home Ins. Co., 105 Tenn. 548, 58 S. W. Rep. 848.

[37] Graham *v.* Penn. Ins. Co. (above). Compare Insurance Co. *v.* Weide, 9 Wall. 677.

Where the insured proceeds, after a loss by fire, to sell the goods at auction over the protest of the insurer which insists that their value be determined by arbitration as provided in the policy, the price realized on such sale is not binding on the Company as the true market value of the goods. Reading Ins. Co. *v.* Egelhoff, 115 Fed. Rep. 393.

[38] De Groot *v.* Fulton Fire Ins. Co., 4 Robt. 504.

In estimating the damage done to plaintiff's growing crop, the yield of other fields of similar kind and quality in the neighborhood may be considered, as showing what plaintiff's land would have yielded but for the damage. Condon *v.* Des Moines Mut. Hail Assoc, 120 Iowa, 80, 94 N. W. Rep. 477.

[39] Levine *v.* Lancashire Ins. Co., 66 Minn. 138, 68 N. W. Rep. 855. It was held in Insurance Companies *v.* Weides, 14 Wall. 375, 380, that a statement in figures of the value of certain merchandise destroyed by fire, which statement professed to be a copy of another statment contained in a book, itself destroyed in the fire, accompanied by proof that on a certain day the witness took a correct inventory of the merchandise, and that it was correctly reduced to writing by one of them and entered in the volume burnt, and that what was offered was a correct copy, was admissible in evidence in a suit against the insurance company to fix the value of the merchandise burnt, though there was no independent recollection by the witness of the value stated. See also Bates *v.* Preble, 151 U. S. 149, 155.

Where the policy of insurance on a stock of goods provided that the insurer's liability should in no case exceed what it would then cost the insured to replace the goods with like kind and quality, the insured cannot claim what he could have realized by selling the goods in the usual course of business. Texas Moline Plow Co. *v.* Niagara Fire Ins. Co., 39 Tex.

The valuation in a valued marine policy is conclusive[40] on the insurers, if there was a total loss, and no fraud, imposition,[41] or accidental overrating.[42] Hence plaintiff need not prove value.[43] On a partial loss, or on an open policy, he must.[44] A provisional valuation in a preliminary agreement is not conclusive.[45]

20. Preliminary Proofs.

If preliminary proofs of loss are required by the contract, plaintiff must prove substantial and timely compliance,[46]

Civ. App. 168, 87 S. W. Rep. 192.

[40] Marine Ins. Co. *v.* Hodgson, 6 Cranch, 206, 220.

It is otherwise in the case of a fire insurance policy. Howerton *v.* Iowa State Ins. Co., 105 Mo. App. 575, 80 S. W. Rep. 27.

[41] Kane *v.* Commercial Ins. Co., 8 Johns. 229; Whitney *v.* American Ins. Co., 3 Cow. 210.

[42] Watson *v.* Ins. Co., of North America, 3 Wash. C. Ct. 1. If the valuation is by weight, etc., the standard of the place where the insurance was effected will be presumed intended. Gracie *v.* Bowne, 2 Cai. 30.

[43] Lang *v.* Eagle Fire Co., 12 N. Y. App. Div. 39, 42 N. Y. Supp. 539; Minneapolis Fire & Marine Mut. Ins. Co. *v.* Fultz, 72 Ark. 365, 80 S. W. Rep. 576; Sturm *v.* Atlantic Mutual Ins. Co., 38 Super. Ct. (6 J. & S.) 281, 303, affi'd 63 N. Y. 77; Delano *v.* Am. Ins. Co., 42 Barb. 142.

Under statutes in some states, the value fixed in the policy conclusively controls. Bode *v.* Firemen's Ins. Co., 103 Mo. App. 289, 77 S. W. Rep. 116.

[44] Rosc. N. P. 426.

[45] Fabbri *v.* Merchants' Mut. Ins. Co., 6 Lans. 446.

[46] Bliss on Life Ins. 435, § 257, &c.; May on Ins. 564, § 460, &c. The burden of proving compliance with the necessary requirements of an insurance policy as to proofs of loss, or the waiver of such compliance on the part of the company, is on the insured; and, if he fails to establish the same by a preponderance of evidence, his case must fail. Flanaghan *v.* Phenix Ins. Co., 42 W. Va. 426, 26 S. E. Rep. 513.

"'If no forfeiture is provided for in case of failure to furnish the proofs, forfeitures being stipulated in case of breach of other requirements, or furnishing the proofs in the specified time is not made a condition precedent to recovery, the great majority of recent decisions hold the effect of failure to furnish them is merely a postponement of the time of payment to the specified time after they are furnished.'" Munson *v.* German-American Fire Ins. Co., 47 S. E. Rep. 160, quoting 13 Am. & Eng. Ency. L. (2d Ed.) 329;

or waiver by the insurers. Statements or acts by the insurers justly leading the insured to rest on his proofs as a compliance with the condition, or even silence when they are delivered, coupled with plain assertion of a distinct objection, or a mere general denial of liability, are evidence of waiver of other objections which might have been remedied. Where the preliminary proofs are in defendant's possession, and not produced by them, evidence that they were made in presence of defendant's agent, by filling a blank furnished by them, and were received without objection, is enough to go to the jury, without proof of contents.[47] Evidence of due mailing of notice and proof of loss properly addressed to the insurer raises a presumption that they were duly received by him, but such presumption may be overcome by evidence.[48] It

Rheims *v.* Standard Fire Ins. Co., 39 W. Va. 672, 20 S. E. Rep. 670.

"Unless waived, the furnishing of proofs of loss as stipulated by the policy is a condition precedent to the maintenance of an action." Perry *v.* Caledonian Ins. Co., 103 N. Y. App. Div. 113, 93 N. Y. Supp. 50.

If the policy expressly specifies a number of days within which proof of loss must be made, failure to make such proof within the time specified bars a blaim on the policy, there being no waiver by the company pleaded or proved. White *v.* Home Mut. Ins. Co., 128 Cal. 131, 60 Pac. Rep. 666.

Waiver of performance should be pleaded. Hanover Fire Ins. Co. *v.* Johnson, 26 Ind. App. 122, 57 N. E. Rep. 277.

Where, however, the company has rejected the contract and disclaimed liability thereunder, it is deemed to have waived the condition in the policy requiring that proofs of loss be furnished within a given time. Lang *v.* Eagle Fire Co., 12 N. Y. App. Div. 39, 42 N. Y. Supp. 539.

[47] Life Insurance Co. *v.* Francisco, 17 Wall. 672; Hincken *v.* Mut. Benefit Life Ins. Co., 50 N. Y. 657, affi'g 6 Lans. 21

[48] Pennypacker *v.* Capital Ins. Co., 80 Iowa, 56, 20 Am. St. Rep. 395, 45 N. W. Rep. 408. Where all that the policy or the statutes require is that assured shall render the company proofs of loss, no proof of service is required where, upon notice to produce, counsel for the company hands them to plaintiff's attorney, during the trial, and the latter then introduces them in evidence. Runkle *v.* Hartford Fire Ins. Co., 99 Iowa, 414, 68 N. W. Rep. 712.

Where a life insurance policy provided that proof of death must be made on forms to be furnished by the company and must be sent in to the company within ninety

is competent to show by parol that a written statement of the loss has been furnished.[49] Notice of loss is not equivalent to proof of loss;[50] and silence on its receipt is not a waiver.[51] Slight evidence that the certifying magistrate was the nearest one is enough.[52] Evidence that the nearest magistrate, etc., on a proper application by the insured, refused to give a certificate such as the policy stipulated for, is not sufficient to dispense with the requirement, in the absence of any evidence of interference or waiver by defendants.[53]

days after the insured's death, a delay of the forms in the mails will excuse the plaintiff for not complying with the requirement. Robinson *v.* Northwestern Natl. Ins. Co., 92 Minn. 379, 100 N. W. Rep. 226.

[49] Hogan *v.* Merchants & Bankers Ins. Co., 81 Iowa, 321, 25 Am. St. Rep. 493; Commercial Fire Ins. Co. *v.* Morris, 105 Ala. 498, 507, 18 So. Rep. 34.

The proofs being in defendant's possession, plaintiff may, on the trial, give in evidence a copy of the proofs and a postal from the company acknowledging receipt of them, to prove that they had been furnished seasonably. Dowling *v.* Lancashire Ins. Co., 92 Wis. 63, 65 N. W. Rep. 738, 31 L. R. A. 112.

[50] O'Reilly *v.* Guardian Mut. Life Ins. Co., 60 N. Y. 169.

[51] Id.

With regard to silence on the part of the company, after receipt of insufficient proofs, see Minneapolis Fire & Marine Mut. Ins. Co. *v.* Fultz, 72 Ark. 365, 80 S. W. Rep. 576.

In Gould *v.* Dwelling-House Insurance Co., 134 Pa. 570, 19 Atl. Rep. 793, 19 Am. St. Rep. 717, the court stated the rule as follows: "If the insured, in good faith, and within the stipulated time, does what he plainly intends as a compliance with the requirements of his policy, good faith equally requires that the company shall promptly notify him of their objections, so as to give him the opportunity to obviate them; and mere silence may so mislead him to his disadvantage, to suppose the company satisfied, as to be of itself sufficient evidence of waiver by estoppel."

Likewise in Fink *v.* Lancashire Ins. Co., 60 Mo. App. 673, where objections were raised to the first set of proofs furnished, and the insured remedied some of the defects, but not all, the company, by receiving such second proofs without objection, was deemed to have waived the other defects.

[52] May on Life Ins. 571, § 466.

And it seems that where the policy requires it, the insured must state in the proofs that the certify-

[53] Johnson *v.* Phœnix Ins. Co., 112 Mass. 49, s. c., 17 Am. Rep. 65; Brown *v.* Mayor of N. Y., 63 N. Y. 239; McNally *v.* Phœnix

The preliminary proofs, duly furnished, are admissible; but are not competent evidence in favor of plaintiff of the facts therein stated.[54] They are competent evidence in favor of the insurer, and against plaintiff, as his admissions of the facts represented therein.[55] They are not, however, conclusive;[56] but they are generally sufficient against the insured, unless it be shown that the representations were made under a misapprehension of the facts, or in ignorance of material information subsequently had.[57] And even then

ing magistrate or notary was the nearest to the place of fire, otherwise his proofs may be deemed defective. Fink *v.* Lancashire Ins. Co., 60 Mo. App. 673.

Ins. Co., 137 N. Y. 389, 33 N. E. Rep. 475; Lang *v.* Eagle Fire Co., 12 N. Y. App. Div. 39, 42 N. Y. S. 539.

The requirement of a certificate from a magistrate "living nearest the place of the fire," is not always literally interpreted. See, for instance, Paltrovitch *v.* Phœnix Ins. Co., 143 N. Y. 73, 37 N. E. Rep. 639, 25 L. R. A. 198.

[54] Newton *v.* Mut. Benefit Life Ins. Co., 2 Dill, 154; paragraph 18 (above); Howard *v.* City Fire Ins. Co., 4 Den. 502. *Contra*, Jones *v.* Mechanics' Fire Ins. Co., 36 N. J. (7 Vroom) 29, s. c., 13 Am. Rep. 405.

[55] Kiesewetter *v.* Supreme Tent Knights of Maccabees, 227 Ill. 48, 81 N. E. Rep. 19. But a separate narrative, such as a newspaper slip, submitted with the proofs, but not sworn to, nor necessary as a part of them, is not admissible in favor of the insurers. Clieff *v.* Mut. Ben. Ins. Co., 99 Mass. 317.

The beneficiary may, however, offer explanations of such proofs if they are opposed to his interest. Haughton *v.* Ætna Life Ins. Co., 165 Ind. 32, 73 N. E. Rep. 592, 74 N. E. Rep. 613.

[56] A statement in the proof of loss that the premises were vacant at the time of the fire is not conclusive to prevent the insured from proving the circumstances of vacancy, so as to show that it was not within the terms of the policy. Cummings *v.* Agricultural Ins. Co., 67 N. Y. 260, rev'g 5 Hun, 554.

Becket *v.* Northwestern Masonic Aid Ass'n, 67 Minn. 290, 69 N. W. Rep. 923. See also Traiser *v.* Commercial Travelers' Eastern Accident Association, 202 Mass. 292, 88 N. E. Rep. 901.

Where proofs of death were taken by the defendant's agents, who solicited and wrote them, the plaintiff may contradict false statements made over her signature. Prudential Ins. Co. of America *v.* Hummer, 36 Colo. 208, 84 Pac. Rep. 61.

[57] Hassencamp *v.* Mutual Ben.

the insured will not be allowed on the trial to show that the facts were different from those stated, if the insurers have been prejudiced in their defense by relying on the statements contained in the proofs. In these cases the question is one of equitable estoppel.[58] A statement which was not called for by the contract may be corrected by evidence of mistake, without giving notice to the insurers before the trial.[59]

21. Notice to Company.

Duly mailing notice or proofs of loss, is evidence for the jury,[60] but not conclusive evidence,[61] that the company re-

Life Ins. Co., 120 Fed. Rep. 475, 56 C. C. A. 625; Insur. Co. *v.* Newton, 22 Wall. 32.

It is no objection to the admission of proofs of loss that they contain untrue statements. Runkle *v.* Hartford Fire Ins. Co., 99 Iowa, 414, 68 N. W. Rep. 712.

Misstatements in the proofs of loss, to be a cause for avoiding the policy, must have been knowingly and intentionally untrue and the burden of proving this is on the insurer. Cole *v.* North British Mercantile Insurance Co., 113 Me. 512, 95 Atl. Rep. 217.

The recovery on an accident policy cannot exceed the amount claimed in the proof of loss. Travelers' Ins. Co. *v.* Thornton, 46 S. E. Rep. 678, 119 Ga. 455.

[58] Campbell *v.* Charter Oak Ins. Co., 10 Allen, 213; Irving *v.* Excelsior Ins. Co., 1 Bosw. 507, as explained in 22 Wall. 36. Compare, however, McMaster *v.* Ins. Co. of N. Am., 55 N. Y. 222, affi'g 64 Barb. 536; Parmelee *v.* Hoffman Fire Ins. Co., 54 N. Y. 193.

The insured is not prejudiced by a misstatement in an affidavit made by him after the loss, to the effect that he was the sole and unconditional owner when in fact he was not. Knop *v.* National F. Ins. Co., 101 Mich. 359, 59 N. W. Rep. 653.

[59] Connecticut Mut. Life Ins. Co. *v.* Schwenk, 94 U. S. (4 Otto) 593.

[60] Killips *v.* Putnam Fire Ins. Co., 28 Wis. 472, s. c., 9 Am. Rep. 506.

Where notice of loss is a condition precedent to the right to recover such condition is complied with by mailing the notice even though it is not received by the company. Munson *v.* German-Am. Fire. Ins. Co., 55 W. Va. 423, 47 S. E. Rep. 160.

[61] Plath *v.* Minnesota Farmers' Mutual Fire Ins. Association, 23 Minn. 479, s. c., 23 Am. Rep. 697.

The requirement in a New York standard fire policy that the insured shall render a statement within sixty days of loss to the attorney of the insurer is not com-

ceived them in due course of mail. Evidence of notice to one who was not the proper agent to receive it, may be aided by evidence that the company acted on it, and will sustain an inference of waiver.[62]

22. Waiver of Conditions or Forfeiture.

Waiver of a condition prior to[63] or contemporaneous[64] with the execution of the writing containing the condition cannot be proved by parol. A waiver subsequent to the policy may be shown by parol, notwithstanding the policy expressly requires a writing.[65] To prove a waiver of a condition, the evidence must justify the inference of an agreement

plied with by mailing such statement on the sixtieth day, the same not being received until the sixty-second day. Such notice should be served personally upon the attorney or his authorized agent. Peabody *v.* Satterlee, 166 N. Y. 174, 59 N. E. Rep. 818, 52 L. R. A. 956.

[62] Rallie *v.* White, 20 Misc. 635, 46 N. Y. Supp. 376; Inland Ins. Co. *v.* Stauffer, 9 Casey, 397, 403; and see Kendall *v.* Holland Purchase Ins. Co., 2 Supm. Ct. (T. & C.) 375. As to what amounts to notice to the company, see Thomas *v.* Builders' Mut. Fire Ins. Co., 20 Am. Rep. 317, 322, note.

[63] Hartford Fire Ins. Co. *v.* Davenport, Mich. S. Ct. Oct. 1877, Cent. L. J.

The burden of proving a waiver is on the party asserting it. Planters Mut. Ins. Co. *v.* Loyd, 67 Ark. 584, 56 S. W. Rep. 44, 77 Am. St. Rep. 136.

[64] Lamatt *v.* Hudson River Ins. Co., 17 N. Y. 199, note.

"It is a fundamental rule, in courts both of law and equity, that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument." Northern Assur. Co. *v.* Grand View Bldg. Assoc., 183 U. S. 308, 22 S. Ct. 133, 46 L. ed. 213.

But see Merchants Ins. Co. *v.* Oberman, 99 Ill. App. 357.

[65] Carroll *v.* Charter Oak Ins. Co., 1 Abb. Ct. App. Dec. 316, affi'g 40 Barb. 292; Insurance Co. *v.* Norton, 96 U. S. (6 Otto) 234; and see Bodine *v.* Exchange Fire Ins. Co., 51 N. Y. 117. For conflicting cases on waiver of clauses as to consent to other insurance, see Gilbert *v.* Phœnix Ins. Co., 36 Barb. 372; Couch *v.* City Fire Ins. Co. of Hartford, 38 Conn. 181, s. c., 9 Am. Rep. 375; Goodall *v.* New Eng. Mut. Fire Ins. Co., 5 Foster (N. H.), 169, 189; Barrett *v.* Union Mut. Fire Ins. Co., 7 Cush. 175, 180; Union Mut. Ins. Co. *v.* Wilkinson, 13 Wall. (U. S.) 222, 1 Greenl. Ev., 13th ed. 326, § 281; Thomas *v.* Builders' Mutual

founded on a valuable consideration; or the act relied on must be such as to estop the insurer from insisting on performance of the contract or forfeiture of the condition.[66] If the forfeiture was not absolute, but optional, there must be evidence that the option was manifested.[67] Even after forfeiture, a waiver, and the revival of the policy, may be shown by any act from which the consent of the underwriters may be inferred.[68]

A general agent has power to waive most forfeitures; a

Fire Ins. Co., 119 Mass. 121, s. c., 20 Am. Rep. 317; Lindley *v.* Union Farmers' Mutual Fire Ins. Co., 65 Me. 368, s. c., 20 Am. Rep. 701.

Receipt and retention of the premium with knowledge of a breach of conditions by the insured may amount to a waiver. Ætna Life Ins. Co. *v.* Frierson, 114 Fed. Rep. 56, 51 C. C. A. 424.

It seems that a provision that no waiver of conditions in the policy may be made, may itself be waived. Ætna Life Ins. Co. *v.* Frierson, 114 Fed. Rep. 56, 51 C. C. A. 424.

[66] Ripley *v.* Ætna Ins. Co., 30 N. Y. 136, rev'g 29 Barb. 552; Leslie *v.* Knickerbocker Life Ins. Co., 63 N. Y. 27, affi'g 2 Hun, 616, s. c., 5 Supm. Ct. 193; Insurance Co. *v.* Eggleston, 96 U. S. (6 Otto) 572; Beatty *v.* Lycoming Co. Mut. Ins. Co., 66 Penn. 9, s. c., 5 Am. Rep. 318; Insurance Co. *v.* Wolff, 95 U. S. (5 Otto) 326. In some states proof of waiver is admissible under an allegation that all the conditions of a policy had been complied with. Nickell *v.* Phœnix Ins. Co., 144 Mo. 420, 432, 46 S. W. Rep. 435.

It has been held that where the company with knowledge of a fact which renders the contract invalid, exercises a right by virtue of such policy, it thereby waives the objection. Enos *v.* St. Paul Fire & Marine Ins. Co., 4 S. D. 639, 57 N. W. Rep. 919, 46 Am. St. Rep. 796; Manufacturers', etc., Mut. Ins. Co. *v.* Armstrong, 45 Ill. App. 217.

The repudiation of liability on the policy excuses the holder from further compliance with its requirements. Cole *v.* Preferred Acc. Ins. Co., 40 Misc. 260, 81 N. Y. Supp. 901.

[67] Mut. Life Ins. Co. *v.* French, 30 Ohio St. 240.

[68] Shearman *v.* Niagara Falls Ins. Co., 46 N. Y. 326, affi'g 2 Sweeny, 470.

Where by the terms of the policy, the company may cancel the policy upon a certain contingency, the mere happening of the contingency does not constitute a termination of the policy, and where the conduct of the company is inconsistent with its having elected to exercise its option to cancel, the policy is still in force. New York Life Ins. Co. *v.* Mills, 41 So. Rep. 603, 51 Fla. 256.

local agent or clerk has not.[69] The charter and by-laws are admissible in evidence against the insured to show who are competent to waive a forfeiture.[70] Where facts tending to show waiver are in evidence, the question of waiver is a conclusion, and a witness should not be allowed to express his opinion on it, or be asked generally whether there was a waiver.[71]

23. Adjustment.

An adjustment of loss, if made by the insurer, with knowledge of all the facts, is conclusive on him;[72] otherwise, if he

[69] Paragraph 5.

See Ætna Life Ins. Co. *v.* Frierson, 114 Fed. Rep. 56, 51 C. C. A. 424.

[70] Kolgers *v.* Guardian Life Ins. Co., 9 Abb. Pr. N. S. 91, s. c., 58 Barb. 185, 2 Lans. 480.

On the authority of Corley *v.* Travelers' Protective Assoc., 105 Fed. Rep. 854, 46 C. C. A. 278, the constitution or by-laws of the company may be looked to, though not attached or annexed to the policy, as required by statute, provided, however, that the parts of the constitution or by-laws referred to, do not add a new element to the contract.

[71] Adams *v.* Greenwich Ins. Co., 4 L. & Eq. L. 291.

"For example, the written application for the life policy is made part of the contract and its statements are warranted to be true. It declares that the age of the insured is thirty-five, or that he never had typhoid fever, or that he has taken out no other insurance; but on the trial of the action . . . the testimony shows that his age was forty, or that he had been afflicted with typhoid fever, or that he had taken out other insurance. Under the doctrine of parol waivers, however, the plaintiff is permitted to show by oral testimony that the agent of the company had knowledge of the truth of the circumstances misstated in the application, and closed the contract and received the premium or delivered the policy in full possession of such knowledge. The agent denies any such knowledge; the issue so raised goes to the jury, and if decided for the plaintiff, as it usually is, without much regard to weight of evidence, the plaintiff recovers."

The medical examiner is deemed the agent of the company notwithstanding a provision to the contrary in the application. Sternaman *v.* Metropolitan Life Ins. Co., 170 N. Y. 13, 62 N. E. Rep. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625.

[72] Dow *v.* Smith, 1 Cai. 32.

The mere adjustment of the amount of the loss by the parties,

show that it was made on the misrepresentation (whether intentional or not) of the insured.[73] In a case of contributing policies, an adjustment by an expert may be submitted to the jury, not as evidence of the facts stated therein, nor as obligatory, but to assist the jury in calculating the amount

without a promise on the part of the company to pay the damage, does not amount to an adjustment of the liability on the part of the insurer. Willoughby *v.* St. Paul German Ins. Co., 68 Minn. 373, 71 N. W. Rep. 272.

But where, in addition to adjusting the loss, the company promises to pay the amount agreed upon, such an adjustment and promise constitute a new and independent contract. McCallum *v.* Natl. Credit Ins. Co., 84 Minn. 134, 86 N. W. Rep. 892.

If an adjuster for the insurer knows at the time of the adjustment that a breach of conditions has been committed by the insured, his adjustment may amount to a waiver of such breach. German Fire Ins. Co. *v.* Gibbs, 92 S. W. Rep. 1068, 42 Tex. Civ. App. 497, rehearing denied, 42 Tex. Civ. App. 407, 96 S. W. Rep. 760.

"The action to recover after adjustment is based upon a new and independent contract, and not upon the policy, and the insurer can defeat such action only by showing fraud or mistake in the adjustment. Even if it be shown that there had been forfeitures, of which the insurer had no knowledge when the adjustment was made, it will not be excused, if it appears that the information was available and might have been obtained by the use of reasonable diligence." German Fire Ins. Co. *v.* Gibbs, 42 Tex. Civ. App. 497, 92 S. W. Rep. 1068, rehearing denied 42 Tex. Civ. App. 407, 96 S. W. Rep. 760.

An adjuster may bind the company by his waiver of proof of loss. Roberts *v.* Ins. Co. of America, 94 Mo. App. 142, 72 S. W. Rep. 144.

[73] Faugier *v.* Hallett, 2 Johns. Cas. 233, Rosc. N. P. 425. But see Fuhrman *v.* Sun Ins. Office, 180 Mich. 439, 147 N. W. Rep. 618, Ann. Cas. 1916 A. 466.

It has been held, however, that alteration, even with bad motives, of the books of the insured, after loss, and the suppression of an inventory made before the loss, do not constitute a defense to an action to recover the amount agreed upon on the adjustment, unless it can be proved that the defendant was injured thereby. The court said: "The law does not undertake to furnish remedies for wrongs which are so impalpable or imaginary as not to cause damage. The law does not regard or treat as a fraud, a deception so intangible as not to cause damage. To amount to a legal fraud it must both deceive and damage." Commercial Bank *v.* Fireman's Ins. Co., 87 Wis. 297, 58 N. W. Rep. 391.

of liability upon the several hypotheses of fact mentioned in the adjustment, if they find either hypothesis correct.[74]

24. Declarations and Admissions of Officers and Agents.

In addition to what has been already said on this point,[75] it may be useful to add that evidence of admissions or declarations of a distinct fact, made by the president or other proper officer having power to settle and adjust claims, when the matter was presented to him for settlement, is competent against the company.[76] Otherwise, if the admission was not a part of the *res gestæ* of the actual dealing of the officer or agent with the subject.[77] Evidence of the

[74] Home Ins. Co. *v.* Baltimore Warehouse Co., 93 U. S. (3 Otto) 527, s. c., 16 Am. Law Reg. 162, 169.

It has been held that in an action on a fire policy, the adjustment is admissible evidence of the value of the goods destroyed and *prima facie* proof of the amount due under the policy. German F. Ins. Co. *v.* Gibbs, 42 Tex. Civ. App. 407, 92 S. W. Rep. 1068; rehearing denied, 42 Tex. Civ. A. 497, 96 S. W. Rep. 760.

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[76] Northrup *v.* Miss. Valley Ins. Co., 47 Mo. 435, s. c., 4 Am. Rep. 337. So held even of a general promise to pay, if the other companies did. Letters in reference to the transfer of a policy of fire insurance written by an agent to the company, which notified it of the facts and form the basis of its communications to him, are admissible in evidence. Medearis *v.* Anchor Mut. Fire Ins. Co., 104 Iowa, 88, 73 N. W. Rep. 495.

The admissions of an adjuster at the time of examining the loss are the admissions of the company, and admissible against it. Sisk *v.* American Central Fire Ins. Co., 95 Mo. App. 695, 69 S. W. Rep. 687.

[77] Baptist Church *v.* Brooklyn Fire Ins. Co., 28 N. Y. 153, affi'g 23 How. Pr. 448.

Testimony by the plaintiff that defendant's agent said to him at the time of delivering the policy: "You are a thousand dollars better off than you thought; here is a policy for a thousand dollars just put on your stable," held admissible as part of the *res gestæ*. But evidence of defendant's agent's declarations, made subsequent to the delivery of the policy and after the termination of the agency, to the effect that he (the agent) "had received a dispatch from his company to adjust a loss on Crawford's stable, and that he had found out since . . . that his policy didn't cover," and again a declaration made after the fire that "he had issued a policy for a thousand

agent's declarations of his opinion, based upon past occurrences, is not to be received as an admission of his principals, especially when the agent was not a party to the occurrences;[78] and it is to be excluded even where the agent had been deputed to examine the question of liability of the principal.[79] An admission is to be taken, as an entirety, of the fact which makes for the one side, with the qualifications which limit, modify or destroy its effect, on the other.[80]

25. Defenses.

Special matters of defense, including false warranty and representations, and concealment, must be pleaded or cannot be proved,[81] and the burden is on defendants to prove

dollars on that building to Crawford a few days before," was held only hearsay and incompetent. Crawford *v.* Transatlantic F. Ins. Co., 125 Cal. 609, 58 Pac. Rep. 177.

[78] Packet Co. *v.* Clough, 20 Wall. 528.

"It is not competent to prove a contract by the declarations or admissions of an agent, subsequently made. Such declarations or admissions are not part of the *res gestæ*, but are mere declarations or admissions of a past transaction and are never competent to prove a fact against the principal of the agent making them." Commercial Fire Ins. Co. *v.* Morris, 105 Ala. 498, 18 So. Rep. 34.

[79] Insurance Co. *v.* Mahone, 21 Wall. 157.

[80] Insurance Co. *v.* Newton, 22 Wall. 32. Thus, where proofs of death showed that the death was by suicide, the company's admission that the proofs were sufficient in form, coupled with the objection at the same time that they were not liable for suicide, are to be taken together, and only admit death in a mode not rendering them liable.

[81] Marine Ins. Co. of Alexandria *v.* Hodgson, 6 Cranch, 206; Northrup *v.* Miss. Valley Ins. Co., 47 Mo. 435, s. c., 4 Am. Rep. 337; Baumiller *v.* Workingman's Co-op. Ass'n, 9 Misc. 157, 29 N. Y. Supp. 26; Phœnix Ins. Co. *v.* Hague, 34 S. W. Rep. (Tex. Civ. App.) 654.

"While plaintiff is required to allege performance of conditions precedent, and therefore may logically be said to have the burden of proving such performance, yet under the rule now generally recognized that defendant to raise an issue on a general allegation of performance, must particularly allege the breach relied on, it is almost uniformally held that without regard to whether the breach complained of is that of a condition precedent, or a promissory warranty, or condition subsequent,

them.[82] Mortgaging or incumbering of the property in violation of the terms of the policy is a matter of defense, and it is not the duty of the insured to negative it in the first instance.[83]

26. — False Representations.

The burden is on defendants to show the untruthfulness of representations, and either their materiality,[84-86] or actual fradulent design and deceit thereby. The materiality of a representation is to be presumed from the fact of its having been made in answer to a specific question.[87]

defendant has the burden of proving the facts constituting such a breach." 19 Cyc. 936, citing many cases. But see Knoxville Fire Ins. Co. *v.* Avery, 95 Tenn. 296, 32 S. W. Rep. 256.

[82] Piedmont & Arlington Life Insurance Co. *v.* Ewing, 92 U. S. (2 Otto) 377; Trenton Ins. Co. *v.* Johnson, 24 N. J. L. (4 Zab.) 576; Elkin *v.* Janson, 13 M. & W. 655; Ins. Co. *v.* Folsom, 18 Wall. 252; Milhim *v.* Hawkeye Ins. Co., 171 Ill. App. 262.

[83] Mintzer *v.* St. Paul Trust Co., 45 Minn. 323, 47 N. W. Rep. 973; Mistilski *v.* German Ins. Co., 64 Minn. 366, 67 N. W. Rep. 80; Butternut Mfg. Co. *v.* Manufacturers Mut. Fire Ins. Co., 47 N. W. Rep. (Wis.) 366; Perine *v.* Grand Lodge, A. O. U. W., 53 N. W. Rep. (Minn.) 367; Price *v.* Phœnix Mut. Ins. Co., 17 Minn. 497; Bank of River Falls *v.* German-American Ins. Co., 40 N. W. Rep. (Wis.) 506; Farmers' and Merchants' Ins. Co. *v.* Peterson, 47 Nebr. 747, 750, 66 N. W. Rep. 847.

[84-86] May on Ins. 193, § 183; N. Y. Life Ins. Co. *v.* Graham, 2 Duv. (Ky.) 506.

"A negative answer to the question, 'Do you use spirituous, malt, or vinous liquors?' is not false when the answerer partakes of intoxicating liquors only occasionally and temperately." Brignac *v.* Pacific Mutual Life Ins. Co., 112 La. 574, 36 So. Rep. 595, 66 L. R. A. 322.

The physician designated by an insurance company to examine applicants for insurance, is the agent of the company notwithstanding the statement in the application signed by the applicant that the physician is made the applicant's agent, and a false statement made in the examination of the insured by the physician does not avoid the policy. Royal Neighbors of America *v.* Boman, 177 Ill. 27, 69 Am. St. Rep. 201, 52 N. E. Rep. 264.

[87] May on Ins. 194, §§ 185, 186.

"Where an insurance company or association seeks to avoid a policy or certificate of membership on the ground of falsity in the

27. — False Warranty.

A warranty or condition not in the policy cannot be proved by parol.[88] A variance between an allegation of false warranty and its proof, if not substantial, will be disregarded.[89] Neither materiality of the warranty, fraudulent intent, nor that the insurer acted on it, need be shown.[90]

28. — Concealment.

The application is not evidence, as that plaintiff did not communicate all he knew on subjects not referred to in it.[91] But slight evidence of non-communication is enough, in the first instance.[92] Knowledge by the concealer is essential; but for this purpose an insurer is conclusively presumed to know what a man of ordinary intelligence ought to know,[93] and what his agent at the time knew.[94] The jury may also

answer to a question which is by the terms of the contract made material, the court will construe the question and answer strictly as against the company, and liberally with reference to the insured." Newton *v.* Southwestern Mut. Life Ass'n, 116 Iowa, 311, 90 N. W. Rep. 73.

[88] Alston *v.* Mechanics' Mut. Ins. Co., 4 Hill, 329, and cases cited.

While parol evidence is not admissible to contradict an insurance contract, it is admissible to show that the applicant's answers to questions were true but were falsely written in the application at the suggestion of the insurer's agent, such evidence not varying the agreement but estopping the insurer to take advantage of it. Lynchburg Fire Ins. Co. *v.* West, 76 Va. 575, 44 Am. Rep. 177.

[89] McComber *v.* Granite Ins. Co., 15 N. Y. 495; Lum *v.* U. S. Fire Ins. Co., 104 Mich. 397, 62 N. W. Rep. 562; Manchester Fire Assur. Co. *v.* Feibelman, 118 Ala. 308, 23 So. Rep. 759.

[90] See note 65, page 1248; Brennan *v.* Security Life Ins. Co., 4 Daly, 296.

An application for insurance is not a warranty of the statements therein but merely a representation, and if made in good faith, though untrue, it is no defense to the policy. Convis *v.* Citizens' Mut. Fire Ins. Co., 127 Mich. 616, 86 N. W. Rep. 994.

[91] Ins. Co. *v.* Folsom, 8 Blatchf. 170, 9 Id. 202, 18 Wall. 252.

[92] Elkin *v.* Janson, 13 Mees. & W. 655, 663; Steph. Dig. Ev. 100.

[93] May on Ins. 211, § 202.

[94] Id.

"The assured will not be allowed to protect himself against the charge of an undue concealment by evidence that he had disclosed

infer knowledge as a matter of fact, from probabilities, such as the situation of the person and the character of the fact.[95]

The insurers are presumed to be skilled in their business, and to know (and therefore need no communication of) those general facts, geographical, political, and others, which are open to the public, and may be known to all who are interested to inquire.[96] A newspaper taken by them is competent as raising an inference that they had knowledge of information, affecting the business, contained in it.[97]

29. — Materiality to the Risk.

On the question whether a fact, representation or concealment was material to the risk, if it be on a point of common experience, not requiring special knowledge,—as, for instance, whether a change in the occupation of a dwelling altered the risk—the opinions of witnesses are not competent.[98] If it be a matter requiring special knowledge or skill, the opinions of skilled witnesses are competent.[99] But

to the underwriters, in general terms, the information that he possessed. Where his own information is specified, it must be communicated in the terms in which it was received. General terms may include the truth, but may fail to convey it, with its proper force and in all its extent. Nor will the assured be permitted to urge, as an excuse for his omission to communicate material facts, that they were actually known to the underwriters, unless it appears that their knowledge was as particular and full as his own information. It is the duty of the assured to place the underwriter in the same situation as himself, to give to him the same means and opportunity of judging of the value of the risks, and when any circumstance is withheld, however slight and immaterial it may have seemed to himself, that, if disclosed, would probably have influenced the terms of the insurance, the concealment vitiates the policy." Duer Lech. 13 pt., § 13, 2 Ins. 398.

[95] Id. 213, § 202.

[96] May on Ins. 217, § 207; De Longuemere *v.* N. Y. Fire Ins. Co., 10 Johns. 120.

[97] Green *v.* Merchants' Ins. Co., 10 Pick. 402.

[98] Carroll *v.* Home Insurance Co., 51 N. Y. App. Div. 149, 64 N. Y. Supp. 522; Liverpool, etc., Ins. Co. *v.* McGuire, 52 Miss. 227; Luce *v.* Dorchester Mut. Fire Ins. Co., 105 Mass. 297, s. c., 7 Am. Rep. 522; Hartford Protective Ins. Co. *v.* Harmer, 2 Ohio St. 452.

[99] See Leitch *v.* Atlantic Mut. Ins.

in either class of cases the actual usage of insurance companies generally, to charge a greater or less rate (as distinguished from a custom of the particular company not shown to have been communicated to the insured), is competent,[1] and may be proved by the testimony of experts in insurance,[2] stating the usage as a fact,[3] as distinguished from stating what would or would not be considered an insurable subject or a greater or less risk.[4] For the purpose of determining the question of materiality, it is not competent to ask a witness, even one who acted in the transaction, whether he considered the fact material; [5] or whether he would have taken the risk

Co., 66 N. Y. 100; Traders' Insurance Co. *v.* Catlin, 163 Ill. 256, 45 N. E. Rep. 255, 35 L. R. A. 595; Russell *v.* Cedar Rapids Ins. Co., 78 Iowa, 216, 42 N. W. Rep. 654, 4 L. R. A. 538.

Such special knowledge, skill or experience must be affirmatively shown in order that a witness may testify as to technical facts. Pepper *v.* Planters Natl. Bank, 5 Ky. L. Rep. 85.

[1] Luce *v.* Dorchester Mut. Fire Ins. Co., 105 Mass. 297, s. c., 7 Am. Rep. 522.

Expert evidence of a usage among insurance companies not to insure unoccupied buildings on account of the increased risk, is not admissible. Thayer *v.* Providence Washington Ins. Co., 70 Me. 531.

[2] Id.; Hobby *v.* Dana, 17 Barb. 111.

For an exhaustive dissertation on expert opinion in matters affecting the materiality of undisclosed facts, and the amount of premium which would have been charged on the risk, see Quin *v.* National Assur. Co., 1 Jones & Cary, 316.

[3] Luce *v.* Dorchester Mut. Fire Ins. Co., (above).

"We do not mean to say that the rates of insurance are to be considered a decisive test as to the risk, but it is evidence to go to the jury, to be considered, in connection with other facts, in determining the question of increase of risks." Planter's Mutual Ins. Co. *v.* Rowland, 66 Md. 236, 7 Atl. Rep. 257.

[4] Rawls *v.* American Mut. Life Ins. Co., 27 N. Y. 282, affi'g 36 Barb. 357; Jefferson Ins. Co. *v.* Cotheal, 7 Wend. 72. Compare Kern *v.* South St. Louis Mut. Ins. Co., 40 Mo. 19, 26; Schenck *v.* Mercer Co. Ins. Co., 24 N. J. L. (4 Zabr.) 447, 451.

[5] Southern Mutual Ins. Co. *v.* Hudson, 115 Ga. 638, 42 S. E. Rep. 60. In the United States the weight of authority is against the view that an insurance expert may be asked his own opinion whether facts undisclosed or misrepresented by the applicant in his

had he known the fact; or what influence the fact would have on the mind of an insurer.[6] But one to whom a material representation was made may be asked what effect it actually had on his mind in the transaction.[7]

To qualify a witness to express opinion, it is not enough that he is conversant with insurance business in general; but he should be shown to have special knowledge upon the particular topic in question.[8]

Testimony given by experts, and especially by insurers, when necessary on the question of materiality, because without it the fact is not sufficiently obvious to sustain a decision, is to be treated like the testimony of credible witnesses upon any other fact; and is controlling if there is no conflict. It is only where there is a difference of opinion that the question is one for the jury.[9]

30. — Over-valuation.

Evidence of over-valuation in the policy,[10] or in the proofs of loss,[11] without evidence of bad faith, does not bar the ac-

application for a policy of insurance were material to the risk, and this rule is applicable to life insurance cases. Penn Mut. Life Ins. Co. *v.* Mechanics' Savings Bank, 37 U. S. App. 692, 72 Fed. Rep. 413.

[6] Jefferson Ins. Co. *v.* Cotheal (above); Rawls *v.* Am. Mut. Life Ins. Co. (above); Walsh *v.* Ætna Life Ins. Co., 30 Iowa, 133, s. c., 6 Am. Rep. 664; and see Atlantic Dock Co. *v.* Libby, 45 N. Y. 499. *Contra*, Hawes *v.* New England, &c. Ins. Co., 2 Curt. C. Ct. 229; Roberts *v.* Continental Ins. Co., 3 Law & Eq. R. 767; Hartman *v.* Keystone Ins. Co., 9 Harr. (Penn.) 466, 478. Compare, on this subject, 5 Am. L. Rev. 231.

[7] Valton *v.* National Loan Fund Assurance Society, 4 Abb. Ct. App. Dec. 437, rev'g 17 Abb. Pr. 268.

[8] Schmidt *v.* Peoria Marine Ins. Co., 41 Ill. 295, 299; Nelson *v.* Sun Mut. Ins. Co., 71 N. Y. 453, affi'g 40 Super. Ct. (J. & S.) 417.

Thus the opinion of an insurance agent who was introduced as an expert, tendered on the question as to whether the use of certain premises as a saloon increased the risk, is inadmissible, it appearing that he had no personal knowledge of the premises in question. Carroll *v.* Home Insurance Co., 51 N. Y. App. Div. 149, 64 N. Y. Supp. 522.

[9] Leitch *v.* Atlantic Mut. Ins. Co., 66 N. Y. 100.

[10] Huth *v.* New York Mutual Ins. Co., 8 Bosw. 538.

[11] Owens *v.* Holland Purchase

tion.[12] Evidence that other dealers in the same trade and place usually had a much less stock, is not competent evidence of over-statement or valuation.[13] The usual proportion of stock to annual sales may be proved, for the purpose of raising an inference, by comparison with the annual sales of the insured, that his statement of amount of stock was grossly exaggerated.[14] This should be proved by merchants of the same trade and place; [15] those of other places, different in size and business usages, are not competent on the point.[16]

31. Charge of Crime.

Where the issue requires the defendant to establish a charge of crime,—such as arson, in burning the thing insured;

Ins. Co., 56 N. Y. 565, affi'g 1 Supm. Ct. (T. & C.) 285.

A discrepancy between the amount claimed in the proofs of loss and the amount awarded on the trial may be evidence of fraudulent over-valuation if sufficiently substantial, as, for instance, a difference of about $18,000 between the amount claimed (about $23,000), and the amount awarded by the jury ($5,000). Sternfeld *v.* Park F. Insurance Co., 50 Hun, 262, 2 N. Y. Supp. 766.

But in another case, where the proofs estimated the loss at $2,154.15 and the jury awarded only $1,000, the court refused to hold that, as a matter of law, plaintiff had fraudulently overstated his damages. Davis *v.* Guardian Assur. Co., 87 Hun, 414, 34 N. Y. Supp. 332.

[12] Franklin Fire Ins. Co. *v.* Vaughan, 92 U. S. (2 Otto) 516.

"The material and important question then and now is, was there an *intentional* over-valuation, not a mere error in judgment, if the estimates were put too high, and this is solved by a verdict which declares that the property was respectively worth the sums at which it is valued in the application, and that consequently there was no misrepresentation fraudulent or otherwise in the application." Dupree *v.* Virginia Home Ins. Co., 92 N. C. 417.

[13] Phœnix Fire Ins. Co. *v.* Phillip, 13 Wend. 81; Townsend *v.* Merchants Ins. Co., 36 Super. Ct. (4 J. & S.) 172.

Evidence of offers to purchase the goods or property insured, after the policy had issued, is inadmissible upon the question of good faith by the plaintiff. Wood *v.* Firemen's F. Ins. Co., 126 Mass. 316.

[14] Ins. Co. *v.* Weide, 11 Wall. 440.

[15] Id.

[16] Jones *v.* Mechanics' Fire Ins. Co., 36 N. J. (7 Vroom) 29, s. c., 13 Am. Rep. 405.

or perjury, in swearing to false preliminary proofs,—the rule followed by the greater number of American authorities is that proof beyond a reasonable doubt, such as is required in criminal cases, is not necessary.[17] Whether a mere pre-

[17] So held in *Indiana*, (Continental Ins. Co. *v.* Jachnichen, 110 Ind. 59, 10 N. E. Rep. 636, 59 Am. Rep. 194); *Kentucky*, (Ætna Ins. Co. *v.* Johnson, 11 Bush, 587, s. c., 21 Am. Rep. 223); *Louisiana*, (Hoffman *v.* Western Mar. & F. Ins. Co., 1 La. Ann. 216, 219; Wightman *v.* The Same, 8 Rob. (La.) 442); *Massachusetts*, (Schmidt *v.* N. Y. Union Mut. F. Ins. Co., 1 Gray, 529, 534); *Maine*, (Market, etc., Natl. Bank *v.* Sargent, 85 Me. 348, 27 Atl. Rep. 192, 35 Am. St. Rep. 376); *Michigan*, (Watkins *v.* Wallace [Fraud], 19 Mich. 57); *Missouri*, (Rothschild *v.* Am. Cent. Ins. Co., 62 Mo. 356; Marshall *v.* Thames Fire Ins. Co., 43 Id. 586); *New Hampshire*, (Mathews *v.* Huntley [Slander], 9 N. H. 150; Folsom *v.* Brown [Slander], 5 Fost. N. H. 122); *New York*, (Weir *v.* Ætna Ins. Co., 91 Hun, 217, 36 N. Y. Supp. 216); *North Carolina*, (Kincade *v.* Bradshawe [Slander], 3 Hawks, 63); *Wisconsin*, (Wright *v.* Hardy [Fatal Malpractice], 22 Wis. 348); Blackburn *v.* St. Paul F. & M. Insurance Co., 116 N. C. 821, 21 S. E. Rep. 222); *Wisconsin*, (Washington Union Ins. Co. *v.* Wilson, 7 Wis. 169; Blaeser *v.* Milwaukee Mech. Mut. Ins. Co., 37 Id. 31, s. c., 19 Am. Rep. 747); and by DILLON, J., in the U. S. Circ. Court, Scott *v.* Home Ins. Co., 1 Dill. C. Ct. 105; see also Huchberger *v.* Merchants' Fire Ins. Co., 4 Biss. C. Ct. 265, s. P., in other issues; (Agnew *v.* Farmers' Mutual Protective Fire Ins. Co., 95 Wis. 445, 70 N. W. Rep. 554; Knopke *v.* Germantown Farmers' Mutual Ins. Co., 99 Wis. 289, 74 N. W. Rep. 795). *Contra*, and requiring proof beyond reasonable doubt, are decisions in *England*, (Thurtell *v.* Beaumont, 1 Bing. 339, Steph. Dig. Ev. 98); *Illinois*, (McConnell *v.* Delaware, &c. Ins. Co., 18 Ill. 228); and *Ohio*, (Lexington Ins. Co. *v.* Paver, 16 Ohio St. 324. So in other civil actions, where the issue involves a charge of crime, etc., the same and some other courts require proof beyond reasonable doubt. *Indiana*, (Wonderly *v.* Nokes [Slander], 8 Blackf. 589. Compare Bissel *v.* West, 35 Ind. 54); *Iowa*, (Ellis *v.* Lindley [Slander], 38 Iowa, 461; Fountain *v.* West [Libel], 23 Id. 1); *Missouri*, (Polston *v.* See [Slander], 54 Mo. 291); *New York*, (Clark *v.* Dibble [Slander], 16 Wend. 601; Hopkins *v.* Smith [Slander], 3 Barb. 592, 602); *New Jersey*, (Berckmans *v.* Berckmans [Charge of Adultery in Divorce], 17 N. J. Eq. 453; Taylor *v.* Morris [Usury], 22 Id. 606); *Ohio*, (Strader *v.* Mulvane [Slander], 17 Ohio, 624); *Pennsylvania*, (Steinman *v.* McWilliams [Slander], 6 Penn. St. 170; Gorman *v.* Sutton, 32 Id. 247); *Tennessee*, (Coulter *v.* Stewart [Slander], 2 Yerg. 225); and *Wisconsin*, (Free-

ponderance of evidence is enough,[18]—or whether the jury should be instructed to consider the gravity of the charge, and the legal presumption of innocence,[19] and that the legal evidence must be such as taken together clearly satisfies them,[20]—is still disputed.[21] But in a doubtful case evidence

man *v.* Freeman [Charge of Adultery in Divorce], 31 Wis. 235. Compare Warner *v.* Commonwealth, 2 Va. Cas. 105); and in the *Supreme Court of the United States*, in debt for a statute penalty. Chaffee *v.* U. S., 18 Wall. 516.

[18] As is held in *Alabama*, (Spruil *v.* Cooper [Slander], 16 Ala. 791); *California*, (Ford *v.* Chambers [Fraud], 19 Cal. 143); *Colorado*, (Downing *v.* Brown [Justification in Libel], 3 Col. 591); *Connecticut*, (Munson *v.* Atwood [Felonious Taking], 30 Conn. 102); *Georgia*, (Wright *v.* Hicks [Adulterine Bastardy], 12 Geo. 155); *Indiana*, (Continental Ins. Co. *v.* Jachnichen, 110 Ind. 59, 10 N. E. Rep. 636, 59 Am. Rep. 194); *Maine*, (Knowles *v.* Scribner [Bastardy], 57 Me. 497); (Market, etc., Natl. Bank *v.* Sargent, 85 Me. 348, 27 Atl. Rep. 192, 35 Am. St. Rep. 376; *Missouri*, (Rothschild *v.* American Cent. Ins. Co. [Insurance], 62 Mo. 356; Marshall *v.* Thames Fire Ins. Co., 43 Id. 586); *New York*, (Weir *v.* Ætna Ins. Co., 91 Hun, 217, 36 N. Y. Supp. 216); *North Carolina*, (Blackburn *v.* St. Paul F. & M. Insurance Co., 116 N. C. 821, 21 S. E. Rep. 222); and *Wisconsin*, (Blaeser *v.* Milwaukee Mech. Mut. Ins. Co., 37 Wis. 31, s. c., 19 Am. Rep. 747); (Agnew *v.* Farmers' Mutual Protective Fire Ins. Co., 95 Wis. 445, 70 N. W. Rep. 554); (Knopke *v.* Germantown Farmers' Mutual Ins. Co., 99 Wis. 289, 74 N. W. Rep. 785); and see 10 Am. Law Rev. N. S. 642.

[19] As held in Kane *v.* Hibernia Ins. Co., 10 Vroom N. J. 697, s. c., 23 Am. Rep. 239; and Brandish *v.* Bliss [Action for Burning Plaintiff's Barn], 35 Vt. 326.

[20] As held in Kane *v.* Hibernia Ins. Co. (above), and Scott *v.* Home Ins. Co., 1 Dill. C. Ct. 106.

[21] The reasons assigned for following mere preponderance of probabilities are, 1st, that this is the rule in all civil issues; and, 2d, that the issue is really not a question of crime, but of dollars and cents. To this it may be replied that there is no such universal rule in civil cases. It has been a general (but not universal), rule for *juries*, in civil cases at common law, never a general rule for the chancellor nor for juries in feigned issues. Again, how ought the fact that a question of dollars and cents is presented affect the rule? If plaintiff makes a charge of crime for the sake of recovering money, or the defendant sets up a charge of crime to exonerate him from an otherwise admitted obligation, ought either to succeed on evidence that would be inadequate if the State undertook to investigate? On the other hand,

of his previous successive losses, and collection of insurance moneys, may be competent as tending to show that the loss now in question was not accidental.[22]

A defense of this nature does not put character in issue;[23] and plaintiff's general character not having been impeached, evidence of his good character is not admissible in his own behalf.[24] Evidence of another firing in the same town, at the same time, is not alone relevant as tending to prove that it was set by a stranger.[25]

31a. Laws of Other States.

The laws of sister States upon the subject of insurance are merely facts, and must be pleaded and proved as other facts.[26]

ought one to be made to respond in damages for expressing his belief in a charge of crime, because the evidence on which he acted proves insufficient to convict? It seems difficult to justify the proposition that the jury are to proceed on the preponderance of *testimony*, disregarding the presumption of innocence. Compare 2 Whart. Ev., § 1245. For other cases of proof beyond reasonable doubt required in civil actions, see Chaffee *v.* U. S., 18 Wall. 545; The Mohler, 21 Id. 230.

[22] Rex *v.* Gray, 4 Fost. & F. 1102; Steph. Dig. Ev. 19.

Evidence of circumstances throwing light on insured's motives is also admissible. Dwyer *v.* Continental Ins. Co., 63 Tex. 354; Agnew *v.* Farmers' Mutual Protective Fire Ins. Co., 95 Wis. 445, 70 N. W. Rep. 554.

[23] Schmidt *v.* N. Y. &c. Ins. Co., 1 Gray, 529; American F. Insurance Co. *v.* Hazen, 110 Pa. St. 530, 1 Atl. Rep. 605.

[24] Fowler *v.* Ætna Fire Ins. Co., 6 Cow. 673; American F. Insurance Co. *v.* Hazen, 110 Pa. St. 530, 1 Atl. Rep. 605.

[25] Faucett *v.* Nichols, 4 N. Y. Supm. Ct. (T. & C.) 597.

[26] State *v.* Insurance Company of N. A., 115 Ind. 257, 17 N. E. Rep. 574; Union Central Life Ins. Co. *v.* Pollard, 94 Va. 146, 26 S. E. Rep. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271.

Where a policy of marine insurance is to be performed in California, a clause in the policy "warranted free from all average and salvage," is governed by the law of California, the place of performance. Progress S. S. Co. *v.* St. Paul Fire & Marine Ins. Co., 146 Cal. 279, 79 Pac. Rep. 967.

II. RULES PECULIARLY APPLICABLE TO MARINE INSURANCE

32. Interest.

The registry is competent [27] but not conclusive [28] evidence of ownership. A copy of a register from the proper department of the United States where the original is required by the act of Congress to be filed, duly certified, is proof of the register; and proof that there was a register, with very slight evidence that it was on board during the voyage, is *prima facie* proof that the vessel was duly documented.[29]

Interest in freight is proved by showing an interest in the ship, founding an interest in its freight, and then a shipment or other act or contract sufficient to give that interest in the particular freight in question.[30]

33. Warranties.

In general the performance of an express warranty in marine insurance is said to be a condition precedent, to be averred and proved by plaintiff; [31] but if no question arises

[27] 2 Pars. Mar. Ins. 512. *Contra*, 2 Phil. 657.

But in an action to recover a premium paid by one who had no insurable interest, it was held that the register is not even *prima facie* evidence for the plaintiff to show that it stood in the name of others. Sharp *v.* U. S. Ins. Co., 14 Johns. (N. Y.) 201.

[28] Draper *v.* Commercial Ins. Co., 21 N. Y. 378, rev'g 4 Duer, 234.

[29] Pacific Ins. Co. *v.* Catlett, 4 Wend. 75, affi'g 1 Id. 561. Compare U. S. Rev. St., §§ 882, 4131–4195; Catlett *v.* Pacific Ins. Co., 1 Paine, 594; Code Civ. Pro., §§ 944, 945.

[30] 2 Pars. Mar. Ins. 515.

The owners of a vessel sailing under charter party have an insurable interest in the freight. Hodgson *v.* Miss. Ins. Co., 2 La. 341.

[31] 2 Pars. Mar. Ins. 510; Craig *v.* U. S. Ins. Co., 1 Pet. C. Ct. 410; Wilson *v.* Hampden, &c. Ins. Co., 4 R. I. 159.

Judge Gray in Phœnix Ins. Co. *v.* McLoon, 100 Mass. 475, stated the rule as follows: "An express warranty in a policy of insurance is a condition precedent, the burden of proving performance of which rests upon the assured. The nature and form of the warranty may affect the amount of evidence to be required

on the warranty,—as where there is warranty "free from average," and no claim as to average is made,—or where the warranty is in terms negative,—such as that certain goods shall not be carried,—affirmative proof of performance is not necessary unless the evidence indicates a breach,[32] or a breach is averred by defendant.

34. Seaworthiness.

Where there is an implied warranty of seaworthiness, parol evidence of the nature of the vessel, etc.—such as that she was known to the insurers to be not constructed for the kind of navigation for which they insured her—is competent for the purpose of showing that such degree of seaworthiness as she was capable of would satisfy the policy.[33]

It is held by high authority that on a marine policy,[34] the insured must aver and prove that the ship was seaworthy when the risk commenced; [35] but slight and general evidence,

of the plaintiff in the first instance; but whether the terms used are affirmative or negative, the warranty is equally a condition precedent, performance of which must be proved by the plaintiff in order to maintain an action on the policy. The rule has accordingly been applied equally to warranties to sail with convoy or with a certain crew, armament or licence and to warranties not to carry a particular kind of merchandise."

See N. Y. Code Civ. Pro., § 533, as to form of pleading.

[32] This, at least, is the opinion of Prof. Parsons. 2 Pars. Mar. Ins. 511.

[33] Paddock-Hawley Iron Co. *v.* Providence-Washington Ins. Co., 118 Mo. App. 85, 93 S. W. Rep. 358; Burges *v.* Wickham, 3 B. & S. 669, 697; Powell Ev. 430; Rosc. N. P. 412.

[34] Compare paragraph 10.

[35] Moses *v.* Sun Mutual Ins. Co., 1 Duer, 159. *Contra*, Paddock *v.* Franklin Ins. Co., 11 Pick. 227 (SHAW, Ch. J.); Rosc. N. P. 411, and cases cited.

In Treat *v.* Union Insurance Co., 56 Me. 231, 96 Am. D. 447, the Court expressed its view thus: "The position assumed by the defendants that the burden of proof was on the plaintiff to show, in the first instance, the seaworthiness of the vessel at the inception of the voyage, and the instruction requested in conformity therewith, were not correct. In the outset, the presumption is that all things are as they should be in that respect. . . . If anything appear in the evidence relating to the manner and circumstances of the loss, to repel that presumption, and change the burden of proof as to seaworthi-

if not contradicted, is sufficient, and shifts the burden upon the insurer.[36] Evidence that inability of the ship to perform its voyage became evident in port,[37] or soon after leaving port, and that it foundered without stress of weather, or other apparent and adequate cause of injury, raises a legal but not conclusive presumption of unseaworthiness.[38] And it is immaterial whether these facts are shown by plaintiff's or defendant's evidence.[39] The presumption thus raised is rebutted by proof that the ship was seaworthy on leaving port, and that it encountered marine perils such as might disable a staunch and well-manned vessel. To carry the question to the jury, it is enough that there is other evidence of the ship's condition and of cause of loss, than the mere fact of sinking in smooth water, tending to show seaworthiness and some peril insured against; and it is not necessary that the jury be able to determine the particular cause of loss if it be within those covered by the policy.[40] The presumption of unseaworthiness, on the other hand, is much strengthened by the length of time that the vessel has been

ness, it would be for the defendant to call attention of the court thereto and request instructions dependent upon the finding by the jury of the facts upon which he relies."

[36] Moses *v.* Sun Mutual Ins. Co., 1 Duer, 159; Martin *v.* Fishing Ins. Co., 20 Pick. 389, 396. The presumption of fact is *prima facie* in favor of seaworthiness, and the burden of proof to the contrary is on the insurer, in an action on a policy of marine insurance, and the same rule applies to other contracts of affreightment. The Warren Adams, 38 U. S. App. 356, 74 Fed. Rep. 413.

[37] Anderson *v.* Morice, L. R. 10 C. P. 58, s. c., 11 Moak's Eng. 252.

[38] Walsh *v.* Washington Ins. Co., 32 N. Y. 427, affi'g 3 Rob. 202; Wright *v.* Orient Mut. Ins. Co., 6 Bosw. 269; Davidson *v.* Burnand, L. R. 4 C. P. 117; Berwind *v.* Greenwich Ins. Co., 114 N. Y. 231, 21 N. E. Rep. 151. *Contra*, Pickup *v.* Thames, &c. Ins. Co., L. R. 3 Q. B. Div. 594. The controversy is whether there is a shifting of the burden of proof or only ground for an inference by the jury.

[39] Paddock *v.* Franklin Ins. Co. (above).

[40] Starbuck *v.* Phenix Ins. Co., 47 N. Y. App. Div. 621, 62 N. Y. Supp. 264, affirmed 166 N. Y. 593, 59 N. E. Rep. 1130; Palmer *v.* Great Western Ins. Co., 116 N. Y. 599, 23 N. E. Rep. 5; Anderson *v.* Morice, L. R. 10 C. P. 58, s. c. 11 Moak's Eng. 252.

at sea, and by former manifestations of weakness and decay by leaking or otherwise.[41] There is no presumption that defects found to exist in the hull during the voyage were produced by a peril of the sea. The burden is on the assured to prove this.[42] Evidence of the performance of other voyages is competent only as they were such, in point of time, etc., as to raise just inferences as to her actual condition at the time in question.[43]

What is a competent crew for the voyage;—at what time they should be on board;—what is pilot ground;—and what the usage of trade, as to the master and crew being on board, when the ship breaks ground for the voyage;—are questions of fact for the jury, admitting of expert testimony.[44] Unusual prolongation of voyage is relevant, but not alone sufficient, evidence of inadequacy of crew.[45]

To testify directly to the question of seaworthiness as a fact, the witness must be an expert.[46] A shipwright may give his opinion, even on facts stated by others.[47]

Seaworthiness is conclusively shown by an admission in the policy.[48]

35. Rating.

The proof of the rating of a vessel consists, not only of testimony as to her construction, materials, age, etc., but

[41] Paddock *v.* Franklin Ins. Co. (above).

[42] Bullard *v.* Roger Williams' Ins. Co., 1 Curt. C. Ct. 148; Talcot *v.* Commercial Ins. Co., 2 Johns. 124.

[43] The Vincennes, 3 Ware, 171.

[44] M'Lanahan *v.* Universal Ins. Co., 1 Pet. 179; Union Insurance Co. *v.* Smith, 124 U. S. 405, 8 S. Ct. 534, 31 L. ed. 497.

[45] The Gentleman, Olc. 110.

[46] Marcy *v.* Sun Ins. Co., 11 La. Ann. 748; Hutchins *v.* Ford, 82 Me. 363, 19 Atl. Rep. 832.

[47] Thornton *v.* The Royal Exch. Ass. Co., 1 Peake, 25; Rose. N. P. 412.

[48] Rose. N. P. 412; Parfitt *v.* Thompson, 13 M. & W. 392.

Other admissions by the insurers may be admissible against them. Thus where, at plaintiff's request, defendant, through its agents, inspected the barge on which the policy had issued, to ascertain whether or not it was seaworthy and then reported to plaintiff that it was seaworthy, on the strength of which report plaintiff was induced to accept the policy and pay

also of the opinion of experts, such as ship-builders and ship-masters and others familiar with the subject. The opinion of the witnesses, as to the rating of a vessel, is but the expression of the result of their examination of her. The rating by official inspectors, with a view to an entry in the books of a company, is evidence of the same character.[49]

36. Shipment.

The shipment of goods insured is usually proved by the captain or any eyewitness. If the captain be dead, the production of the bill of lading and proof of his hand-writing is evidence of the shipment as well as of the interest; but not if he added "contents unknown."[50] A witness to the loading of the goods may refresh his memory by inspection of the bill of parcels, and the receipt given by the drayman who delivered them on board the vessel.[51]

On a valued marine policy, plaintiff need not prove that the whole property was shipped, but it is enough to prove a

the premium, the defendant was thereafter stopped from claiming that the vessel was unseaworthy at the time the policy was issued. Paddock-Hawley Iron Co. *v.* Providence-Washington Ins. Co., 118 Mo. App. 85, 93 S. W. Rep. 358.

[49] Insurance Companies *v.* Wright, 1 Wall. 456. In the case of a vessel in one port, insured at another, the rating at the former is not the criterion, but is competent with other evidence tending to prove her quality and condition. Id.

[50] Rosc. N. P. 408; Haddow *v.* Parry, 3 Taunt. 303. Nor if he be alive. Dickson *v.* Lodge, 1 Stark. 226. *Contra*, Wolf *v.* National, &c. Ins. Co., 20 La. Ann. 583.

An unauthorized bill of lading is not such evidence, where it appears that the master was alive at the time of the trial. Palmer *v.* Great Western Ins. Co., 116 N. Y. 599, 23 N. E. Rep. 5.

[51] Sturm *v.* Atlantic Mut. Ins. Co., 38 Super. Ct. (6 J. & S.) 281. Duplicate receipts for the cases of goods, given and signed by the officer of the vessel who received them, which had been, at the time, compared with the cargobook, lost with the ship, are admissible in evidence to prove the receipt of the cases, though not their contents. Id. See, also, Chapter XVI, paragraphs 36–39 of this vol. A general statement by the plaintiff, admitted in evidence, to the effect that he had the goods put on board the ship, though not evidence of the actual shipment, is not ground for reversal on appeal where other competent evidence was afterward given of the receipt of the merchandise on board. Id.

substantial interest in a subject corresponding to and satisfying the description in the policy. It then devolves on the insurer to show that, either by mistake or design, the whole of the property insured was not put on board, and thus entitle himself to a proportionate deduction from the valuation of the policy.[52]

That a particular line of vessels was exclusively intended as the course of shipment cannot be shown by parol, where the language of the policy is general.[53]

37. The Voyage.

In insurance on a voyage, there must be some evidence of the ship having left port.[54] The time may be proved by the shipping list at Lloyd's [55] or by the log-book of the commander of the convoy under which she is proved to have sailed.[56] If the policy designates the termini, oral evidence is not competent to substitute others,[57] but if a designation of terminus is indefinite, because of the nature of the terminus,[58] or of the voyage and trade itself,[59] oral evidence of the surrounding circumstances, and of usage, is competent.[60] So also of an indefinite period of time; [61] but a definite limit cannot be varied by parol.[62] On a question of reasonableness of delay, the facts should be proved; the letters of the plaintiff's agents, to him explaining the causes, are not competent in his favor, because not part of the *res gestæ*.[63]

38 Weather.

The official registries of a signal service or coast-guard

[52] Atlantic Ins. Co. *v.* Lunar, 1 Sandf. Ch. 91, and cases cited.

[53] N. Y. Fire Marine Ins. Co. *v.* Roberts, 4 Duer, 141. Compare Weston *v.* Emes, 1 Taunt. 115.

[54] Cohen *v.* Hinckley, 2 Camp. 51.

[55] Macintosh *v.* Marshall, 11 M. & W. 116, 125; 1 Greenl. Ev. 13th ed. 236, § 198.

[56] D'Israeli *v.* Jowett, 1 Esp. 427, Rosc. N. P. 410.

[57] Kaines *v.* Knightly, Skin. 54.

[58] Reed *v.* Ins. Co., 95 U. S. (5 Otto) 23, 30.

[59] Vallance *v.* Dewar, 1 Camp. 503, 508.

[60] Reed *v.* Ins. Co. (above).

[61] Chaurand *v.* Angerstein, Peake, 43.

[62] Rosc. N. P. 26.

[63] Langhorn *v.* Allnutt, 4 Taunton, 511.

office, noting the state and changes of weather, kept pursuant to the requirement of law, are competent on production, with proof that they come from the proper official custody, and the oath of the officer keeping them is unnecessary.[64]

39. Loss.

On evidence that the ship sailed apparently in a seaworthy condition, and has never been heard from, the law presumes that the loss was occasioned by a peril of the sea.[65] It is *prima facie* enough to prove that she has not been heard of in the country whence she sailed, without calling witnesses from the port of destination to prove that she never arrived there,[66] or even members of crew who were reported to be saved from the wreck.[67] In respect to the length of time from which this presumption is to arise, each case is to depend upon its own circumstances.[68] In the absence of anything to indicate a special peril, the usual and not the utmost period of the voyage is to be considered.[69] Evidence that when last seen the ship parted from convoy in a storm, will sustain an inference that she perished in that storm.[70] Evidence that after the time which plaintiff now assigns as the time of loss, he procured further insurance[71] or assumed to assign his interest in the ship,[72] is not conclusive against him. The protest of a mariner, even though not competent to prove loss, may be admissible to fix the time.[73] If loss of

[64] The Catherine Maria, L. R. 1 Adm. & Ecc. 53. And see De Armond *v.* Neasmith, 32 Mich. 231; 1 Whart., § 639; 1 Greenl., § 483. See also The Maria das Dorias, 32 L. J. Pr. M. & P. 163, N. Y. Code Civ. Pro., § 944, and pp. 301–305 of this vol.

[65] Paddock *v.* Franklin Ins. Co. (above), Rosc. N. P. 417.

[66] Id.; Twemlow *v.* Oswin, 2 Camp. 85.

[67] Koster *v.* Reed, 6 B. & C. 19.

[68] Reck *v.* Phenix Ins. Co., 130 N. Y. 160, 29 N. E. Rep. 137.

Gordon *v.* Bowne, 2 Johns. 150; Oppenheim *v.* De Wolf, 3 Sandf. Ch. 571. On this subject, see p. 222 of this vol.

[69] Brown *v.* Neilson, 1 Cai. 525.

[70] Warson *v.* King, 4 Camp. 272.

[71] Brown *v.* Neilson, 1 Cai. 525.

[72] Bunten *v.* Orient Ins. Co., 1 Abb. Ct. App. Dec. 257.

[73] Ruan *v.* Gardner, 1 Wash. C.

freight or passage money is in issue, the burden is on plaintiff to give some evidence that it would have been earned but for the casualty,[74] and could not be earned because of the casualty.[75]

Protest, survey,[76] and log-book are not competent in favor of the insured,[77] unless authenticated by the testimony,[78] or called for by the adverse party.[79] Certificates under seal, by United States consuls, of copies of their official documents, are competent in the courts of the United States.[80]

Experienced navigators, as well as shipwrights, are competent to express opinion on questions involving nautical skill, as to the nature and ordinary effects of the perils to which a marine loss is attributed.[81]

40. Barratry.

To establish barratry mere negligence is not enough, but proof of a wrongful act wilfully done by the master, with knowledge of its wrongfulness and constituting a breach of his duty, injurious to the freighters and ship-owners, is sufficient, although the master derived no benefit therefrom.[82]

III. RULES PECULIARLY APPLICABLE TO LIFE AND ACCIDENT INSURANCE

40a. Interest.

The plaintiff in an action on a life insurance policy issued

Ct. 145. Compare Miller *v.* South Carolina Ins. Co., 2 M'Cord, 336.

[74] Ogden *v.* N. Y. Mut. Ins. Co., 4 Bosw. 447.

[75] Id.; Kinsman *v.* N. Y. Mutual Ins. Co., 5 Bosw. 460.

[76] The survey is not essential. Bentaloe *v.* Pratt, Wall. C. Ct. 58; Robinson *v.* Clifford, 2 Wash. C. Ct. 1.

[77] Except to show the fact that they were made. Watson *v.* Ins. Co. of N. A., 2 Wash. C. Ct. 152. Compare Hathaway *v.* Sun Mut. Ins. Co., 8 Bosw. 33.

[78] 2 Pars. Mar. Ins. 520; Howard *v.* Orient Mut. Ins. Co., 2 Robt. 539.

[79] Saltus *v.* Com. Ins. Co., 10 Johns. 487.

[80] U. S. Rev. St., §§ 896, 1707.

[81] Louisville Ins. Co. *v.* Monarch et al., 99 Ky. 578, 36 S. W. Rep. 563; Walsh *v.* Washington Ins. Co., 32 N. Y. 427, affi'g 3 Robt. 202. Compare Cincinnati Ins. Co. *v.* May, 20 Ohio, 211, 223.

[82] Atkinson *v.* Western Ins. Co.,

to him upon the life of another must allege and prove that he had an insurable interest in the life of the person insured.[83]

41. Disease; Death.

Death cannot be proved by the letters testamentary or of administration.[84] It may be presumed from absence without being heard from.[85] It may be proved by the official books of the boards of public officers having cognizance of deaths and casualties, kept pursuant to a requirement of law;[86] and their production, with evidence that they come from the proper official custody, is enough without the oath of the officer keeping them.[87] That the death was by a peril within the policy may be inferred from circumstances.[88]

65 N. Y. 531, 4 Daly, 1. See Voisin *v.* Commercial Mut. Ins. Co., 62 Hun, 4, 16 N. Y. Supp. 410.

[83] Burton *v.* Connecticut Mut. Life Ins. Co., 119 Ind. 207, 12 Am. St. Rep. 405, 21 N. E. Rep. 746.

[84] Page 307 of this vol.; Thompson *v.* Donaldson, 3 Esp. 63.

Proof of death of insured does not have to be made "to a moral certainty;" a preponderance of evidence is sufficient. Fidelity Mut. Ins. Co., Life Ass'n *v.* Wheeler, 22 Sup. Ct. 662, 185 U. S. 308, 46 L. Ed. 922.

For facts had insufficient to prove death, see Nelson *v.* Masonic Mut. Life Ass., 57 N. Y. App. Div. 214, 68 N. Y. Supp. 290.

The company may waive proof of death by an implied admission of liability. Globe Mut. Life Ins. Co. *v.* March, 118 Ill. App. 261.

A denial of liability may amount to a waiver of proof of death. Prudential Ins. Co. *v.* Devoe, 98 Md. 584, 56 Atl. Rep. 809.

[85] Chap. V, § 3 &c. of this vol.

A presumption arises that a man who has been missing and unheard of for seven years, is dead; but there is no presumption as to the time of death of such a person. But where one, "steady in his habits, successful in his profession or business, contented and respected, having a fixed residence and pleasant domestic relations, suddenly disappears, and no tidings of him are received, such circumstances, if satisfactory to the jury, may warrant them in finding his death at or about the time of his disappearance." Spahr *v.* Mut. Life Ins. Co., 98 Minn. 471, 108 N. W. Rep. 4.

[86] Wallace *v.* Cook, 5 Esp. 117. The verdict rendered by a coroner's jury at an inquest made over the body of a deceased person is admissible in evidence in a suit to recover upon a certificate of insurance held by him. Grand Lodge I. O. M. A. *v.* Wieting, 168 Ill. 408, 48 N. E. Rep. 59.

[87] 1 Whart. Ev., § 639.

[88] See Rosc. N. P. 437; Tisdale

Any observer of ordinary understanding is competent to testify whether one appeared sick or well.[89] Witnesses who had known the subject of insurance intimately down to the period when the policy was obtained, are competent to testify to his health and constitution.[90] But a photograph is not competent evidence for the purpose of showing his healthy appearance.[91]

Under the New York statute,[92] by which communications to physicians, clergymen and attorneys are to a certain ex-

v. Conn. Mut. Life Ins. Co., 26 Iowa, 170, 176.

[89] Higbie *v.* Guardian Mut. Life Ins. Co., 53 N. Y. 603; Milton *v.* Rowland, 11 Ala. 732. Where the agent's certificate that the applicant was a first-class risk, was appended to the application and declaration, and the latter papers were referred to as part of the plea,—*Held* that the certificate was competent against the insurers. Ins. Co. *v.* Mahone, 21 Wall. 152, 155.

[90] Rawls *v.* Am. Mut. Life Ins. Co., 27 N. Y. 282, affi'g 36 Barb. 357. Testimony of a physician in relation to what an applicant for insurance said about having a particular disease, and the physician's conclusion from such examination, and his statement in his written report thereof, are admissible as tending to prove that the applicant was free from the disease in question. Brown *v.* Metropolitan Life Ins. Co., 65 Mich. 306, 8 Am. St. Rep. 894, 32 N. W. Rep. 610.

[91] Brown *v.* Metropolitan Life Ins. Co., 65 Misc. 306, 8 Am. St. Rep. 894, 32 N. W. Rep. 610.

[92] 2 N. Y. Code Civ. Pro., §§ 833, etc. The statute includes all knowledge acquired from the patient himself, from the statements of others surrounding him, and from observations of his appearance and symptoms. Grattan *v.* Metropolitan Life Ins. Co., 80 N. Y. 281. It includes information received through the sense of sight, as well as that communicated through the ear. (Id.) But the prohibition applies only to information the physician acquires in attending a patient, not to information obtained by him in any other way. Fisher *v.* Fisher, 129 N. Y. 654, 29 N. E. Rep. 951. And the statute does not exclude evidence that the person on whose life the policy was issued was the patient of the physician, and that the physician was in attendance on him. Patten *v.* United Life & Acc. Ins. Assoc., 133 N. Y. 450, 453, 31 N. E. Rep. 342. The death of the patient does not remove the prohibition. Grattan *v.* Metropolitan Life Ins. Co., 80 N. Y. 281. And a waiver by the insured does not render competent the testimony of a physician who attended upon a relative, as such waiver is personal to the insured and cannot operate upon any one else. Davis *v.* Supreme Lodge, 35 App. Div. (N. Y.) 354. Any party

tent privileged, a medical attendant of the insured is not competent against objection to testify to information acquired as necessary to enable him to prescribe, whether it be received from the patient himself, from observation or from the statement of other attendants. And affirmative evidence that it was acquired for the purpose of prescribing is not necessary, if the relationship raise a presumption.[93]

Representations as to the cause of the death of the insured, contained in proofs of death furnished by the beneficiary of a life insurance policy to the company, operate as admissions of a material fact against interest, and while not conclusive, are competent *prima facie* evidence against the beneficiary upon an issue as to the cause of death raised in an action upon the policy.[94]

to an action can object to evidence coming within the prohibition, and the objection can only be waived by the patient himself. Westover *v.* Ætna Life Ins. Co., 99 N. Y. 56, 1 N. E. Rep. 104. The waiver, by the applicant, in an application for membership in a fraternal beneficiary society, of the provisions of law preventing disclosures by a physician, is not against public policy, and if made part of a contract of life insurance entered into when the statute authorized such a waiver without restriction as to time, is not affected by the subsequent amendment of the statute, requiring the waiver to be made upon the trial, but remains binding upon the beneficiary when seeking to recover upon the contract. Foley *v.* Royal Arcanum, 151 N. Y. 196, 45 N. E. Rep. 456.

[93] Edington *v.* Mut. Life Ins. Co., 67 N. Y. 185, rev'g 5 Hun, 1. In this case evidence as to the health or disease of an applicant in June was held incompetent on the question of his condition in August following, but this is a questionable ruling, unless justified by the pleadings. Mode of proving disease of insured not disclosed to company. Mulliner *v.* Guardian Mut. Life Ins. Co., 1 Supm. Ct. (T. & C.) 448. It is required that it should be shown, in the first instance by formal proof, that the information was necessary to enable the physician to prescribe. Grattan *v.* Metropolitan Life Ins. Co., 80 N. Y. 281. But see People *v.* Koerner, 154 N. Y. 355, 48 N. E. Rep. 730.

Under a similar statute in Indiana it has been held that the physician could testify to the fact of his employment and the rendition of services. Haughton *v.* Ætna Life Ins. Co., 165 Ind. 32, 73 N. E. Rep. 592, 74 N. E. Rep. 613.

[94] Hanna *v.* Connecticut Mut. Life Ins. Co., 150 N. Y. 526, 44 N. E. Rep. 1099.

Statements of third persons in

42. Suicide and Insanity.

Where the defense to an action on a life policy is suicide, the burden of proof to establish the same is on the defendant.[95] The surrounding circumstances, and the declarations of deceased made shortly before death and indicating intent, are competent;[96] but not the mere fact that he was an atheist.[97] On doubtful facts, the presumption is against suicide.[98]

the proofs of death, as for example, certificates of physicians, are admissible as part of the proofs, but are not conclusive. Modern Woodmen of America *v.* Davis, 84 Ill. App. 439.

The rule applies even though the attending physician was ignorant as to some of the facts certified. Chinnery *v.* U. S. Industrial Ins. Co., 15 N. Y. App. Div. 515, 44 N. Y. Supp. 581.

[95] Ross-Lewin *v.* Germania Life Ins. Co., 20 Colo. App. 262, 78 Pac. Rep. 305; Ingraham *v.* National Union, 103 Iowa, 395, 72 N. W. Rep. 559.

Where, in an action on an accident policy, the defendant pleads the suicide of the insured and fails to prove the plea, the plaintiff is not thereby relieved of the burden of proving that the death was accidental even if not suicidal. Laessig *v.* Travelers' Protective Ass'n, 169 Mo. 272, 69 S. W. Rep. 469.

Suicidal intent must be shown by facts which will not admit of a contrary construction. Brignac *v.* Pac. Mut. Life Ins. Co., 112 La. 574, 36 So. Rep. 595, 66 L. R. A. 322.

[96] Continental Ins. Co. *v.* Delpeuch, 82 Pa. St. 225. See also Newton *v.* Mutual Benefit Life Ins. Co., 2 Dill. 154, and cases cited.

In an action on a life insurance policy, a verdict of the coroner's jury is not admissible to prove that deceased committed suicide. Wasey *v.* Travelers' Ins. Co., 126 Mich. 119, 85 N. W. Rep. 459.

For facts held sufficient to prove suicide of the insured, see Fidelity Mut. L. Ins. Co. *v.* Blain, 144 Mich. 218, 107 N. W. Rep. 877; Pagett *v.* Conn. Mut. Life Ins. Co., 55 N. Y. App. Div. 628, 66 N. Y. Supp. 804.

[97] Gibson *v.* Am. Mut. Life Ins. Co., 37 N. Y. 580.

[98] Union Casualty, etc., Co. *v.* Goddard, 25 Ky. Law Rep. 1035, 76 S. W. Rep. 832.

For facts held insufficient to rebut the presumption, see Boynton *v.* Equitable Life Assur. Soc., 105 La. 202, 29 So. Rep. 490, 52 L. R. A. 687.

The presumption is one both of law and fact. Ætna Life Ins. Co. *v.* Milward, 118 Ky. 716, 82 S. W. Rep. 364, 26 Ky. L. 589, 68 L. R. A. 285; Mallory *v.* Travelers' Ins. Co., 47 N. Y. 52. Evidence that the deceased retired at bed time, and at midnight, the report of a pistol be-

Self-destruction being shown, there is no presumption of law that it was caused by insanity.[99] The burden is on plaintiff to show that the act was in consequence of insanity, and that the mind of the deceased was so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing.[1] But although the act of self-destruction raises no presumption of insanity, yet such act, and the mode and manner of its accomplishment, may be considered, together with all the facts and circumstances in determining the question of insanity of the

ing heard, was found shot in the mouth, and the pistol lying near, is not sufficient as matter of law to prove that he died by his own hand, and prevent a verdict for plaintiff. Phillips *v.* Louisiana Equitable Life Ins. Co., 26 La. Ann. 404, s. c., 21 Am. Rep. 549. Where the evidence as to the death being accidental or suicidal is so clearly balanced as to leave the question in doubt, the presumption is in favor of the theory of accidental death. Mutual Life Ins. Co. *v.* Wiswell, 56 Kan. 765, 44 Pac. Rep. 996; Connecticut Mut. Life Ins. Co. *v.* McWhirter, 44 U. S. App. 492, 73 Fed. Rep. 444; Travellers' Ins. Co. *v.* McConkey, 127 U. S. 661, 667.

[99] Terry *v.* Life Ins. Co., 1 Dill. Cir. Ct. 403, 15 Wall. 580.

Suicide is a defense to a suit on an insurance policy if, and only if, the deceased was sane at the time of his suicide. Ritter *v.* Mutual Life Ins. Co., 18 Sup. Ct. 300, 169 U. S. 139, 42L. Ed. 693.

[1] Id.; Insurance Co. *v.* Bodel, 95 U. S. (5 Otto) 232, 240.

"The law is that if the insured intentionally took his own life, at a time when his mind was so far gone as to render him unconscious that he was taking his life, the act will not be deemed his, but will be regarded in law as an accidental killing. The converse is equally true, —that although his mind may have been deranged, still if he had mind enough to know that the act would probably result in his death, and if he inflicts it with that intention, it is his act in law, for which the company is not responsible unker the clause of this policy." Masonic Life Ass'n *v.* Pollard, 121 Ky. 349, 89 S. W. Rep. 219, 28 Ky. Law Rep. 301, 123 Am. St. Rep. 198.

If at the time in question the insured "was insane and his reasoning faculties were so impaired that he was not able to understand the moral character, the general nature, consequence and effect of the act he was about to commit, or if he was impelled thereto by an insane impulse which he did not have power to resist, then his act was not suicide, within the sense of the term as used in the application and policy of insurance." Central Mut. Life Ins. Ass'n *v.* Anderson, 195 Ill. 135, 62 N. E. Rep. 838.

deceased.[2] An adjudication of insanity, followed by the commitment of the patient to an asylum for the insane, does not create a conclusive presumption of the continuance of the insanity after the discharge of the patient from the asylum.[3]

The testimony of persons not experts, as to the conduct, manner and appearance of the subject, and the impressions thereby made on them (within limits already stated), is competent to go to the jury on the question of his insanity.[4] Although a skilled witness cannot be asked for his inference whether a suicide was caused by insanity, he may be asked to state, from his experience and reading and acquaintance with the mental condition of the deceased, what effect, if any, a specified disease would have upon the deceased as to his power to control his actions or resist any impulse with which he might be seized.[5]

43. Declarations and Admissions of the Subject.

In the case of a policy issued to one person on the life of another, evidence of the declarations and admissions of the latter are competent against the former, when offered in connection with evidence of facts showing the state of health, and if made concurrently with the fact, and at or prior to the application, and not too remote in point of time from it, and shown to be a part of the *res gestæ* of the fact exhibiting the condition of health which they ultimately tend to explain.[6]

[2] Grand Lodge I. O. M. A. *v.* Wieting, 168 Ill. 408, 48 N. E. Rep. 59.

[3] Mutual Life Ins. Co. *v.* Wiswell, 56 Kan. 765, 44 Pac. Rep. 996.

[4] Insurance Co. *v.* Bodel, 95 U. S. (5 Otto) 232, 238; Mutual Life Ins. Co. *v.* Leubrie, 38 U. S. App. 37, 71 Fed. Rep. 843. Pages 365–366 of this vol.

[5] Koenig *v.* Globe Mut. Life Ins. Co., 10 Hun, 558. Whether the suicide of a person hypothetically regarded as subject to melancholia might be attributed to the disease is not a question for an expert witness, but for the jury. Van Zandt *v.* Mut. Benefit Life Ins. Co., 55 N. Y. 169. As to the mode of proving insanity generally, see p. 355, &c. of this vol.

[6] Edington *v.* Mut. Life Ins. Co., 67 N. Y. 185, and cases cited, rev'g 5 Hun, 1.

Under this rule, statements by the insured, antedating the policy

And whenever the bodily or mental feelings are relevant, declarations of the person himself, as to his then present condition, ills, pains and symptoms, to whomsoever made (as distinguished from narratives of past condition), are competent as part of the *res gestæ*.[7] Except within these limits, such admissions and declarations are incompetent as evidence of the fact declared; unless there be something to show agency, or other ordinary ground for admitting the declarations of third persons. Declarations of the person on whose life the policy issued made after its issue, are not competent against the insured,[8] nor are they competent against his assignee of the policy;[9] but if there be other evidence of the fact, they are admissible (just as are the declarations of strangers communicated to the person whose life was insured),[10] for the purpose of showing his knowledge of the fact, if knowledge is relevant.[11]

and in explanation of contemporary facts, have been held admissible. Houghton *v.* Ætna Life Ins. Co., 165 Md. 32, 73 N. E. Rep. 592, 74 N. E. Rep. 613.

[7] Insurance Co. *v.* Mosley, 8 Wall. 397; Ashbury Life Ins. Co. *v.* Warren, 66 Me. 523, s. c., 22 Am. Rep. 590.

[8] Swift *v.* Mass. Mut. Life Ins. Co., 63 N. Y. 186, 193, rev'g 3 Hun, 551; Edington *v.* Mut. Life Ins. Co., 67 N. Y. 185, 193, rev'g 5 Hun, 1; Yore *v.* Booth, 110 Cal. 238, 42 Pac. Rep. 808. Where the identity of the beneficiary in an insurance policy is clearly established, the declarations of the insured, made after taking out the policy, as to whom he had made beneficiary, are immaterial. Hogan *v.* Wallace, 166 Ill. 328, 46 N. E. Rep. 1136.

[9] Edington *v.* Mut. Life Ins. Co., 67 N. Y. 185, rev'g 5 Hun, 1; Muncey *v.* Sun Insurance Office, 109 Mich. 542, 67 N. W. Rep. 562. The reason is that after the contract of insurance has been effected, the subject of insurance has no such relation to the holder of the policy as gives him power to destroy or affect it by unsworn statements. An offer of evidence of such declarations should show that they were made before the contract of insurance was effected. Edington *v.* Ætna Life Ins. Co., 13 Hun, 543, 548. Admissions of insured that he had forfeited a policy taken out for another's benefit, are competent

[10] McNair *v.* National Life Ins. Co., 13 Hun, 144.

[11] Dilleber *v.* Home Life Ins. Co., 69 N. Y. 256.

Thus the rule enunciated in § 4 of this chapter, that a written application is presumed to contain the representations which induced

44. Accident Insurance.

An accident insurance company has the burden in an action upon a policy, of proving that the injury to plaintiff, shown to be the result of an accident, was within some exception named in the policy.[12] The accident itself, and the

for defendant, in a suit by the beneficiary upon the policy; where the insured never surrendered control of the policy and under its terms possessed a power of revocation and substitution of a new beneficiary. Life Ass'n *v.* Winn, 96 Tenn. 224, 33 S. W. Rep. 1045.

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it, rendering prior or subsequent oral representations incompetent, is applicable where the company sets up as a defense the misrepresentation of the insured of his age and tries to prove it by his declarations in a former application. Yore *v.* Booth, 110 Cal. 238, 42 Pac. Rep. 808, 52 Am. St. Rep. 81.

But after proof, tending to show that the insured had misrepresented his age, in the application, such declarations are admissible to show that he had knowledge of his age. Union Central Life Ins. Co. *v.* Pollard, 94 Va. 146, 26 S. E. Rep. 421, 64 Am. St. Rep. 715, 36 L. R. A. 271.

[12] Janison *v.* Continental Casualty Co., 104 Mo. App. 306, 78 S. W. Rep. 812; Thomas *v.* Masons' Fraternal Acc. Ass'n 71 N. Y. S. 692, 64 App. Div. 22; Glass *v.* Masons' Fraternal Acc. Ass'n, 112 F. 495 (voluntary exposure to unnecessary danger); Rustin *v.* Standard Life, etc., Co., 58 Nebr. 792, 79 N. W. Rep. 712, 46 L. R. A. 253, 76 Am. St. Rep. 136 (voluntary overexertion); Continental Casualty Co. *v.* Johnson, 74 Kan. 129, 85 Pac. Rep., 545, 6 L. R. A. U. S. 609, 118 Am. St. Rep. 308, 10 Ann. Cas. 851 (sunstroke); Loesch *v.* Union Casualty, etc., Co., 176 Mo. 654, 75 S. W. Rep. 621, (death resulting from injury rather than natural causes); Union Casualty, etc., Co. *v.* Goddard, 76 S. W. Rep. 832, 25 Ky. Law Rep. 1035 (hunting as an exception); Hess *v.* Preferred Masonic Mut. Acc. Assn., 112 Mich. 196, 70 N. W. Rep. 460. But see Ætna Ins. Co. *v.* Vandecar, 57 U. S. App. 455, 86 Fed. Rep. 282. "Under the issue presented by the general denial in the answer it was incumbent upon the plaintiff to show, from all the evidence, that the death of the insured was the result, not only of external and violent, but of accidental means. The policy provides that the insurance shall not extend in case of death or personal injury, unless the claimant under the policy establishes by direct and positive proof that such death or personal injury was caused by external violence and accidental means. Such being the contract, the court must give effect to its provisions according to the only meaning of the words used, leaning, however—where the words do not

manner of it, occurring without the presence of witnesses, may be proved by testimony to the declarations of the deceased, made when found in suffering, that he had immediately previous been injured in a specified way.[13] There is a presumption against suicide; and evidence that death must have been caused either by a cause within the policy or by the suicidal act of the deceased, makes a *prima facie* case against the insurers.[14]

clearly indicate the intention of the parties—to that interpretation which is most favorable to the insured." Travellers' Ins. Co. *v.* McConkey, 127 U. S. 661, 666.

[13] Ins. Co. *v.* Mosley, 8 Wall. 405. As to when declarations of the deceased of his intentions when leaving home are admissible, see Landon *v.* Preferred Accident Ins. Co., 43 N. Y. App. Div. 487.

[14] Mallory *v.* Travellers' Ins. Co., 47 N. Y. 52.

The burden is on the plaintiff to prove an accident, and proof of death alone is not sufficient for this purpose. Laessig *v.* Travelers' Protective Ass'n, 109 Mo. 272, 69 S. W. Rep. 469.

CHAPTER XXVII

ACTIONS ON BONDS, COVENANTS, AND OTHER SEALED INSTRUMENTS

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IV. Covenants for title.
33. Implied covenants.
34. Covenant of warranty.
35. — of seizin and right to convey.
36. — against incumbrances.
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I. GENERAL RULES

1. The Making of the Contract.

Execution and delivery by the party to be charged, if not admitted, must be proved, before the instrument can be put in evidence. If the contract is several or joint and several, proof of execution by those who are parties to the action

is enough, without proof of the signature of the others.[15] Under the new procedure, evidence to charge one only, even jointly liable, may be available against him.[16] Plaintiff may prove that a name written at the left hand, in the place proper for a subscribing witness, was the signature of a party.[17]

2. Execution.

The signer, though competent and available as a witness, need not be called. Proof of signature of the party sought to be charged is *prima facie* sufficient to show execution by him, without other proof of genuineness,[18] unless there are alterations not noted in an attestation clause, such as under rules already stated[19] require explanation.

Execution may be proved by official certificate of acknowledgment or proof,[20] though made since the action was

[15] Sandford *v.* Handy, 23 Wend. 269; Conard *v.* The Atlantic Insurance Co., 1 Pet. 386, 451.

[16] Chapter VII, paragraphs 1 and 2, of this vol.

[17] Richardson *v.* Boynton, 12 Allen, 138.

The fact that one obligor signs on the right side of the bond and another on the left, does not impair the validity of the instrument. Steininger *v.* Hoch, 39 Pa. 263, 80 Am. Dec. 521.

[18] Wing *v.* Cooper, 37 Vt. 169, 176. Identity of name is *prima facie* evidence of identity of person, and is sufficient proof of the fact, in the absence of all evidence to the contrary. Wilson *v.* Holt, 83 Ala. 528, 3 Am. St. Rep. 768, 3 So. Rep. 321.

In an action on a bond, it appeared that defendant's intestate, who could neither read nor write, had executed the bond and made payments thereon during her lifetime; it was held that such evidence was sufficient to go to the jury as tending to show that the instrument had been "signed, sealed and delivered" by the deceased obligor. Moose *v.* Crowell, 147 N. C. 551, 61 S. E. Rep. 574.

[19] Chapter XXI, paragraph 31, of this vol.

[20] Morris *v.* Wadsworth, 17 Wend. 103, affi'd in 10 Paige, 109; Bowen *v.* Irish Presb. Ch., 6 Bosw. 245; Krom *v.* Vermillion, 143 Ind. 75, 41 N. E. Rep. 539. And see United States *v.* Wilkinson, 12 How. U. S. 246; Cameron *v.* Culkins, 44 Mich. 531, 7 N. W. Rep. 157. Where the official character of the officer is given in the body of his certificate, there is no need for him to sign officially, by significant letters

brought,[21] and where there is an acknowledgment it is not necessary to call the subscribing witness.[22] The certificate of acknowledgment is received without proof of the official character of the officer making it.[23] Parol evidence is admissible to prove that the certificate was executed on a date other than that appearing on the face of it.[24] The burden of proving want of due execution of an instrument admittedly signed, and bearing a certificate of acknowledgment admittedly in due form is upon the party attaching.[25]

appended to his name, or otherwise. Hefferman *v.* Harvey, 41 W. Va. 766, 24 S. E. Rep. 592.

A certificate of acknowledgment in proper form makes a *prima facie* case in favor of the execution of the instrument, not only as to third persons, but also as to the parties to the instrument. Carver *v.* Carver, 97 Ind. 497.

Where a deed purporting to have been executed by a husband and wife, was not acknowledged by the husband and his execution of it was not otherwise proved, it was not entitled to record as his deed, and a certified copy is not admissible as evidence of his execution of it. Swafford *v.* Herd, 23 Ky. Law Rep. 1556, 65 S. W. Rep. 803.

[21] Pages 26–28 of this vol.

[22] Simmons *v.* Havens, 101 N. Y. 427, 5 N. E. Rep. 73.

[23] Trustees of Canandaigua Academy *v.* McKechnie, 90 N. Y. 618, 629; Thurman *v.* Cameron, 24 Wend. 91, 92.

[24] Merrill *v.* Sypert, 65 Ark. 51, 44 S. W. Rep. 462. A justice of the peace is a competent witness to impeach a certificate of acknowledgment signed by him; and his testimony may be received to prove that the grantor never appeared before him nor acknowledged the deed. Pickens *v.* Kinsely, 29 W. Va. 1, 6 Am. St. Rep. 622, 11 S. E. Rep. 932.

[25] People *v.* Cogswell, 113 Cal. 129, 141, 45 Pac. Rep. 270; Nichols *v.* Mase, 94 N. Y. 160; Green *v.* Maloney, 12 Del. 22, 30 Atl. Rep. 672; Langenbeck *v.* Louis, 140 Cal. 406, 73 Pac. Rep. 1086.

It is a well settled rule, as well in those states where such a certificate is held or declared to be *prima facie* evidence only as where it is held conclusive in the absence of fraud or duress, that, to impeach the certificate, the evidence must be cogent, clear and convincing. The unsupported testimony of the grantor is not sufficient to overcome a certificate regular on its face, especially where the certificate is supported by the officer who took the acknowledgment or by other competent evidence. Adams *v.* Smith, 11 Wyo. 200, 70 Pac. Rep. 1043.

Where a deed is admissible as an ancient document, the filing of an affidavit of forgery, as provided by statute, does not shift

A defective certificate of acknowledgment or proof does not preclude common-law evidence of execution.[26]

But if there is no sufficient acknowledgment or proof certified, and there is a subscribing witness,[27] he must be called,[28] or his absence must be accounted for unless otherwise provided by statute as in New York.[29] The law recognizes the attestation clause, signed by a witness, as a legitimate auxiliary, aiding what would otherwise be fatal defect of memory. If the witness does not affirmatively impeach the execution or delivery, his testimony to the genuineness of the signature and of his own attestation of it, is sufficient to go to the jury.[30] If he leaves the ques-

the burden of proof from the attacking party; but where a deed, inadmissible as an ancient document, is admissible as a registered instrument, the filing of an affidavit of forgery casts the burden of proof upon the party offering the deed. Leverett *v.* Tift, 6 Ga. App. 90, 64 S. E. Rep. 317.

[26] Borst *v.* Empie, 5 N. Y. (1 Seld.) 33.

Although the certificate of acknowledgment of execution is defective and the record therefore ineffectual, evidence that the deed was recorded is admissible on the issue as to delivery of the deed. Heintz *v.* O'Donnell, 17 Tex. Civ. App. 21, 42 S. W. Rep. 397.

[27] Who signed as such at time of execution or delivery (Henry *v.* Bishop, 2 Wend. 575; Hollenback *v.* Fleming, 6 Hill, 303. *Contra*, Jackson *v.* Phillips, 9 Cow. 94) or attested on the present request of the parties (Munns *v.* Dupont, 3 Wash. C. Ct. 31). It may be shown that a name written at the right hand, as if that of a party, was in fact that of a witness (Richardson *v.* Boynton) above, or fictitious or unauthorized (chapter XXI, paragraph 4, of this vol.). There is no legal presumption that the obligor and one of the subscribing witnesses are the same from identity of name. Jackson *v.* Christman, 4 Wend. 277.

[28] Story *v.* Lovett, 1 E. D. Smith, 153; Willoughby *v.* Carleton, 9 Johns. 136; Fletcher *v.* Perry, 97 Ga. 368, 23 S. E. Rep. 824; Jones *v.* State, 113 Ala. 95, 21 So. Rep. 229. But where it is sought to disprove the execution or, in other words, prove that the deed is a forgery, it is not necessary to call or account for the alleged subscribing witnesses. Goza *v.* Browning, 96 Ga. 421, 422, 23 S. E. Rep. 842.

[29] In that state the necessity for calling a subscribing witness is dispensed with except where such witness is necessary to the validity of the instrument. Code Civ. Pro., § 961b.

[30] 2 Greenl. Ev., p. 277, § 295;

tion in doubt, other evidence of execution becomes admissible.[31]

The absence of the subscribing witness may be accounted for by showing that he is not living, or not competent to testify, or not within the jurisdiction of the court, or not to be found with due diligence;[32] thereupon his handwriting must be proved.[33] The fact that the execution was abroad raises a presumption that the witness is beyond jurisdiction.[34] If there were several subscribing witnesses, it is enough to produce either who can prove the instrument;[35] but the absence of all must be accounted for before it can be proved by handwriting,[36] and then it may be proved by the handwriting of either.[37] Under these rules, due proof of the handwriting of all the witnesses is *prima facie* evidence of execution,[38] without proof of the handwriting of the

Hall *v.* Luther, 13 Wend. 491, and cases cited; Hemphill *v.* Dixon, Hempst. 235.

"If such witness prove his own handwriting and yet may not be able to prove anything more, that alone will be sufficient to prove the execution by the party to be charged; and if, as here, non-execution is alleged, the duty devolves on the defendant to show that fact." Green *v.* Maloney, 12 Del. 22, 30 Atl. Rep. 672.

[31] Chapter XXI, paragraph 4, of this vol.

[32] Jackson *v.* Waldron, 13 Wend. 178; Story *v.* Lovett (above).

As to what constitutes due diligence see Delony *v.* Delony, 24 Ark. 7; Gallager *v.* London Assur. Corp., 149 Pa. 25, 24 Atl. Rep. 115.

[33] Id.; Clarke *v.* Courtney, 5 Pet. 319.

[34] Chapter XXI, paragraph 4, of this vol.; McMinn *v.* Whelan, 27 Cal. 300, 310.

[35] 3 Abb. N. Y. Dig. new ed. 134, 135.

[36] Id.; Jackson *v.* Christman, 4 Wend. 277.

[37] Van Rensselaer *v.* Jones, 2 Barb. 643. When the grantor and all the subscribing witnesses are residents in a foreign country, proof of its execution by proof of the handwriting of the subscribing witnesses is sufficient. Hanrick *v.* Patrick, 119 U. S. 156. When a deed is attested by two subscribing witnesses, and one of the witnesses is proven to be dead, and the signature of the other witness, who resides out of the state, is clearly proved, the execution of the deed is sufficiently shown to render it admissible in evidence. Smith *v.* Keyser, 115 Ala. 455, 22 So. Rep. 149.

[38] Murdock *v.* Hunter, 1 Brock. Marsh. 135; Clarke *v.* Courtney (above); United States *v.* Boyd, 8 App. Cas. (D. C.) 440. Whether,

party.[39] If the witness' handwriting cannot be proved, then, after preliminary evidence of diligent and fruitless exertions to prove his handwriting, proof of the handwriting of the party may be given.[40]

Evidence of the handwriting of the party, though not competent as a substitute for proof by testimony or handwriting of subscribing witness, is competent in corroboration of it.[41]

The mode of proving handwriting has already been fully stated.[42] An ancient deed may be admitted in evidence, without direct proof of its execution, if it appears to be of the age of at least thirty years, or it is found in proper custody, and either possession under it is shown, or some other corroborative evidence of its authenticity, freeing it from all just grounds of suspicion.[43] But the rule appears

to impair the effect of proof of witness' handwriting, evidence of his declarations that he had never attested the instrument is competent. Compare Neely *v.* Neely, 17 Penn. St. 227, and p. 347 of this vol, note 5, and 1 Whart. Ev., § 731, citing Hobart *v.* Dryden, 1 Mees & W. 615. See also United States *v.* Boyd (above).

[39] Unless, perhaps, when there are very suspicious circumstances, when proof of the identity of the grantor may be also necessary. Brown *v.* Kimball, 25 Wend. 259, rev'g Kimball *v.* Davis, 19 Id. 437. *Contra*, Northrop *v.* Wright, 7 Hill, 476, 493.

[40] Jackson *v.* Waldron, 13 Wend. 178; Clarke *v.* Courtney, 5 Pet. 319; Morgan *v.* Curtenius, 4 McLean, 366, and cases cited. Boswell *v.* Laramie First Natl. Bank, 16 Wyo. 161, 184, 92 Pac. Rep. 624, 93 Pac. Rep. 661.

In some jurisdictions proof of the party's signature may be given without such preliminary evidence. McMinn *v.* Whelan, 27 Cal. 300; Jones *v.* Roberts, 65 Me. 273; Smith Charities *v.* Connolly, 157 Mass. 272, 31 N. E. Rep. 1058; Chator *v.* Brunswick-Balke-Collender Co., 71 Tex. 588, 10 S. W. Rep. 250.

[41] Clarke *v.* Courtney, 5 Pet. 319.

[42] Chapter XXI, paragraphs 6–18.

[43] Kansas City *v.* Scarritt, 169 Mo. 471, 69 S. W. Rep. 283; Stafford *v.* Goldring, 197 Ill. 116, 64 N. E. Rep. 395; New York, etc., R. Co. *v.* Benedict, 169 Mass. 262, 47 N. E. Rep. 1027; Templeton *v.* Luckett, 75 Fed. Rep. 254, 21 C. C. A. 325; Sims *v.* Sealy, 53 Tex. Civ. A. 518, 116 S. W. Rep. 630; Millwell *v.* Phelps (Tex. Civ. A.), 115 S. W. Rep. 891.

If an instrument otherwise admissible as an ancient document

to require some supplementary evidence of genuineness.[44]

is found in the office where it should have been filed, the fact that it was not found in the proper file in the office does not render it inadmissible. Keck *v.* Woodward, 53 Tex. Civ. A. 267, 116 S. W. Rep. 75.

Documents more than thirty years old at the date of the trial are "ancient," although less than thirty years old at the date of the commencement of the suit. Reuter *v.* Stuckart, 181 Ill. 529.

Proof of possession of the subject of the grant is not indispensable to render an instrument admissible as an ancient deed where there is nothing to excite suspicion as to its genuineness. Hodge *v.* Palms, 117 Fed. Rep. 396, 54 C. C. A. 570; Applegate *v.* Lexington & Carter County Mining Company, 117 U. S. 255, 262. One claiming under a deed, forty years old, through several mesne conveyances, may offer the deed in evidence as an ancient deed, though never seen by any but the first grantee to whom it was given. Williams *v.* Conger, 125 U. S. 397.

A deed in the possession of the heirs of the grantor does not come from such custody as to raise a presumption of its execution. Heintz *v.* O'Donnell, 17 Tex. Civ. App. 21, 42 S. W. Rep. 797.

But an ancient deed in the possession of an heir of one of the grantees is admissible in evidence without formal proof of its execution where the various records of the probate court tend to show that the possession and claim of title of the parties to the deed was for a long time in conformity with it. In re Butrick, 185 Mass. 107, 69 N. E. Rep. 1044.

The custody of the grantee's wife is "proper custody," where her possession under it is shown. Reuter *v.* Stuckart, 181 Ill. 529, 54 N. E. Rep. 1014.

The transfer of a land certificate with the name of the grantee left blank when executed, and the grantee's name afterwards inserted, all of which appears from the face of the instrument, does not cast suspicion upon it so as to affect its admissibility in evidence as an ancient instrument. The fact that the signatures to the transfer were traced, if not patent upon the instruments themselves, does not cast such suspicion on them as to bar them from admission as ancient documents. Ward *v.* Cameron, 76 S. W. Rep. (Tex. Civ. App.) 240.

[44] Swafford *v.* Herd, 23 Ky. Law Rep. 1556, 65 S. W. Rep. 803; Templeton *v.* Luckett, 41 U. S. App. 392, 398, 75 Fed. Rep. 254. A copy made in 1837 of a lost certified copy of a power of attorney is admissible in evidence to show that the original power, found and produced in court, was an ancient instrument. Williams *v.* Conger, 125 U. S. 397. A recital in an ancient power of attorney that the

3. Seal.

In addition to the rules as to proof of seal already stated,[45] it should be observed, that the record or a certified copy of the record of an instrument which has been recorded, if evidence under the statute, is competent, for the purpose of showing whether the instrument had a seal or not at the date of record.[46] An expert may express an opinion whether the original instrument shown him bears marks of having had a seal.[47]

4. Sealed Authority.

Where foundation has been laid for secondary evidence, proof of an oral acknowledgment by the defendant that the agent or attorney acted under sealed authority, is competent, and an acknowledgment of having given authority, may,

donor is a citizen raises a presumption of the truth of that fact which can be overthrown only by positive proof. Id.

[45] Chapter XXI, paragraph 5; and as to corporate seal, pp. 122–123.

[46] Follett *v.* Rose, 3 McLean, 332; Gillespie *v.* Reed, Id. 377.

[47] Follett *v.* Rose (above); and see chapter XXI, paragraphs 14 and 15 of this vol.

The absence of a seal cannot be accounted for by parol evidence in the absence of proof of the genuineness of the document. "The genuineness of the seal itself is always determined by the court from inspection, and the seal being genuine, it vouches for the genuineness of the document to which it is attached. But when the seal is not produced no inspection by the court can take place, and the mere testimony of a witness that the wax and seal had been attached to the document could be no substitute for inspection by the court as a means of inferring genuineness of the document." Adams *v.* Wilder, 91 Ga. 562, 18 S. E. Rep. 530.

Where an instrument, signed by two or more parties, bears seals opposite the names of some of the signers but not all, and the instrument contains a recital "given under our hands and seals," a presumption arises that the seal or seals attached were adopted by all the signers and the instrument is regarded the sealed instrument of all. Rockwell *v.* Capital Traction Co., 25 App. Cas. (D. C.) 98; Rusling *v.* Union Pipe, etc., Co., 5 N. Y. App. Div. 488, 39 N. Y. Supp. 216, aff'g 158 N. Y. 737, 53 N. E. Rep. 1131; Building Ass'n *v.* Cummings, 45 Ohio St. 664, 16 N. E. Rep. 841. But see State *v.* Humbird, 54 Md. 327.

with other circumstances, sustain an inference that the acknowledgment related to sealed authority.[48]

5 Statutory Conditions.

The fact that defendant executed and delivered an obligation required or permitted by statute to be given under certain conditions—whether of jurisdiction[49] or procedure[50]—amounts to an admission that those conditions existed, and throws upon him the burden of proving the contrary.[51]

6. Delivery.[52]

Delivery may be inferred from circumstances.[53] Posses-

[48] Blood *v.* Goodrich, 12 Wend. 525, and cases cited.

[49] See, for instance, People *v.* Falconer, 2 Sandf. 81, and cases cited.

[50] Whiley *v.* Sherman, 3 Den. 185; Dormday *v.* Kanouse, 2 N. Y. Leg. Obs. 330. See, for instance, Onderdonk *v.* Voorhis, 36 N. Y. 358; Delaney *v.* Brett, 1 Abb. Pr. N. S. 421.

[51] Onderdonk *v.* Voorhis (above); Coleman *v.* Bean, 1 Abb. Ct. App. Dec. 394.

[52] An averment or admission of execution may be a sufficient allegation of execution and delivery. Roberts *v.* Good, 36 N. Y. 408.

Where delivery is in question, evidence of delivery must come from without the instrument. Whitney *v.* Dewey, 10 Ida. 633, 80 Pac. Rep. 1117, 69 L. R. A. 572.

[53] St. Louis Brew. Ass'n *v.* Hayes, 97 Fed. Rep. 859, 38 C. C. A. 449; Gardner *v.* Collins, 3 Mass. 398. Delivery of a deed will be presumed from slight circumstances, where there is proof of an intention on the part of the grantor to convey to the grantee. Crabtree *v.* Crabtree, 159 Ill. 342, 42 N. E. Rep. 787.

Delivery of a deed by the grantor to his agent for delivery to the grantee is not a sufficient delivery to vest the title in the grantee. Dagley *v.* Black, 197 Ill. 53, 64 N. E. Rep. 275.

Nor can a grantor deliver a deed to himself as the agent of the grantee. Rendler *v.* Edwards, 116 Mo. App. 390, 92 S. W. Rep. 731.

But where the obligor in a bond delivered it to a third person instructing the latter to deliver the bond to the obligee upon the death of the obligor, there was a sufficient delivery. Frank *v.* Frank, 100 Va. 627, 42 S. E. Rep. 666.

Where one of the obligors in a bond delivers it to an attorney of a party in interest, and he holds the same for some months and thereafter delivered it to the obligee, it is a sufficient delivery.

sion is *prima facie* evidence of it [54] as to those who have signed it, even though others named in the instrument have not. The fact that a deed of conveyance has been recorded affords *prima facie* evidence of its delivery.[55] Stronger presumptions arise in favor of the delivery of a deed in escrow as a voluntary settlement upon a child than in an ordinary case of bargain and sale.[56]

7. Qualified Delivery.

If a written instrument is executed by part only of those named in it as parties, the question whether those who have executed it are bound, depends upon the circumstances under which it was delivered. The burden is on the defendant to show that they were not.[57] The circumstances of

Wylie *v.* Commercial, etc., Bank, 63 S. C. 406, 41 S. E. Rep. 504.

[54] Sicard *v.* Davis, 6 Pet. 124; Games *v.* Dunn, 14 Id. 322, affi'g 1 McLean, 321; Grim *v.* School Directors, &c., 51 Penn. 219; Dillon *v.* Anderson, 43 N. Y. 231. As to proof of delivery, see also Brackett *v.* Barney, 28 N. Y. 333; People *v.* Bostwick, 32 Id. 443; Fisher *v.* Hall, 41 Id. 416. Where a duly executed deed is found in the grantor's possession, it is presumed to have been delivered by the grantee, and testimony to rebut such presumption must be clear. Harshbarger *v.* Carroll, 163 Ill. 636, 45 N. E. Rep. 565.

Where the principal obligor on a bond given to a corporation is also the treasurer of the corporation, the possession of the bond by the principal obligor may be regarded as the possession of the corporation and hence the jury may find that there has been delivery of the bond. Johnson *v.* Gerald, 169 Mass. 500, 48 N. E. Rep. 764.

Where a bond has no subscribing witness, proof of possession by the obligee, and also the handwriting of the obligers, is a sufficient ground for presuming that the bond was sealed and delivered by the obligor. Blume *v.* Bowman, 24 N. C. 338.

[55] Gustin *v.* Michelson, 55 Neb. 22, 75 N. W. Rep. 153; Bush *v.* Genther, 174 Pa. St. 154, 34 Atl. Rep. 520; McGee *v.* Wells, 52 S. C. 472, 30 S. E. Rep. 602; Davis *v.* Pacific Improvement Co., 118 Cal. 45, 50 Pac. Rep. 7; Harshbarger *v.* Carroll, 163 Ill. 636, 45 N. E. Rep. 565. *Contra*, Webber *v.* Stratton, 89 Me. 379, 381, 36 Atl. Rep. 614.

[56] Shults *v.* Shults, 159 Ill. 654, 43 N. E. Rep. 800; Crabtree *v.* Crabtree, 159 Ill. 342, 42 N. E. Rep. 787.

[57] Dillon *v.* Anderson, 43 N. Y. 231.

delivery may be proved by parol. If it appears by what was said at the time of the delivery, or by the nature of the transaction or the attendant circumstances, that any party whose signature is affixed did not agree to be bound unless the other parties also signed, the delivery will be considered as not absolute but *in escrow* merely.[58] But such an understanding had prior to the execution and delivery, and in no other way connected with that act, cannot be shown.[59] If the instrument is on its face complete by the signatures affixed before delivery, the stipulation that others should sign cannot be shown by parol,[60] unless notice of it is brought home to the obligee.[61]

The presumption of law is that those signing consented to the delivery of the bond without the signature of the other parties. "Such a presumption is consistent with the face of the paper, even where it imports an original intention that others should execute it. To make this presumption in such a case does no injustice to those who have executed the paper. They may still show how the fact really is. They may also protect themselves against any inconvenience that may arise from such a presumption, in the first instance, by taking care to keep the instrument out of the hands of the grantee or obligee until it is fully consummated according to their intention. The obligee or grantee, on the other hand, has full notice from the face of the paper of the original intention of those who signed it, and he cannot complain if they are allowed to prove that this original intention was not relinquished in the delivery. He should either refuse to accept the paper in its existing shape, or be prepared to repel the defence of a conditional delivery." Ward *v.* Churn, 18 Gratt. (59 Va.) 801, 809, 99 Am. Dec. 749; Mullen *v.* Morris, 43 Nebr. 596, 62 N. W. Rep. 74; Gyger *v.* Courtney, 59 Nebr. 555, 81 N. W. Rep. 437.

[58] Chouteau *v.* Suydam, 21 N. Y. 179; People *v.* Bostwick, 32 N. Y. 445, affi'g 43 Barb. 9; Black *v.* Lamb, 1 Beasley (N. J.), 108; State Bank *v.* Evans, 15 N. J. L. 155, 28 Am. Dec. 400. *Contra*, Pope *v.* Latham, 1 Pike (Ark.). 66.

[59] Philadelphia, &c. R. R. Co. *v.* Howard, 13 How. (U. S.) 307. This seems the sound principle which should guide where the conflict in authorities permits. Com-

[60] State *v.* Potter, 63 Mo. 212, s. c., 21 Am. Rep. 440, reviewing conflicting cases.

[61] State ex rel. Barnes *v.* Lewis, 73 N. C. 138, s. c., 21 Am. Rep. 461. Where a bond is delivered in

8. Escrow.

A statement in a receipt given by a third person for a deed, that it was delivered to him *in escrow*, is not necessarily controlling. The grantor's intention is to be gathered from the whole evidence.[62] In an action upon a contract executed under seal, but which does not require a seal for its validity, it is competent for defendant to show that the instrument was executed upon a condition that it was not to operate as

pare Dair *v.* U. S., 16 Wall. 1, citing conflicting cases; Miller *v.* Fletcher, 27 Gratt. 403, s. c., 21 Am. Rep. 356; People *v.* Bostwick (above); Pawling *v.* United States, 4 Cranch, 219.

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escrow to a third person who delivers it to the obligee with or without notice of the condition, the obligor is not bound; but in case of a delivery by a co-obligor to the obligee, the validity of the condition annexed by one or more of the obligors upon delivery to the co-obligor depends upon whether or not the obligee has notice of the condition. Blair *v.* Security Bank, 103 Va. 762, 50 S. E. Rep. 262.

[62] Brown *v.* Austen, 35 Barb. 341, 22 How. Pr. 394, and cases cited.

The terms of a deposit in escrow may be in writing or in parol or partly in each, and the rule that a contract made in writing must be deemed to contain the entire agreement does not apply. Fred *v.* Fred, 50 Atl. Rep. (N. J. Ch.) 776.

If the deed was delivered in escrow and the conditions upon which it was delivered fully performed by the grantee, the title was fully vested in him. Francis *v.* Francis, 143 Mich. 300, 106 N. W. Rep. 864.

The memorandum made by the custodian with whom a deed is deposited in escrow is not conclusive as to the terms of the escrow. Francis *v.* Francis, 143 Mich. 300, 106 N. W. Rep. 864.

It is absolutely essential to the validity and effectiveness of a deed in escrow that it be delivered to a third person for the grantee, beyond any power in the grantor to recall or revoke it. Hayden *v.* Collins, 1 Cal. App. 259, 81 Pac. Rep. 1120.

A conveyance to take effect on the death of the grantor is invalid. Hayden *v.* Collins, 1 Cal. App. 259, 81 Pac. Rep. 1120.

A deed deposited with a third person to be delivered to the grantee upon the happening of some contingency and not to be held until the performance of some condition by the grantee is not a deed in escrow. Rendlen *v.* Edwards, 116 Mo. App. 390, 92 S. W. Rep. 731.

In order to constitute a valid deposit in escrow, it is not necessary that the depositor part with all right ever to control the instrument: it is enough that he part with all right over it except upon non-

a contract until the performance by plaintiff of some prescribed act, and this may be shown by oral evidence.[63] But deeds conveying real estate, or an interest therein, or agreements for the sale thereof, cannot be delivered to the grantee or other party thereto conditionally, and when delivered to a party the delivery operates at once and the condition is unavailable.[64]

Evidence that an obligation was placed in the hands of a stranger to be delivered in a future contingency, and was delivered by him without it and without authority, is competent,[65] and proves that the obligation never had inception.[66]

performance of the condition of the escrow. Franklin *v.* Killilea, 126 Wis. 88, 104 N. W. Rep. 993.

[63] Blewitt *v.* Boorum, 142 N. Y. 357, 37 N. E. Rep. 119; Ware *v.* Allen, 128 U. S. 590, 595–596; McFarland *v.* Sikes, 54 Conn. 250, 1 Am. St. Rep. 111, 7 Atl. Rep. 408; Harrison *v.* Morton, 83 Md. 456, 35 Atl. Rep. 99; Tug River Coal Co. *v.* Brigel, 58 U. S. App. 320, 86 Fed. Rep. 818. But see Ryan *v.* Cooke, 172 Ill. 302, 50 N. E. Rep. 213; Feeney *v.* Howard, 79 Cal. 525, 12 Am. St. Rep. 162, 21 Pac. Rep. 984.

Where it appears that the grantor deposited a deed with a third person with the understanding that he would retake possession of it, there is no delivery in escrow. Baker *v.* Baker, 9 Cal. A. 737, 100 Pac. Rep. 892.

[64] Gilbert *v.* North American Fire Ins. Co., 23 Wend. 43; Worrall *v.* Munn, 5 N. Y. 229; Braman *v.* Bingham, 26 N. Y. 483; Wallace *v.* Berdell, 97 N. Y. 13, 25; Blewitt *v.* Boorum, 142 N. Y. 357, 363, 37 N. E. Rep. 119; Anderson *v.* Goodwin, 125 Ga. 663, 54 S. E. Rep. 679; Mays *v.* Shields, 117 Ga. 814, 45 S. E. Rep. 68; Whitney *v.* Dewey, 10 Ida. 633, 80 Pac. Rep. 1117, 69 L. R. A. 572. A bond cannot be delivered to the obligee as an escrow, but it may be delivered by the surety to the principal obligor as an escrow. Blume *v.* Bowman, 24 N. C. 338.

While, as a general rule, the delivery of an instrument to the known agent of the grantee or obligee is a delivery to the principal and cannot create an escrow, yet there is no such personal identity between a corporation and its officers that a deed may not be delivered to the latter in escrow. Blair *v.* Security Bank, 103 Va. 762, 50 S. E. Rep. 262.

[65] Lovett *v.* Adams, 3 Wend. 380; Morris *v.* Blunt, 35 Utah, 194, 99 Pac. Rep. 686.

[66] Anderson *v.* Goodwin, 125 Ga. 663, 54 S. E. Rep. 679; Matteson *v.* Smith, 61 Neb. 761, 86

9. Acceptance.

Acceptance, whether by plaintiff [67] or by defendant,[68] may be presumed from the apparently beneficial character of the contract, and evidence even of slight acts indicating assent. Non-acceptance is not shown by mere proof that the instrument was returned for the purpose of having an additional surety.[69]

N. W. Rep. 472; Hanley *v.* Sweeney, 109 Fed. Rep. 712, 48 C. C. A. 612; Chipman *v.* Tucker, 38 Wis. 43, s. c., 20 Am. Rep. 1.

"It is a well-settled principle of law that when a deed is delivered as an escrow, to take effect upon the performance of some condition by the grantee in the future, no title passes until the condition has been fully performed and the grantee can acquire no title by obtaining possession of the deed, even by the voluntary act of the depositary, until the condition has been performed." Powers *v.* Rude, 14 Okl. 381, 79 Pac. Rep. 89; Schmidt *v.* Musson, 20 S. D. 389, 107 N. W. Rep. 367; Bales *v.* Roberts, 189 Mo. 49, 87 S. W. Rep. 914.

Where a deed in escrow is delivered by the third person to the grantee without performance of the condition of the escrow and the property covered thereby is subsequently soln to an innocent purchaser, the grantor in escrow may nevertheless assert his title against the innocent holder unless his negligence brought about the unauthorized delivery. Houston Land, etc., Co. *v.* Hubbard, 37 Tex. Civ. App. 546, 85 S. W. Rep. 474.

It is the duty of the grantor, however, immediately upon learning that the deed has been improperly delivered, to take steps to prevent innocent purchasers from acting to their injury, otherwise he will not be protected as against them. Mays *v.* Shields, 117 Ga. 814, 45 S. E. Rep. 68.

If the grantee is lawfully in possession at the time the escrow is deposited with a third person, and subsequently secures the deed from the depositary, he can convey title to an innocent purchaser for value. Id.

The death of the grantor of a deed deposited in escrow does not annul the grantee's right to perform the condition and receive the deed. Seibel *v.* Higham, 216 Mo. 121, 115 S. W. Rep. 987, 129 Am. St. Rep. 502.

[67] Bank of United States *v.* Dandridge, 12 Wheat. 64.

Where the bond of an assistant cashier of a bank was delivered to the cashier of such bank, who was one of the directors, and such bond was retained by the cashier of the

[68] Kingsbury *v.* Burnside, 58 Ill. 310, s. c., 11 Am. Rep. 67.

[69] Postmaster General *v.* Norvell, Gilp. 106.

10. Date.

The date stated in the instrument is usually *prima facie*,[70] but not conclusive,[71] evidence of the date of execution and delivery. When blank, the party who seeks to enforce the instrument has the burden of showing the true date,[72] if material.

11. Consideration.

The seal affixed to the writing sued on[73] is presumptive,[74]

bank, acceptance of the bond by the bank is established, though the minutes of the board of directors show no such acceptance. Fiala *v.* Ainsworth, 63 Neb. 1, 88 N. W. Rep. 135, 93 Am. St. Rep. 420.

The question of acceptance of a bond by a corporation cannot be determined from the secret understanding or undisclosed intention of its officers. National Bldg., etc., Assoc. *v.* Day, 23 Ky. Law Rep. 599, 63 S. W. Rep. 590.

[70] Pages 56, 57 and chapter XXI, paragraph 37, of this vol. Seymour *v.* Van Slyck, 8 Wend. 403. This presumption will be greatly strengthened if it is accompanied by an acknowledgment of the same date in proper form before a proper officer. Cover *v.* Manaway, 115 Pa. St. 338, 2 Am. St. Rep. 552, 8 Atl. Rep. 393.

[71] Mayburry *v.* Brien, 15 Pet. 21.

While a mistake in the date of a deed may be shown by parol, it cannot be shown by parol that land was sold for the taxes of a different year than the year stated in the deed. Bower *v.* Chess, etc., Co., 83 Miss. 218, 35 So. Rep. 444.

An erroneous date may be corrected in a suit at law without recourse to proceedings in equity. Tautphœus *v.* Harbor, etc., Bldg., etc., Assoc., 185 N. Y. 308, 78 N. E. Rep. 89, 104 N. Y. App. Div. 451, 93 N. Y. Supp. 916.

[72] See Graves *v.* Lebanon Nat. Bank, 10 Bush, 23, 19 Am. Rep. 50.

The non-statement or mistatement of the date of a bond does not invalidate it, nor is it material that the signatures and seals are between the penal part and its condition, or that the names of the obligors do not appear in the body of the bond, if signed by them. Fournier *v.* Cyr, 64 Me. 32.

[73] Gein *v.* Little, 43 Misc. Rep. 421, 89 N. Y. Supp. 488. It is only when the writing is set up as a cause of action, or a set-off or counterclaim, that its conclusive effect is taken away by the statute. Calkins *v.* Long, 22 Barb. 97. A sealed release is conclusive. Gray *v.* Barton, 55 N. Y. 68; Torry *v.* Black, 58 Id. 185. Otherwise of a composition deed. Russell *v.* Rogers, 15 Wend. 351.

[74] Home Ins. Co. *v.* Watson, 59 N. Y. 390, rev'g 4 Supm. Ct. (T. & C.)

but not conclusive,[75] evidence of a consideration; but it is not evidence that the consideration was adequate, where the law requires adequacy to be shown.[76] Hence even partial failure of consideration is available.[77] Under the statute the consideration is open to inquiry, to the same extent as if the contract were unsealed.[78] The statute applies to foreign contracts,[79] and to previous as well as to subsequent contracts, so far as it affects the remedy only.[80] Beyond this, it cannot apply to previous contracts, because it would impair their obligation.

Notwithstanding the statute, the rule excluding parol evidence which would vary the writing, remains unaffected.[81]

A nominal consideration inserted in the writing does not

226, s. c., 1 Hun, 643; Graham *v.* Middleby, 185 Mass. 349, 70 N. E. Rep. 416, 69 L. R. A. 867; Forgotston *v.* Cragin, 62 N. Y. App. Div. 243, 70 N. Y. Supp. 979.

The presumption being that a sealed instrument was made for consideration, the defense of lack of consideration must be affirmatively pleaded. Recknagel *v.* Steinway, 58 N. Y. App. Div. 352, 69 N. Y. Supp. 132.

[75] 2 N. Y. R. S. 406, § 77. "There is no longer any magic in a wafer." Johnson *v.* Miln, 14 Wend. 195. At common law, it is conclusive. Storm *v.* U. S., 94 U. S. (4 Otto) 84. See also Cosgrove *v.* Cummings, 195 Pa. 497, 46 Atl. Rep. 69; Chamberlain *v.* Fernbach, 118 Ill. App. 145.

[76] As in case of a contract in restraint of trade. Ross *v.* Sagdbeer, 21 Wend. 166. Compare Tallmadge *v.* Wallis, 25 Wend. 107.

[77] Van Epps *v.* Harrison, 5 Hill, 63; Tallmadge *v.* Wallis, 25 Wend. 107.

[78] Wilson *v.* Baptist Educational Society, 10 Barb. 308. For the rule in other states than New York, see Paige *v.* Sherman, 6 Gray, 511, 513; Wilkinson *v.* Scott, 17 Mass. 249; Carr *v.* Dooley, 119 Mass. 294, 296; Mills *v.* Dow, 133 U. S. 423, 431; Cardinal *v.* Hadley, 158 Mass. 352, 35 Am. St. Rep. 492, 33 N. E. Rep. 575; Sullivan *v.* Lear, 23 Fla. 463, 11 Am. St. Rep. 388, 2 So. Rep. 846; Sterricker *v.* McBride, 157 Ill. 70, 41 N. E. Rep. 744; DeGoey *v.* Van Wyk, 97 Iowa, 491, 496, 66 N. W. Rep. 787; Smith *v.* McClain, 146 Ind. 77, 45 N. E. Rep. 41; Duttera *v.* Babylon, 83 Md. 536, 35 Atl. Rep. 64; Wheeler *v.* Campbell, 68 Vt. 98, 34 Atl. Rep. 35; Van Lehn *v.* Morse, 16 Wash. 219, 48 Pac. Rep. 404; Mills *v.* Dow, 133 U. S. 423, 431.

[79] Williams *v.* Haynes, 27 Iowa, 251, s. c., 1 Am. Rep. 268.

[80] Mann *v.* Eckford, 15 Wend. 502; Case *v.* Boughton, 11 Id. 106.

[81] McCurtie *v.* Stevens, 13 Wend. 527.

necessarily preclude evidence of the actual consideration agreed on.[82]

12. Oral Evidence to Vary the Obligation.

The rule excluding oral evidence to vary the terms of a writing has a more strict application to formal instruments, such as bonds and covenants, than to commercial contracts made in the ordinary course of mercantile business.[83] In the former case there is much more ground for presuming that the parties put all the terms of their contract into the writing, than in the latter. Hence evidence of any prior or contemporaneous oral understanding is generally incompetent; but prior or contemporaneous contracts to which the instrument in question was subsidiary or auxiliary may be shown. Thus an instrument expressed to be an absolute obligation for payment of money may be shown, by parol, to have been delivered under an agreement that it should be held by the obligee as collateral security for a debt of a third person, and be cancelled on payment thereof. Such evidence is not regarded as contradictory to the written undertaking, but as tending to show that it has been discharged.[84]

[82] Baker *v.* Bradley, 42 N. Y. 316. Compare Halliday *v.* Hart, 30 N. Y. 474.

It may be shown as between the immediate parties to a deed, that the consideration is different from that recited in the deed. Jones *v.* Noe, 71 Ind. 368.

[83] See chapter XVI, paragraph 8, chapter XXI, paragraphs 36 and 43, of this vol.

A bond, undertaking to set out the whole contract between the parties, is the exclusive evidence of that contract. Flewellen *v.* Ft. Bend County, 17 Tex. Civ. App. 155, 42 S. W. Rep. 775.

In an action to enforce liability on a bond, the obligation may not be enlarged by parol evidence. Bernard-Beere *v.* Klaw, 35 Misc. Rep. 27, 70 N. Y. Supp. 204.

Where a deed recites that the grantee covenants to pay a mortgage, evidence is inadmissible to show that he did not agree to pay the mortgage. Beeson *v.* Green, 103 Iowa, 406, 72 N. W. Rep. 555; Blood *v.* Crew Levick Co., 177 Pa. 606, 35 Atl. Rep. 871, 55 Am. St. Rep. 742.

[84] Chester *v.* Bank of Kingston, 16 N. Y. 336. And see Huntington *v.* Adams, 12 Ala. 834; Barry *v.* Colville, 129 N. Y. 302, 29 N. E. Rep. 307; Burgett *v.* Osborne, 172

But a deed cannot be so far contradicted by parol as to show that it was not intended to operate at all, or that it was the intention or agreement of the parties that the grantee should acquire no rights whatever under it, or that he should reconvey to the grantor on his request without any consideration.[85] Although the execution of a deed merges all prior conversations and statements of the parties, yet the purpose for which it was made may afterwards be shown by parol evidence.[86]

Ill. 227, 50 N. E. Rep. 206; Helbreg *v.* Schumann, 150 Ill. 12, 41 Am. St. Rep. 339, 37 N. E. Rep. 99; Crutcher *v.* Muir's Exr., 90 Ky. 142, 29 Am. St. Rep. 366, 13 S. W. Rep. 435; Pinch *v.* Willard, 108 Mich. 204, 66 N. W. Rep. 42, Shank *v.* Groff, 43 W. Va. 337, 27 S. E. Rep. 340; Williams *v.* American Nat. Bank, 56 U. S. App. 316, 85 Fed. Rep. 376. Oral evidence is admissible for the purpose of showing that the consideration for a deed of land by contemporaneous verbal agreement also settled a trespass previously committed by the grantee upon the land. Hodges *v.* Heal, 80 Me. 281, 6 Am. St. Rep. 199, 14 Atl. Rep. 11.

[85] Hutchins *v.* Hutchins, 98 N. Y. 56, 63; Whitney *v.* Dewey, 10 Ida. 633, 80 Pac. Rep. 117, 69 L. R. A. 572.

A deed of conveyance cannot be varied by parol evidence to show that it was not intended to operate as a conveyance. Wishart *v.* Gerhart, 105 Mo. App. 112, 78 S. W. Rep. 1094.

Therefore the recitals of a deed cannot be contradicted by parol to show a delivery in escrow. Mays *v.* Shields, 117 Ga. 814, 45 S. E. Rep. 68.

Where defendant signed a lease making himself jointly liable with another for the whole of the rent of certain premises, evidence that the lessor agreed with him that he should be liable only for half of the rent is inadmissible. Smith *v.* Rust, 112 Ill. App. 84.

Where a wife conveyed property by deed to her husband, evidence of an understanding between them that in case he died first, she could destroy the deed and revest herself with the title is inadmissible. Tyler *v.* Currier, 147 Cal. 31, 81 Pac. Rep. 319.

[86] Richmond Ice Co. *v.* Crystal Ice Co., 103 Va. 465, 49 S. E. Rep. 650; Donisthorpe *v.* Fremont, etc. R. Co., 30 Neb. 142, 27 Am. St. Rep. 387, 46 N. W. Rep. 240. Where a railroad company obtains a deed to a right of way, under representations that it is designed for the main line, and not for side tracks, and it is afterwards used for side-track purposes, parol evidence is admissible to show the purpose for which the deed was executed. Donisthorpe *v.* Fremont, &c. R. Co., 30 Neb. 142, 27 Am. St. Rep. 387, 46 N. W. Rep. 240.

Parol testimony is competent to

In the case of a sealed agreement parol evidence is not admissible, as in other cases,[87] to show that the one signing was only an agent, for the purpose of enabling his principal to enforce it, unless it appears on the face of the contract that it was intended to be the contract of such principal;[88] nor is such evidence admissible for the purpose of holding such alleged principal liable on it, unless a seal was unnecessary, and the interest of the defendant appears on its face, and he has received its benefit, and ratified it.[89] So oral evi-

to show the negotiations leading up to the execution of a written contract provided it does not contradict or vary the terms of the written contract. Colvin *v.* McCormick Cotton Oil Co., 66 S. C. 61, 44 S. E. Rep. 380.

Such testimony is admissible not to explain the terms of the contract but to throw light on the question of its execution. Gholson *v.* Finney, 46 S. W. Rep. (Tenn. Ct. App.) 345.

"Parol evidence of the acts and conversations of the grantor and the grantee prior to the execution of the deed cannot be received in a court of law to show that the description written in the deed is an error." Duggan *v.* Uppendahl, 197 Ill. 179, 64 N. E. Rep 289.

Where the husband conveyed property to his wife by deed which recited that the consideration was paid out of her separate funds, parol evidence that the consideration was not so paid from her separate funds is inadmissible. Kahn *v.* Kahn, 94 Tex. 114, 58 S. W. Rep. 825.

Where, by a sealed agreement, defendant was to pay plaintiff a commission for procuring a loan on plaintiff's property, and plaintiff was to furnish to the person making the loan, a title free and clear, the defendant cannot show, when sued for the commission, when signing the contract, he told the plaintiff's agent of an incumbrance on the property. Finch *v.* Bauer, 40 Misc. Rep. 218, 81 N. Y. Supp. 625.

[87] Chapter XVI, paragraphs 10 and 13, of this vol.

[88] City of Providence *v.* Miller, 11 R. I. 272, s. c., 23 Am. Rep. 453, and cases cited. See also Stowell *v.* Eldred, 39 Wis. 614. But see Barbre *v.* Goodale, 28 Ore. 465, 38 Pac. Rep. 67, 43 Pac. Rep. 378, where it was held that parol testimony is admissible to show that a contract which is not a negotiable instrument, and not required to be under seal, although so in fact, executed by and in the name of an agent, is the contract of the principal.

Parol evidence is inadmissible to show that the principals named in a bond really signed as sureties. Coots *v.* Farnsworth, 61 Mich. 497, 28 N. W. Rep. 534.

[89] Briggs *v.* Partridge, 64 N. Y. 364, and cases cited. And see Squier *v.* Norris, 1 Lans. 285.

dence is not admissible to enable him to enforce it, nor to exonerate from personal liability trustees, directors or the like, who, in their individual names, have entered into a sealed obligation not indicating their representative capacity.[90]

As it is not the office of a deed to express the terms of a contract of sale, but to pass the title pursuant to the contract, a parol agreement, being a part of the consideration for the sale, restricting the use of the premises in one particular, for a limited period, is not merged in the deed, and does not qualify or in any way affect the title to the land; and the admission of parol evidence to prove such an agreement is no infringement of the rule.[91]

The general rule that unambiguous language in a contract must control, does not exclude extrinsic evidence of the subject-matter and other surrounding circumstances to enable the court to consider what the parties saw and knew, in order to ascertain their meaning.[92]

[90] Lincoln *v.* Crandall, 21 Wend. 101. The Pennsylvania rule seems to allow oral qualification more freely. Lippincott *v.* Whitman, 83 Pa. St. 244, and cases cited; Greenwalt *v.* Kohne, 85 Pa. St. 369.

[91] Collins *v.* Tillou, 26 Conn. 368; Pierce *v.* Woodward, 6 Pick. 206; Willis *v.* Hulbert, 117 Mass. 151; Tallmadge *v.* East River Bank, 26 N. Y. 105; Hall *v.* Solomon, 61 Conn. 476, 29 Am. St. Rep. 218, 23 Atl. Rep. 876.

[92] Clark *v.* United States Life Ins. & T. Co., 64 N. Y. 33, rev'g 7 Lans. 322; and see Reynolds *v.* Commercial Fire Ins. Co., 47 N. Y. 597.

Where the written instrument shows on its face that it is not the complete embodiment of the agreement made by the parties, parol evidence is admissible to show what the full agreement was. Locke *v.* Lyon Medicine Co., 27 Ky. Law Rep. 1, 84 S. W. Rep. 307.

"Parol evidence is admissible to apply the description to the parcel intended to be conveyed, when the terms of the deed leave it uncertain what property was intended to be embraced in it." Snooks *v.* Wingfield, 52 W. Va. 441, 44 S. E. Rep. 277.

Where a deed was made subject to the right of commissioners to open a highway on the land when the compensation should be paid, parol evidence is admissible to show that the grantor and not the grantee was to receive the compensation. Chandler *v.* Morey, 195 Ill. 596, 63 N. E. Rep. 512.

When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail, against either party, in which he supposed the other understood it.

13. Practical Construction.

The acts and admissions of a party to an ambiguous instrument, subsequent to its execution,[93] and particularly a long-continued course of acts under it, giving it a practical construction,[94] are competent against him. But if the language is clear and unambiguous, such a practical construction cannot vary it,[95] unless there is evidence to sustain a waiver or estoppel.

14. Lost Instrument.

Loss need not be alleged in pleading.[96] If the instrument is shown to have been filed pursuant to statute, its loss may be shown by official certificate of search, if authorized by statute;[97] or by testimony of a witness who has searched, unless the statute makes an official certificate the exclusive evidence.[98] If the lost instrument is otherwise proven, slight evidence that it had a seal is enough to go to the jury.[99] Secondary evidence is admissible to prove the existence, loss, and contents of an unrecorded deed, where it has been voluntarily destroyed by the grantee for the purpose and with the intention of revesting title in the grantor.[1]

[93] Goodyear *v.* Cary, 4 Blatchf. 271.

[94] Forbes *v.* Watt, L. R. 2 S. & D. App. 214, s. c., 2 Moak's Eng. 512.

[95] Railroad Co. *v.* Trimble, 10 Wall. 367.

[96] Livingston *v.* White, 30 Barb. 72.

Where the complaint alleges that the note sued on has been lost but does not allege its loss before maturity, it is not necessary to allege that the note had not been indorsed by plaintiff. Embree *v.* Emmerson, 37 Ind. App. 16, 74 N. E. Rep. 44, 1110.

[97] 2 N. Y. R. S., 3d ed. 639, § 13, Code Civ. Pro., § 921.

[98] Teall *v.* Van Wyck, 10 Barb. 376.

[99] Livingston *v.* White, 30 Barb. 72.

[1] Potter *v.* Adams, 125 Mo. 118,

An agreement of the parties dispensing with production of the original instrument, does not necessarily dispense with the ordinary proof of due execution of the original.[2]

15. Subsequent Modification.

A sealed agreement cannot, before breach,[3] be modified by a simple executory contract.[4] It may (subject, however, to the requirements of the statute of frauds) be modified by an executed contract, either oral or written, founded on new consideration.[5] And the right of a party under it may be impaired by a waiver or estoppel founded on his acts, his

46 Am. St. Rep. 478, 28 S. W. Rep. 490.

Where the loss of an instrument has been established, its contents may be proved by a copy when it is shown that the copy has been compared with the original and is correct, even though the copy offered in evidence is a record ruled out because of non-compliance with registry laws. Lancaster *v.* Lee, 71 S. C. 280, 51 S. E. Rep. 139; McCarty *v.* Johnson, 20 Tex. Civ. App. 184, 49 S. W. Rep. 1098.

"The law is well settled that proof of the negotiations and conversations and acts of the parties before, at the time of, and after the execution of a written instrument are not competent to prove its content, where the instrument is lost." Capell *v.* Fagan, 30 Mont. 507, 77 Pac. Rep. 55, 2 Ann. Cas. 37.

[2] Clark *v.* Courtney, 5 Pet. 319. For a case where the instrument is shown to be out of the jurisdiction, see Knickerbocker *v.* Wilcox, 83 Mich. 200, 21 Am. St. Rep. 595, 47 N. W. Rep. 123.

Where the instrument relied on is alleged to have been lost and a copy cannot be produced, the existence and loss of the original and its contents and proper execution must be shown by satisfactory evidence. Greer *v.* Young, 113 Ga. 120, 38 S. E. Rep. 314; Lloyd *v.* Simons, 97 Minn. 315, 105 N. W. Rep. 902; Garland *v.* Foster County State Bank, 11 N. D. 374, 92 N. W. Rep. 452.

[3] See Kuhn *v.* Stevens, 7 Robt. 544, s. c., 36 How. Pr. 275.

[4] Allen *v.* Jaquish, 21 Wend. 628; Eddy *v.* Graves, 23 Wend. 81. A contract under seal may be abrogated, cancelled and surrendered by an executed parol agreement. Alschuler *v.* Schiff, 164 Ill. 298, 45 N. E. Rep. 424. But a sealed executory contract cannot be altered, changed or modified in its terms by a parol agreement. (Id.) And a contract under seal cannot be changed or modified by proof of subsequent parol understanding or agreement. Ryan *v.* Cooke, 172 Ill. 302, 50 N. E. Rep. 213.

[5] Moses *v.* Bierling, 31 N. Y. 462;

words or even his silence. A discharge or modification of any liability upon such an instrument, after breach, may be shown by parol.[6]

16. Breach.

On a contract merely to pay money, although plaintiff usually alleges non-payment, only very slight if any evidence of breach is required.[7] In other contracts plaintiff should allege a breach, and should prove it, unless it is admitted, or performance is affirmatively alleged by defendant.[8] Where indemnity alone is expressed, there must be evidence that damage has been sustained; but where there is a positive agreement that the act which is to prevent damage to the plaintiff shall be done, it is enough that such act is unperformed.[9] Where the covenant is both to do the act and to indemnify, it becomes a question of the intention of the parties.[10]

Under an allegation of breach of agreement, and a total failure to prove the agreement, the action is not sustained by evidence of a tort, although such as would have been a breach had there been such an agreement.[11]

Where performance is in issue, evidence of non-per-

Fleming *v.* Gilbert, 3 Johns. 528; Pierrepont *v.* Barnard, 6 N. Y. 279, rev'g 5 Barb. 364.

[6] Delacroix *v.* Bulkley, 13 Wend. 71; Townsend *v.* Empire Stone Dressing Co., 6 Duer, 208; Dodge *v.* Crandall, 30 N. Y. 294. See further as to this subject, p. 388, chapter XVI, paragraph 27, of this vol.

[7] The same has been held of a covenant to do an act or pay a certain sum. McGregory *v.* Prescott, 5 Cush. (Mass.) 67.

Statutes providing that breaches must be alleged to be availed of generally, exclude from their operation contracts for the payment of money. Mutual Ben. Ins. Co. *v.* Brown, 80 Mo. App. 459.

[8] This I understand to be the general rule and commonly applied in practice, although the decisions are not harmonious. See Guy *v.* McDaniel, 51 S. C. 435, 441, 29 S. E. Rep. 196; Mutual Ben. Ins. Co. *v.* Brown (above).

[9] Matter of Negus, 7 Wend. 498, and cases cited.

[10] Rector, &c. of Trinity Ch. *v.* Higgins, 48 N. Y. 532, rev'g 4 Robt. 1; Gilbert *v.* Wiman, 1 N. Y. 550, 554; Rubens *v.* Prindle, 44 Barb. 336.

[11] Beard *v.* Yates, 2 Hun, 466.

formance with an excuse therefor, is, in general, inadmissible.[12]

17. Damages.

Plaintiff is not entitled to prove a breach not alleged,[13] unless there is a general allegation; [14] but he is not bound to prove a breach to the full extent alleged; nor is he confined to the precise number or value alleged.[15] But he cannot recover more than alleged, and he cannot prove any damages of a kind not necessarily resulting from the breach alleged and proved, unless they are specially stated in the complaint. To recover damages more than nominal, they must be shown with reasonable certainty at the trial, and not left to speculation and conjecture; [16] but every reasonable presumption may

[12] Oakley *v.* Morton, 11 N. Y. 25; Warren *v.* Bean, 6 Wis. 120.

[13] Briggs *v.* Vanderbilt, 19 Barb. 222.

[14] Trimble *v.* Stilwell, 4 E. D. Smith, 512; Atlantic Trust, etc., Co. *v.* Laurenburg, 163 Fed. Rep. 690, 90 C. C. A. 274.

[15] 2 Greenl. Ev. 243, § 260.

[16] Neary *v.* Bostwick, 2 Hilt. 514.

Where plaintiff's remuneration under a contract for selling defendant's land was to be one-half of the amount paid for the land in excess of a certain sum, and where, after plaintiff had sold part of the land defendant refused to allow the remainder to be sold, plaintiff, in an action for damages, may show that there was a demand for the land at the time of the breach, and the amount for which the land could have been sold. McLane *v.* Maurer, 28 Tex. Civ. App. 75, 66 S. W. Rep. 693, 1108.

In an action by the lessee for breach of the lessor's agreement to give possession, evidence of the rent paid by the lessee for other premises claimed to be of a similar character is incompetent on the issue of plaintiff's damages. Rosenblum *v.* Riley, 84 N. Y. Supp. 884.

In an action by a city against a railroad company for breach of its contract to make the city the end of a division, evidence of decline in the population and a depreciation in real estate values is inadmissible on the issue of damages, such evidence being speculative. Ry. Co. *v.* Fort Scott, 15 Kan. 435. In an action by a city for failure to finish a public library by the time agreed upon, evidence of what the city had expended for renting rooms for library purposes during the period of delay is inadmissible, such evidence having no tendency to show what the value of the use of the library by the city would have been. Hipwell *v.* National Surety Co.,

be made as to the benefit which the other parties might have obtained by the *bona fide* performance of the agreement.[17] The allegation of amount of unliquidated damages is not, for this purpose, to be taken as true, by an omission to deny it.[18] An award as to the amount of damages, may avail as conclusive, although the action be necessary to establish liability.[19]

If the contract specifies the amount to be paid in case of a breach, and the settled rules of construction[20] do not conclusively determine whether it is liquidated damages or a penalty, the instrument may be aided and the real intention ascertained by proof of extrinsic facts.[21] A sum duly fixed as liquidated damages, and not as a penalty, is recoverable without proof of actual damage.[22]

The general principles as to proof of value, injury, etc., by the opinions of witnesses, have been already stated.[23] The opinion or conclusion of a witness as to the amount of damage sustained, as distinguished from his knowledge of value, and of the difference in value caused by breach, is not admissible.[24]

130 Iowa, 656, 105 N. W. Rep. 318.

[17] Wilson *v.* Northampton & Banbury Junction Ry. Co., L. R. 9 Chan. App. 279, s. c., 8 Moak's Eng. R. 866, per Ld. SELBORNE.

[18] Stuart *v.* Binsse, 10 Bosw. 436.

[19] Whitehead *v.* Tattersall, 1 Ad. & E. 491.

[20] Bagley *v.* Peddie, 16 N. Y. 469, and cases cited, 2 Greenl. Ev. 241, § 258.

Where the condition of a bond is an agreement not to engage in a certain business, the sum stipulated in the bond, in the absence of proof as to the amount of actual damages, will be treated as a penalty and not liquidated damages. Disosway *v.* Edwards, 134 N. C. 254, 46 S. E. Rep. 501.

[21] See Shute *v.* Hamilton, 3 Daly, 462, 472.

[22] Smith *v.* Coe, 33 Super. Ct. (1 J. & S.) 480, 483.

Where there is no allegation or proof as to the amount of damages, it is error to enter judgment for the penalty of the bond. Disosway *v.* Edwards, 134 N. C. 254, 46 S. E. Rep. 501. But see Quintard *v.* Corcoran, 50 Conn. 24.

[23] Pages 811, 939, chapter XVI, paragraphs 23 and 82, and chapter XIX, paragraph 22, of this vol.

[24] Morehouse *v.* Mathews, 2 N. Y. 514; Wetherbee *v.* Bennett, 2 Allen, 428, 430.

18. Fraud; Failure of Consideration.

Fraud in the execution is always admissible under proper allegation.[25] Fraud in the consideration, or a failure of consideration, though not usually admitted at common law,[26] is equally available under the new procedure if it amount to an equitable defense. Evidence that the signer was illiterate, and that the instrument was not read to him or only read

[25] Hartshorn *v.* Day, 19 How. U. S. 211; Hanley *v.* Sweeny, 109 Fed. Rep. 712, 48 C. C. A. 612; Strickland *v.* Graybill, 97 Va. 602, 34 S. E. Rep. 475.

Fraud as a defense to an action on a contract cannot be pleaded in general terms; but the specific facts constituting the fraud must be averred. Fire Extinguisher Mfg. Co. *v.* Perry, 8 Okl. 429, 58 Pac. Rep. 635.

An answer, in order to make out a good defense of fraud, must allege that the plaintiff made the representations knowing them to be false, that the defendant relied upon such statements and he acted thereon to his disadvantage. Eccardt *v.* Eisenhauer, 74 N. Y. App. Div. 35, 77 N. Y. Supp. 18.

In an action on a promissory note given for land bought of plaintiff, plaintiff's fraud in procuring others as his agents to pretend that they would purchase the land from defendant at an advance may be shown as a defense. De Lissa *v.* Fuller Coal, etc., Co., 59 Kan. 319, 52 Pac. Rep. 886.

Where it appears that the grantor conveyed lands to the grantee under the latter's false representations as to his intended use of the premises, the conveyance will be set aside upon the grantor's tendering the consideration and expenses incurred by the grantee. Adams *v.* Gillig, 131 N. Y. App Div. 494, 115 N. Y. Supp. 999.

Evidence of plaintiff's understanding of an instrument, while not admissible to vary the terms of the instrument, is nevertheless admissible to rebut the charge of fraud. Sloan *v.* Rose, 101 Va. 151, 43 S. E. Rep. 329.

[26] Hartshorn *v.* Day, 19 How. U. S. 211.

When sued by the seller for the purchase price of goods, the purchaser may set up as a defense the failure of the title and the recovery of the goods from the purchaser by the true owner. Forgotston *v.* Cragin, 62 N. Y. App. Div. 243, 70 N. Y. Supp. 979; Jones *v.* Noe, 71 Ind. 368.

In an action for breach of contract, it is a good defence to allege that plaintiff has broken another contract, which other contract formed part of the consideration inducing the defendant to enter into the contract sued on, such breach by the plaintiff amounting to a failure of consideration. Falvey *v.* Woolner, 71 N. Y. App. Div. 331, 75 N. Y. Supp. 1106.

to him by the other party, does not avoid it, but shifts the burden to the other to show that it was explained to him in substance, and there was no suppression, concealment, or misrepresentation of any of its obligations.[27] To avoid a surety's signature for fraudulent concealment by the creditor, it must be shown that the creditor misled him, or induced him to become surety in ignorance, or at least was present when another did so.[27a] A failure of consideration cannot be proved under a general denial.[27b]

19. Reformation.

Under the new procedure, either the plaintiff [27c] or defendant,[27d] if appearing and claiming in one and the same capacity,[27e] may, under proper allegations show fraud or mistake in the instrument sued on, entitling him to a reformation and judgment accordingly, without bringing a separate action.

For this purpose,[27f] it is necessary to show either mutual

[27] Ellis *v.* McCormick, 1 Hilt. 313; Harris *v.* Story, 2 E. D. Smith, 363; Suffern *v.* Butler, 19 N. J. Eq. 202.

Where a mother conveyed all her property by deed to one of her children, evidence that she was on friendly terms with all her children is admissible to show fraud practiced by the grantee. Baker *v.* Baker, 9 Cal. A. 737, 100 Pac. Rep. 892.

[27a] Atlas Bank *v.* Brownell, 9 R. I. 168, s. c., 11 Am. Rep. 231; Magee *v.* Manhattan Life Ins. Co., 92 U. S. (2 Otto) 93, 99.

Evidence of failure of consideration is inadmissible unless such failure has been pleaded. Robertson *v.* Merriam, 106 Ill. App. 610; Raritan R. R. Co. *v.* Middlesex, &c. Co. (N. J. 1902), 51 Atl. Rep. 623. See also Recknagel *v.* Steinway, 58 N. Y. App. Div. 352, 69 N. Y. Supp. 132.

[27b] Dubois *v.* Hermance, 56 N. Y. 673, affi'g 1 Supm. Ct. (T. & C.) 293.

[27c] Laub *v.* Buckmiller, 17 N. Y. 620; Bartlett *v.* Judd, 21 N. Y. 200, affi'g 23 Barb. 262; Bacot *v.* Fessenden, 64 Misc. 422, 119 N. Y. Supp. 464.

[27d] Haire *v.* Baker, 5 N. Y. 357.

[27e] Cady *v.* Potter, 55 Barb. 463. Compare Haddow *v.* Lundy, 59 N. Y. 320, and Rathbone *v.* Hooney, 58 N. Y. 463.

"Reformation may be made against a subsequent purchaser with notice of the mistake." Remm *v.* Landon, 43 Ind. A. 91, 86 N. E. Rep. 973.

[27f] As distinguished from a claim

mistake, or mistake of one party to the instrument, known to the other, and fraudulently taken advantage of, by him. The mistake must be as to a fact shown to be material and to have animated and controlled the conduct of the party in assenting,[28] or as to the preparation and contents of the instrument, so that it does not express the actual agreement

to rescind. Smith *v.* Mackin, 4 Lans. 41; Mikesell *v.* Wekrle, 37 Pa. Super. Ct. 231; Lesser *v.* Demarest (N. J. Ch.), 72 Atl. Rep. 14; Hart *v.* Walton, 9 Cal. App. 502, 99 Pac. Rep. 719; Cherry *v.* Brizzolara, 89 Ark. 309, 116 S. W. Rep. 668, 21 L. R. A. N. S. 508; Kenyon Paper Co. *v.* Nederlandsche Lloyds, 124 N. Y. App. Div. 886, 109 N. Y. Supp. 311; Tyler *v.* Merchants, etc., Bank (Ark.) 116 S. W. Rep. 213.

Where a mortgage fails to cover property intended by both parties to be included, the mortgage will be reformed, without proof of fraud. Craig *v.* Pendleton, 89 Ark. 259, 116 S. W. Rep. 209.

"A mistake as to the subject matter surveyed, superinduced by ignorance of the true location of the land which one intended to sell and the other to buy, when participated in by both parties, is such a mutual mistake of fact as equity will correct." American Assoc. *v.* Williams, 166 Fed. Rep. 17, 93 C. C. A. 1.

Where the mistake is not mutual and about the same thing, the instrument will not be reformed: the proper remedy is rescission or concellation. Prindle *v.* Union School Dist. No. 5, Board of Education, 61 Misc. Rep. 533, 115 N. Y. Supp. 888.

While equity will afford relief in a case of mutual mistake, yet it will not make an entirely new contract. House *v.* McMullen, 9 Cal. A. 664, 100 Pac. Rep. 344.

[28] Grymes *v.* Sanders, 93 U. S. (3 Otto) 55, 60, and cases cited.

"A contract may only be reformed to express some material thing which the parties agreed upon and meant to put in but left out, or by striking out or changing something they did not mean to express." Moffett *v.* Jaffe, 132 N. Y. App. Div. 7, 116 N. Y. Supp. 402 (rev'g 61 Misc. 584, 114 N. Y. Supp. 614).

Where in a contract to sell land, it does not appear that the consideration was based on a price per acre, proof that there was a mutual mistake as to the number of acres will not warrant a reformation of the contract by ratably reducing the consideration. Moffett *v.* Jaffe, 132 N. Y. App. Div. 7, 116 N. Y. Supp. 402 (rev'g 61 Misc. 584, 114 N. Y. Supp. 614). See also Sweet *v.* Marsh, 133 N. Y. App. Div. 315, 117 N. Y. Supp. 930.

If the mistake is apparent on the face of the instrument, reformation is unnecessary and will be denied. Pittsburgh Amusement Co. *v.* Ferguson, 115 N. Y. App. Div. 241, 101 N. Y. Supp. 217.

made.[29] In the case of an error in the instrument, the fact that the other party knew of the mistake, and inequitably suffered it to pass, is practically equivalent to fraud.[30] Within these limits, even though the contract be within the statute of frauds,[31] parol evidence of the agreement or the intent of the parties is admissible, to prove that by mistake something material has been omitted; or that the instrument contains more than was intended; or that it varies from their intent by expressing something different in substance from the truth of that intent.[32] The mistake must be clearly

[29] Leavitt *v.* Palmer, 3 N. Y. 19; O'Donnell *v.* Harmon, 3 Daly, 424; Pitcher *v.* Hennessy, 48 N. Y. 415.

Where both parties to a suit claim title to land through the mortgagor, a mistake in the mortgage will not be corrected where the parties are not present to authorize such relief, and where the language of the mortgage is ambiguous. Bernheim *v.* Talbot, 54 Ore. 30, 100 Pac. Rep. 1107.

[30] Botsford *v.* McLean, 45 Barb. 478, correcting 42 Id. 445.

When persons are dealing with each other at arm's length, neither is under any duty to disclose facts to the other which are equally in the knowledge of both, and equity will not relieve one from the consequences of his own carelessness. Cherry *v.* Brizzolara, 89 Ark. 309, 116 S. W. Rep. 668, 2 L. R. A. N. S. 508.

[31] Rider *v.* Powell, 4 Abb. Ct. App. Dec. 63, s. c., less fully, 28 N. Y. 310.

[32] Pennell *v.* Wilson, 2 Abb. Pr. N. S. 466, s. c., less fully, 2 Robt. 505; Nevins *v.* Dunlap, 33 N. Y. 676.

"Parol evidence may be resorted to for the purpose of identifying the description contained in the writing with its location upon the ground, but not for the purpose of ascertaining and locating the land about which the parties negotiated and supplying a description thereof which they have omitted from the writing." House *v.* McMullen, 9 Cal. A. 664, 100 Pac. Rep. 344.

To show mistake, parol evidence that a deed of land for a gross consideration was in reality a sale by the acre is admissible. Chestnut *v.* Chism, 20 Tex. Civ. App. 23, 48 S. W. Rep. 549.

Where a contract purports to have been made in duplicate, but one of the copies by mistake, does not correctly state the agreement, reformation is not necessary, since parol evidence is admissible in an action at law to show which copy is the real agreement. Bowman *v.* Poppenberg, 53 Misc. Rep. 373, 103 N. Y. Supp. 245.

Where a contract correctly states the meaning and intention of the parties, evidence showing that their meaning and intention would have been otherwise but for their mutual ignorance of certain facts,

made out by the most satisfactory proof;[33] and the actual agreement must also be shown with clearness.[34]

20. Declarations and Admissions of Principal.

In an action against principal and surety jointly, the admissions and declarations of the former are competent not only against himself, but also against the surety, if made as part of the *res gestæ* of an act properly in evidence against the former,[35] otherwise not.[36] But when admissible, such dec-

does not make out a case for reformation, there being no mutual mistake but mutual ignorance. Westinghaus & Co. *v.* Remington Salt Co., 116 N. Y. App. Div. 123, 101 N. Y. Supp. 303.

[33] Same cases. Lyman *v.* United Ins. Co., 17 Johns. 373; Lesser *v.* Demarest (N. J. Ch.), 72 Atl. Rep. 14; Fuller *v.* Knapp, 82 Vt. 166, 72 Atl. Rep. 688; Cherry *v.* Brizzolora, 89 Ark. 309, 116 S. W. Rep. 668, 21 L. R. A. N. S. 508; Tyler *v.* Merchants' etc., Bank, 89 Am. Rep. 462, 116 S. W. Rep. 213; Eustis Mfg. Co. *v.* Saco Brick Co., 201 Mass. 391, 87 N. E. Rep. 596. The burden of proof is on the party seeking reformation. Ezell *v.* Humphrey, 90 Ark. 24, 117 S. W. Rep. 758; Bibb *v.* American Coal, etc., Co., 109 Va. 261, 64 S. E. Rep. 32. While equity will reform a writing which does not embody the real contract between the parties, the evidence must clearly establish that fact. Knuckles *v.* Hughes Lumber Co. (Ky.), 116 S. W. Rep. 1193. Some cases have held that the proof should be "clear, unequivocal and decisive," Cherry *v.* Brizzolora (above) while others have gone to the extreme of requiring that the mutual mistake must be conclusively established. Bibb *v.* American Coal, etc., Co. (above). "Beyond all reasonable doubt," says the chancellor in Coles *v.* Bowne, 10 Paige, 526. But compare chapter XXVI, paragraph 31, of this vol.

Evidence held sufficient to show mutual mistake. Norton *v.* Gross, 52 Wash. 341, 100 Pac. Rep. 734. Evidence insufficient. Davis *v.* Carter, 142 Iowa, 99, 120 N. W. Rep. 1039; Salezman *v.* Machinery, etc., Ins. Ass'n, 142 Iowa, 99, 120 N. W. Rep. 697; Ezell *v.* Humphrey (above); Hackett *v.* View, 109 N. Y. App. Div. 351, 95 N. Y. Supp. 675; Kenyon Paper Co. *v.* Nederlandsche Lloyds, 124 N. Y. App. 886, 109 N. Y. Supp. 311; Eustis *v.* Saco Brick Co., 201 Mass. 391, 87 N. E. Rep. 596.

[34] Kent *v.* Manchester, 29 Barb. 595.

[35] Bank of Brighton *v.* Smith, 12 Allen, 243, 249; Union Savings

[36] Stetson *v.* City Bank, 2 Ohio St. 167, 177; Blair *v.* Perpetual Ins. Co., 10 Mo. 559, 567; Smith *v.* Whippingham, 6 C.. & P. 78.

larations and admissions of the principal, and even his formal official reports made during the period in respect of

Assoc. *v.* Edwards, 47 Mo. 445; Snell *v.* Allen, 1 Swan (Tenn.), 208; Dobbs *v.* Justices, &c., 17 Ga. 624, 630, 2 Whart. Ev., § 1212. For a broader rule, see Atlas Bank *v.* Brownell, 9 R. I. 168, s. c., 11 Am. Rep. 231; Swift *v.* Trustees of Schools, 189 Ill. 584, 60 N. E. Rep. 44; Singer Mfg. Co. *v.* Reynolds, 168 Mass. 588, 47 N. E. Rep. 438, 60 Am. St. Rep. 417; Jangraw *v.* Perkins, 79 Vt. 107, 64 Atl. Rep. 449; Lancashire Ins. Co. *v.* Callahan, 68 Minn. 277, 71 N. W. Rep. 261, 64 Am. St. Rep. 475; State *v.* Paxton, 65 Nebr. 110, 90 N. W. Rep. 983; Hall *v.* U. S. Fidelity, etc., Co., 77 Minn. 24, 79 N. W. Rep. 590. But compare chapter VII, paragraph 5, of this vol. Unless there is evidence of combination between the plaintiff and the principal. Commonwealth *v.* Kendig, 2 Pa. St. 448, 452; United States *v.* Cutter, 2 Curt. C. Ct. 617.

"Admissions of a principal on a bond made during the transaction of the business for which the surety is bound become a part of the *res gestæ* and are admissible against the surety." Bailey *v.* McAlpine, 122 Ga. 616, 631, 50 S. E. Rep. 388; North America Guarantee Co. *v.* Phœnix Ins. Co., 124 Fed. Rep. 170, 59 C. C. A. 376; Wieder *v.* Union Surety, etc., Co., 42 Misc. Rep. 498, 86 N. Y. Supp. 105.

In a suit by the county against a tax collector and the sureties on his official bond, the declaration of the tax collector that he was expecting a lawsuit over the performance of his duties is admissible against both the collector and his sureties. Walling *v.* Morgan County, 126 Ala. 326, 28 So. Rep. 433.

In a suit against the sureties on a defaulting trustee's bond, the admissions of the trustee of receipt of the trust fund are admissible. Yates *v.* Thomas, 35 Misc. Rep. 552, 71 N. Y. Supp. 1113.

The retention by the principal of statements and accounts sent him by the obligee is an admission of their correctness and admissible against the surety. Bartlett *v.* Illinois Surety Co. (Iowa), 119 N. W. Rep. 729.

Compare Amherst Bank *v.* Root, 2 Metc. (Mass.) 522, 541; Parker *v.* State, 8 Black. 292.

Conversations had with the principal obligor on a bond the day after the alleged breach are not part of the *res gestæ* and are inadmissible against the surety. Knott *v.* Peterson, 125 Iowa, 404, 101 N. W. Rep. 173. See Bailey *v.* McAlpine, 122 Ga. 616, 50 S. E. Rep. 388; Opet *v.* Denzer, 93 S. W. Rep. (Tex. Civ. App.) 527.

Admissions of an officer after the expiration of his term of office: McFarlane *v.* Howell, 16 Tex. Civ. App. 246, 43 S. W. Rep. 315.

Admissions made prior to exe-

which the surety is liable, are not conclusive against the surety.[37]

Entries made by the principal against his interest, though in a private book, are, after his death, competent primary evidence against his surety, although a witness to the transaction might have been called.

II. BONDS

21. Estoppel by Recital.

In an official bond the recital of official character or appointment is conclusive evidence of the appointment as against the obligors, sureties as well as principal.[38] A mere recital cannot operate, by way of estoppel, so far as to preclude the obligees from showing the instrument absolutely void;[39] but it may estop as to any particular matter of fact

cution of the bond are not part of the *res gestæ* and therefore are inadmissible. Matter of Williams, 26 Misc. Rep. 636, 57 N. Y. Supp. 943, 30 N. Y. Civ. Proc. Rep. 76.

On the issue whether or not certain makers of a note were principals or sureties, the statement of the principal that they were co-principals with himself, made in their absence, is inadmissible. Barkley *v.* Bradford, 100 Ky. 304, 38 S. W. Rep. 432, 18 Ky. Law Rep. 725.

Statements made by the principal's attorney in an answer are not admissible against the sureties where it does not appear that the attorney was instructed by the principal in respect of those statements. Farr *v.* Rouillard, 172 Mass. 303, 52 N. E. Rep. 443.

[37] Bissel *v.* Saxton, 66 N. Y. 55; State *v.* Paxton, 65 Neb. 110, 90 N. W. Rep. 983.

[38] Fake *v.* Whipple, 39 N. Y. 394, affi'g 39 Barb. 339, and cases cited; Bruce *v.* United States, 17 How. U. S. 437; Plowman *v.* Henderson, 59 Ala. 559; Hoffman *v.* Fleming, 66 Oh. St. 143, 64 N. E. Rep. 63; Nash *v.* Sawyer, 114 Iowa, 742, 87 N. W. Rep. 707; Talbott *v.* Curtis, 65 W. Va. 132, 63 S. E. Rep. 877. It need not be pleaded or proved. Custer County *v.* Albien, 7 S. D. 482, 64 N. W. Rep. 533.

[39] It may be shown for instance that the bond is a forgery. Terrill *v.* Tillison, 75 Vt. 193, 54 Atl. Rep. 187; Caldwell *v.* Colgate, 7 Barb. 253. Avoiding the deed avoids also the estoppel. Id. As, for instance, where the case was without jurisdiction. Caffrey *v.* Dudgeon, 38 Ind. 512, s. c., 10 Am. Rep. 126; Germond *v.* People, 1 Hill, 343.

Where bonds are valid on their

recited.[40] Even sureties are bound by the recital of preliminaries not affecting the jurisdiction.[41] A recital estops as to the fact recited,[42] but does not necessarily exclude evidence of another independent fact which avoids the effect of the former.[43]

face, the burden of proving their invalidity rests upon him who alleges it. Nichols *v.* Mase, 94 N. Y. 160.

[40] See Decker *v.* Judson, 16 N. Y. 409.

A statement in a replevin bond as to the value of the property estops the maker from asserting a different value. Weyerhaeuser *v.* Foster, 60 Minn. 223, 61 N. W. Rep. 1129.

[41] Coleman *v.* Bean, 1 Abb. Ct. App. Dec. 394.

[42] Cocks *v.* Barker, 49 N. Y. 107; Dunterman *v.* Storey, 40 Nebr., 447, 58 N. W. Rep. 949; Fidelity, etc., Co. *v.* Mobile County, 124 Ala. 144, 27 So. Rep. 386.

Where a bond recites that it is under seal, the obligor is estopped to deny that it was sealed. Metropolitan L. Ins. Co. *v.* Bender, 124 N. Y. 47, 26 N. E. Rep. 345, 11 L. R. A. 708, [rev. 41 Hun, 142].

A mortgagor, in order to regain possession of mortgaged goods, gave the mortgagee a bond which recited the articles covered by the mortgage, It was held that such recital estopped the mortgagor to dispute the mortgagee's ownership of all the articles contained in the recital, but that the surety on the mortgagor's bond was not so estopped unless the inventory of the articles was exhibited to the surety. Wheeler *v.* Meyer, 95 Mich. 36, 54 N. W. Rep. 689.

Where a person is indicted and enters into a recognizance for his appearance, he is thereby estopped to deny that he is the person named in the indictment. U. S. *v.* McNeily, 19 C. C. A. 318, 72 Fed. Rep. 972.

Where a bond appears upon its face to have been executed in compromise of a pending prosecution against an individual, both the latter and his surety must be held to have waived any objection that they might have made to the proceedings at the time the bond was given, and to be estopped from denying the legality of the proceedings resulting in the execution of the bond. Anderson *v.* Com., 105 Va. 533, 54 S. E. Rep. 305.

"In an action to recover the possession of personal property, when the defendant gives an undertaking for the return of the property described in his affidavit and requisition from defendant's possession, he is estopped from denying that he had possession of the property or any part thereof at the commencement of the action, or from showing that it was different or other property; he is concluded by the recitals in the undertaking." Blake *v.* McNamara, 9 Misc. Rep. 212, 29 N. Y. Supp. 676.

[43] Reed *v.* McCourt, 41 N. Y. 435.

A bond to an officer is at least *prima facie* evidence, against the obligors, of his appointment.[44] In a bond of indemnity against the non-performance of a contract, the recital of the execution of the contract is conclusive evidence of its due execution,[45] and its validity so far as that is matter of fact.[46] Recitals are evidence, though the facts recited be not alleged otherwise than by setting forth the instrument in which they appear.[47]

22. Breach.

In an action on a bond for payment of money only, it is for defendant to prove payment.[48] In an action for breach of any other condition, plaintiff should allege non-performance of the condition,[49] and give some evidence of non-

"A judgment against the personal representative to enforce a debt or liability of his intestate, is not binding on the sureties on his bond, so as to preclude or estop them from denying that the administrator had come into the possession of assets with which to discharge the indebtedness." Woodall *v.* Wright, 142 Ala. 205, 37 So. Rep. 846.

[44] Scott *v.* Duncombe, 49 Barb. 73.

[45] Lee *v.* Clark, 1 Hill, 56.

[46] Jarvis *v.* Sewall, 40 Barb. 449.

[47] Slack *v.* Heath, 4 E. D. Smith, 95, 1 Abb. Pr. 331.

[48] Mann *v.* Eckford, 15 Wend. 519. Compare Jolley *v.* Plant, 1 MacArthur, 93.

[49] Thomas *v.* Allen, 1 Hill, 145; Lipe *v.* Becker, 1 Den. 568, 2 N. Y. R. S. 378, § 5; Lancaster County *v.* Fitzgerald, 74 Nebr. 433, 104 N. W. Rep. 875, 13 Ann. Cas. 88.

A complaint on a bond which fails to set out the terms of the condition which, it alleged, had been broken, does not state a cause of action. Gansevoort Bank *v.* Empire State Surety Co., 112 N. Y. App. Div. 500, 98 N. Y. Supp. 382.

It is sufficient to assign the breach in words equivalent to those in the covenant or condition. Wheeling *v.* Black, 25 W. Va. 266.

The declaration is demurrable unless it discloses an intelligible breach. Palestine Bldg. Assoc. *v.* Spengeman (N. J. 1899), 43 Atl. Rep. 653.

Where the condition of a bond is prescribed by statute, an allegation of the execution carries with it an allegation of the condition and it is not fatal on general demurrer, that the condition is not specifically averred. Hill *v.* Escort, 38 Tex. Civ. App. 487, 86 S. W. Rep. 367.

performance,[50] unless it is admitted expressly or impliedly.[51] It is for plaintiff to show the state of facts called for to prevent the condition taking effect.[52] If the bond is conditioned for performance of another contract, and it appears that there were conditions precedent in that contract requiring something from plaintiff, he must show performance of those conditions.[53] But if there is a proviso or defeasance contained in a condition, the facts necessary to invoke it must be set up by defendant in order to avail him.[54] Satisfaction by parol, of money due by the condition of a bond, before forfeiture, may be proved by parol.[55]

23. Administration Bonds.

Actual appointment, letters and oath, may be proved by the record; but, without its production, may be proved by a recital in the bond, of intent to apply for letters, with evidence that the principal acted as if appointed and qualified.[56] The surrogate's decree, shown to have been made in a proper proceeding,[57] and directing the administrator to make a payment, is conclusive on the sureties, unless fraud or collusion is shown.[58] Plaintiff must also show disobedience; and proof of leave to sue is not enough for this

[50] United States *v.* Bell, Gilp. 41.

[51] Cotheal *v.* Talmadge, 1 E. D. Smith, 573, 576.

[52] Ferris *v.* Purdy, 10 Johns. 358.

[53] Water Commissioners of Detroit *v.* Burr, 56 N. Y. 665, affi'g 35 N. Y. Super. Ct. (3 J. & S.) 522.

[54] Jarvis *v.* Sewall, 40 Barb. 449.

[55] Keeler *v.* Salisbury, 33 N. Y. 648.

[56] Dayton *v.* Johnson, 69 N. Y. 419. Compare Lent *v.* Hascall, 22 N. Y. 188.

[57] Behrle *v.* Sherman, 10 Bosw. 292.

Although the condition of the bond was "to obey all lawful orders and decrees of the court" and hence could not technically be broken where the administrator was dead, yet if the administrator misappropriated the funds of the estate, that is a sufficient breach of the condition to support an action. Dunne *v.* American Surety Co., 43 N. Y. App. Div. 91, 59 N. Y. Supp. 429.

[58] Thayer *v.* Clark, 4 Abb. Ct. App. Dec. 391, affi'g 48 Barb. 243; Casoni *v.* Jerome, 58 N. Y. 315. See also 1 Wms. Exrs., 6th Am. ed. 596, n.

purpose.[59] But if plaintiff show disobedience or failure to comply at a given time, the burden is on defendant to show subsequent compliance if he rely on that.[60] Plaintiff should be prepared to prove the surrogate's leave to sue.[61] His leave to sue is conclusive.[62] Neither notice of these proceedings to the surety, nor a demand on the surety, is necessary.[63]

The defendant may show[64] either that the bond was not made, or that the decree was not made; or, if made, was collusive,[65] or that there was no failure by the administrator to comply; or that there was no order for the prosecution. But not that he was misled in signing the bond, by one with whose deception plaintiff was not connected;[66] nor that the surrogate erred in making the decree, nor that he wrongly adjudged the claim established; nor that there were in fact

[59] People *v.* Barnes, 12 Wend. 492.

[60] Dayton *v.* Johnson, 69 N. Y. 419.

[61] People *v.* Falconer, 2 Sandf. 81; Beall *v.* New Mexico, 16 Walls. 543; and see Matter of Van Epps, 56 N. Y. 599.

Under a statute in Massachusetts, it was held that a creditor of the deceased might sue on the bond of an executor to enforce a judgment against the executor without obtaining authority from the probate court. McKim *v.* Roosa, 183 Mass. 510, 67 N. E. Rep. 651.

Under Code Civ. Pro., §§ 2606–2609, an administrator *de bonis non*, may, without leave of the court, maintain an action against the surety upon his predecessor's bond. Dunne *v.* American Surety Co., 43 N. Y. App. Div. 91, 59 N. Y. Supp. 429. See also Flanagan *v.* Fidelity, etc., Co., 32 Misc. Rep. 424, 66 N. Y. Supp. 544.

[62] People *v.* Downing, 4 Sandf. 189.

[63] Wood *v.* Barstow, 10 Pick. 368.

The order permitting suit on the bond may be entered without notice and is not open to collateral attack. Roberts *v.* Weadock, 98 Wis. 400, 74 N. W. Rep. 93.

[64] People *v.* Laws, 3 Abb. Pr. 450.

[65] Annett *v.* Terry, 35 N. Y. 256, affi'g 2 Robt. 556, s. c., 28 How. Pr. 324; People *v.* Townsend, 37 Barb. 520.

[66] Casoni *v.* Jerome, 58 N. Y. 315.

A surety who signed, in blank and without sealing, an administratrix' bond is bound by the bond as executed and delivered and is estopped to allege that he signed upon the condition that another responsible person was to be the other surety, it appearing that the probate judge had approved the bond and that the obligee had no

no assets, although the surrogate decided that there were assets to be applied.[67]

24. Bottomry Bonds.

The bond duly proved raises a presumption that the amount was furnished to the vessel.[68] But if executed by the master, plaintiff must show that he acted within the scope of his authority,—that is to say, there must be evidence of actual necessity for repairs and supplies; or at least of due inquiry and of reasonable grounds of belief that the necessity was real and exigent.[69] Necessity for repairs and supplies raises a presumption of necessity for credit,[70] especially if the vessel was in a foreign port; [71] and throws on the owner the burden of showing that the money could have been obtained otherwise than by bottomry.[72]

25. Indemnity Bonds.

Possession by the principal is evidence of authority to deliver; and parol qualifications not made known to the obligee cannot be proved against him.[73] The seal raises a

notice of any irregularities in its execution. Fuller *v.* Dupont, 183 Mass. 596, 67 N. E. Rep. 662.

[67] People *v.* Laws (above).

[68] Cohen *v.* The Amanda, Crabbe, 277.

[69] The Grapeshot, 9 Wall. 129; The Bridgewater, Olc. 35.

Where the plaintiff knew that the master was in communication by mail and wire with the owner, he cannot enforce a bottomry bond executed by the master. The Archer, 23 Fed. 350, 23 Blatchf. 186, rev'g 15 Fed. Rep. 276.

"The master can make a bottomry bond only abroad and from necessity. He has no power to do so if the owner can be consulted or if he can borrow the money on the personal credit of the owner." Id.

[70] The Grapeshot (above).

[71] The Washington Irving, 2 Ben. 318, 323.

A master has power to hypothecate the ship by executing a bottomry bond, where the ship is in a foreign port and such measure is reasonably necessary to get the ship back to the owners. The Robert L. Lane, 20 Fed. Cas. No. 11,892, 1 Lowell, 388. See also Schmidt *v.* George Nicholaus, 21 Fed. Cas. No. 12, 463.

[72] The Kathleen, 2 Ben. 456, The Virgin *v.* Vyfhius, 8 Pet. 538.

[73] Belloni *v.* Freeborne, 63 N. Y. 383.

presumption of consideration, even for a bond of indemnity against the consequences of performing a legal obligation; and defendant must overcome this by proof that there were no facts throwing doubt on the obligation.[74] On an indemnity against damage, by reason of any fact, as distinguished from an indemnity against liability or an obligation to do a specific act, actual loss or injury must be shown, except in the case of some statutory bonds.[75] The competency and effect of a judgment against the plaintiff has already been stated.[76]

[74] Home Ins. Co. *v.* Watson, 59 N. Y. 390, rev'g 4 Supm. Ct. (T. & C.) 226, s. c., 1 Hun, 643; and see Coventry *v.* Barton, 17 Johns. 142.

[75] Churchill *v.* Hunt, 3 Den. 321; Gilbert *v.* Wiman, 1 N. Y. 550; Wright *v.* Whiting, 40 Barb. 235; Weller *v.* Eames, 15 Minn. 461, s. c., 2 Am. Rep. 150.

Where a consignee gives an indemnity bond to the carrier in order to obtain possession of goods without presenting a bill of lading therefor, the carrier, in a suit on the bond, must prove that it paid the proper amount to the person holding the bill of lading. Collins *v.* Savannah, etc., Co., 122 Ga. 655, 50 S. E. Rep. 477.

Where an indemnity bond is conditioned that the obligor save harmless the obligee from all loss resulting from certain excavations being made, the question of negligence of the obligee causing the loss, is immaterial and evidence thereof is inadmissible in a suit on the indemnity bond. Omaha Gas Co. *v.* South Omaha, 71 Nebr. 115, 98 N. W. Rep.

[76] Chapter XIII, paragraph 15, of this vol.; and see Bridgeport Ins. Co. *v.* Wilson, 34 N. Y. 275, rev'g 7 Bosw. 427; Taylor *v.* Barnes, 69 N. Y. 430; Thomas *v.* Hubbell, 15 N. Y. 405, rev'g 18 Barb. 9; Fay *v.* Ames, 44 Barb. 327.

"It depends upon the character of the bond. If it undertakes to pay such judgments as may be recovered, that judgment is conclusive, because that judgment is the event on the happening of which the surety agrees to pay." State *v.* Nutter, 44 W. Va. 385, 30 S. E. Rep. 67.

Where defendant contracted to save plaintiff harmless from all claims arising out of certain work agreed to be done, judgments obtained against plaintiff in actions of the pendency of which defendant had notice, are conclusive against defendant when such judgments are shown to have been based on actions arising out of such work. Lake Drummond Canal, etc., Co. *v.* West End Trust, etc., Co., 73 C. C. A. 227, 142 Fed. Rep. 41; New York *v.* Brady, 151 N. Y. 611, 45 N. E. Rep. 1122; Byne *v.* Americus, 6 Ga. App. 48, 64 S. E. Rep. 285.

Where the indemnity bond pro-

26. Official Bonds.[77]

The general rules applicable in actions by and against public officers have already been stated.[78] It may be further

vided that judgments against the obligee should be conclusive of the obligor's liability on the bond where "due notice" of the pendency of the action against the obligee was given, the failure of the obligee to give sufficient notice to enable the obligor to prepare for the trial is a good defense. Spokane *v.* Costello, 33 Wash. 98, 74 Pac. Rep. 58.

Eleven days' notice is *prima facie* "due notice" but not conclusive. Id.

Where the vendee of a business agreed to indemnify the vendor against all loss or damage upon any contract relating to the business, a judgment subsequently recovered by a third person against the vendor is not conclusive on the vendee where the vendee had no notice of the pendency of the action against the vendor. Russel Trimmer Co. *v.* Coburn, 188 Mass. 254, 74 N. E. Rep. 334, 69 L. R. A. 821.

Where the defendant gave plaintiff corporation a bond to save it harmless from actions against it, and the plaintiff, after judgment was recovered against it and an appeal taken, settled the judgment and then sued on the bond for the amount paid in settlement, defendant is liable unless it appears that the plaintiff acted in bad faith in settling the judgment before the appeal was passed upon and that such action of the plaintiff operated to the disadvantage of the defendant. New York *v.* Baird, 176 N. Y. 269, 68 N. E. Rep. 364 (rev'g 74 N. Y. App. Div. 238, 77 N. Y. S. 446).

A judgment against a sheriff as a trespasser is conclusive against those who furnished the bond indemnifying him. Woodworth *v.* Gorsline, 30 Colo. 186, 69 Pac. Rep. 705, 58 L. R. A. 417.

Plaintiff, in a suit on an indemnity bond may introduce in evidence the executions issued upon the judgments recovered against the plaintiff on claims against which the plaintiff was indemnified and such evidence establishes the right of the plaintiff to recover and the amount of such recovery. Smith *v.* Burton, 94 Va. 158, 26 S. E. Rep. 412.

[77] As to the nature and limits of the liability of fiscal officers, see Cent. L. J. 1877, p. 478, 16 Alb. L. J. 129; Perley *v.* County of Muskegon, 32 Mich. 132, s. c., 20 Am. Rep. 637.

Sureties on an official bond are liable for "all defaults of a public officer within the limits of what the law authorizes or enjoins upon him, as such officer . . . but they are not bound for acts which are not done in his official capacity." Gold *v.* Campbell, 54 Tex. Civ. A, 269, 117 S. W. Rep. 463.

[78] Chapter VIII of this vol.

added that a fiscal officer may sometimes be presumed to have received the whole amount collectible upon his warrant, and that he retains in his own hands the balance unaccounted for; and, in such case, the burden of proof is on him to show that the failure to pay arose from his inability to collect the sum, except by compulsory measures against the taxpayers;[79] but a public officer is not generally presumed to have applied funds to his private purposes; and hence his pecuniary embarrassments are not generally competent; yet where it has been shown that those having the right to control his acts, have permitted him to use such funds, his pecuniary embarrassments may be competent in favor of his sureties.[80] A balance shown to have been due from the officer, when reappointed, is presumed, but not conclusively, to have been then still in his hands; but his sureties may show that he was in fact already a defaulter when they became such.[81]

Where persons captured a criminal and placed him in the hands of the sheriff, who let him escape, thus depriving the captors of the rewards offered, the sheriff is not liable to such captors on his official bond conditioned for the faithful performance of his duties. McPhee *v.* U. S. Fidelity, etc., Co., 52 Wash. 154, 100 Pac. Rep. 174, 132 Am. St. Rep. 958, 21 L. R. A. N. S. 535.

Official bonds are joint and several and suit may be maintained against any or all of the obligors. Jenks *v.* School Dist., 18 Kan. 356.

[79] Fake *v.* Whipple, 39 N. Y. 394, affi'g 39 Barb. 339. But compare, *contra*, Bryan *v.* United States, 1 Black, 140.

In a suit against an official and his sureties on the official bond, the burden is on the defendants to show the amount of money received by the official, where such official has failed to keep account of such money received, and failing to show what he received, they will be charged with what he should have received. State *v.* King, 136 Mo. 309, 38 S. W. Rep. 80, 36 S. W. Rep. 681.

The failure of the administrator of a deceased township official to find all the property belonging to the township among the deceased's effects is *prima facie* evidence of the official's default. Trustees of schools *v.* Smith, 88 Ill. 181.

Sureties on an official bond must show, in order to exonerate themselves, that the treasurer paid out the funds according to law. Id.

[80] Nolley *v.* Calloway County Court, 11 Mo. 447, 468.

[81] Bruce *v.* United States, 17 How. (U. S.) 437; United States *v.* Eckford, 17 Pet. 251.

The burden is on the sureties to show that the default of the prin-

Peculiarities in the mode of keeping public accounts should be explained by the testimony of those charged with the duty of keeping them, rather than by the calling of a witness who may happen to be acquainted with the matter, to state his opinion of the effect.[82]

If a cause of action matured on a breach of the bond, no demand need be proved.[83]

III. CHARTER-PARTIES

27. General Rule as to Oral Evidence to Vary.

The rule that oral evidence is generally inadmissible to enlarge or vary the terms of a contract is applied to charter-parties.[84] But if the language be indefinite or ambiguous,

cipal on an official bond occurred before the date of the bond. Faulkner *v.* State, 9 Ark. 14.

[82] United States *v.* Willard, 1 Paine, 539, 545. For the peculiar rules facilitating proof in actions against defaulting officers of the United States, see United States *v.* Eckford, 17 Pet. 251, s. c., 1 How. (U. S.) 250; United States *v.* Hodge, 13 How. (U. S.) 478; Watkins *v.* United States, 9 Wall. 759; United States *v.* Eggleston, 23 Int. Rev. Rec. 113; United States *v.* Jones, 8 Pet. 375; Bruce *v.* United States, 17 How. (U. S.) 437; United States *v.* Gaussen, 19 Wall. 198; Smith *v.* United States, 5 Pet. 292, 299; Bleecker *v.* Bond, 3 Wash. C. Ct. 529; Lawrence *v.* United States, 2 McLean, 581.

[83] Albany City Fire Ins. Co. *v.* Devendorf, 43 Barb. 444; School District No. 1 *v.* Lyford, 27 Wis. 506. See also Jenks *v.* School Dist., 18 Kan. 356.

[84] The Eli Whitney, 1 Blatch. C. Ct. 360. The Hermitage, 4 Id. 474, and see chapter XVI, paragraph 9, and Chapter XXVI, paragraph 11, of this vol.; Pitkin *v.* Brainard, 5 Conn. 451, 13 Am. Dec. 79.

"Any evidence of their failure (if there was a failure) to comply with an agreement made by them preliminary to the execution of the charter-party or contemporaneously with it inconsistent with its terms, cannot be considered by the court. Such parol evidence is inadmissible to vary or add to a written contract which must be held to have merged all previous agreements, if any." The Augustine Kobbe, 37 Fed. Rep. 696.

Where a charter-party states that the vessel is "of the burden of 427 tons or thereabouts" evidence that the owners represented her capacity as 3000 barrels when in fact it was only 2600 barrels, is inadmissible, all agreement as to capacity being considered as stated in the language of the charter-

the situation of the parties may be shown as in other cases for the purpose of ascertaining their intent.[85] Being under seal, the rule excludes evidence to show that another than than the person named as party, was the principal for the purpose of enabling him to sue on it.[86] Though the signer be described as agent in the body of the instrument, yet if he signs personally, without qualification, he may be held liable, unless it appears from the other portions of the instrument that he did not intend to bind himself as principal.[87] But evidence of a usage of trade that if the principal's name is not disclosed within a reasonable time after signing of the charter-party, in such case the broker shall be personally liable, is admissible.[88] If the charter-party appears to have been executed as covering the whole subject-matter of a previous memorandum, a clause in the memorandum, omit-

party. Baker *v.* Ward, Cas. No. 7, 85, 3 Ben. 499.

[85] See Almgren *v.* Dutilh, 5 N. Y. 28.

[86] Humble *v.* Hunter, 12 Ad. & El. N. S. (Q. B.) 310, and see chapter XVI, paragraph 10, of this vol. Where the charter-party is not under seal, it is competent to show that it was executed by the persons signing it, not only for themselves, but as representing all those who chartered the steamship; and they may be treated as agents executing the charter-party for themselves and all others interested as principals with them. Woodhouse *v.* Duncan, 106 N. Y. 527, 531, 13 N. E. Rep. 334; Briggs *v.* Partridge, 64 N. Y. 357; Hill *v.* Miller, 76 N. Y. 32; Nicoll *v.* Burke, 78 N. Y. 580.

"The grounds upon which testimony as to usage is admissible in a case of this kind is that such evidence is necessary to place the court in the situation in which the parties were when they contracted, and thus enable it to understand the meaning of their language. Whether such usage be called a 'custom,' or by any other name, if it is one of the circumstances surrounding the parties to the transaction, and was presumably in their minds when the contract was written, then, in contemplation of the law, such usage is written into the contract. But to have the effect there must be no room to doubt the existence of such a custom, and it must be reasonable, certain, consistent with the contract, uniformly acquiesced in, and not contrary to law." Continental Coal Co. *v.* Birdsall, 48 C. C. A. 124, 108 Fed. Rep. 882.

[87] Haugh *v.* Manzanos, 27 Weekly R. 536. Compare Hayn *v.* Clifford, Id. 541.

[88] Hutchinson *v.* Tatham, L. R. 8 C. P. 482.

ted from the charter-party is merged;[89] otherwise if executed only in part performance of the memorandum.[90] A subsequent agreement by parol for the use of the ship at a period before the charter-party attaches, may be proved.[91]

28. Usage.[92]

Where local usage of the port is competent it is no objection that it was not known to a party who contracted in such form as to be subject to it.[93]

29. Terms; Measurements; Cargo; Capacity.

A usage as to terms, etc., may be proved if the charter-party contemplates it,—as where it stipulates for "the usual and customary terms," [94] or "regular terms of loading;" [95]—but not otherwise to vary clear and unambiguous language.[96] But even ordinary language,—such as "bale," [97] or "full and complete cargo," [98]—may be explained by evidence that in the shipping usage it has a peculiar technical meaning. To admit evidence of technical meaning the phrase need not be on the face of it ambiguous.[99] So if the charter-party

[89] Renard *v.* Sampson, 12 N. Y. 561, affi'g 2 Duer, 285.

[90] Id.

[91] White *v.* Parkin, 12 East, 578. So, of other matters of agreement, express or implied, extrinsic to the contract. Rosc. N. P. 443, citing Fletcher *v.* Gillespie, 3 Bing. 635.

[92] As to the mode of proof, see chapter XVI, paragraph 9, and chapter XXVI, paragraph 16, of this vol.

[93] Robertson *v.* Jackson, 2 C. B. 412.

[94] Robertson *v.* Wait, 8 Exch. 299; and see Rosc. N. P. 445.

Where a charter-party specifies that the vessel shall go "the northern passage" and it appears that this expression is a term used in that trade to designate a particular route, it was error for the court to hold that the determination of the question as to which route was thus known to the trade was immaterial. The John H. Pearson, 121 U. S. 469, 7 Sup. Ct. 1008, 30 Law ed. 979 [rev'g 14 Fed. Rep. 749].

[95] Leidemann *v.* Schultz, 14 C. B. 38, 23 L. J. C. P. 17.

[96] Phillipps *v.* Briard, 1 H. & N. 21, s. c., 25 L. J. Exch. 233. Compare Brown *v.* Byrne, 3 El. & Bl. 703, s. c., L. J. 23 Q. B. 313, Rosc. N. P. 24.

[97] Taylor *v.* Briggs, 2 C. & P. 525.

[98] Cuthbert *v.* Cumming, 11 Exch. 405.

[99] Page 595 of this vol. Myers *v.*

is indeterminate as to the place of measurement of goods, evidence of usage is competent.[1]

The testimony of experts is competent on the question whether a ship has on board a "full cargo." [2]

The defendant may show a fraudulent misrepresentation of capacity, made by plaintiff at the time of hiring, as a ground of reducing the recovery,[3] unless inconsistent with the terms of the instrument.[4]

30. Performance.

Performance or waiver must be affirmatively established by the plaintiff.[5]

31. Damages.

The fact that a party to a charter-party paid an additional price for goods because of delay consequent on its violation, is *prima facie* evidence of damage to that extent without proof of the value at the place of intended sale, and entitles him, in the absence of evidence to the contrary, to go to the jury.[6] Breach in not furnishing a cargo being shown, the burden is thrown on defendant to show, in mitgation of

Sarl, 3 E. & E. 319 (per BLACKBURN, J.).

[1] Bottomley *v.* Forbes, 5 Bing. N. C. 121.

[2] Ogden *v.* Parsons, 23 How. U. S. 167, 169.

[3] Johnson *v.* Miln, 14 Wend. 195.

[4] Baker *v.* Ward, 3 Ben. 499.

[5] Roberts *v.* Opdyke, 40 N. Y. 259, affi'g 1 Robt. 287, Rosc. N. P. 443. Compare Bowley *v.* U. S., 8 Ct. of Cl. 187. As to seaworthiness, compare, The Vincennes, 3 Ware, 171; Werk *v.* Leathers, 1 Woods, 271, Rosc. N. P. 443; Belham *v.* Benson, 1 Gow. 45, and chapter XXVI, paragraph 11, of this vol.

[6] Featherston *v.* Wilkinson, L. R. 8 Ex. 122, s. c., 4 Moak's Eng. 493.

Where defendant broke his charter-party agreement to transport sheep from New York to England, the measure of damages is the difference between the rate of transportation contracted for and that paid, together with the expenses of the delay and an allowance for depreciation, if any. The Rossend Castle, 30 Fed. Rep. 462.

The measure of damages for breach of a charter-party in failing to furnish the vessel chartered is the amount of the freight named in the charter-party, less the amount for which plaintiff could have chartered another vessel. If no other vessel could be chart-

damages, that another cargo might have been procured by the use of ordinary means and proper opportunities on the part of the master or owners.[7]

32. Demurrage, or Damages for Detention.[8]

Where lay days are to commence running "on arrival," parol evidence is competent to show what is commonly understood to be the port; and this evidence may extend to the fact that in the case of a particular class of ships like that in question, the lay days commence only from the mooring at the quay, where by the regulations of the port she only could discharge.[9] But if the written obligation is to land the cargo at a specified dock, evidence of usage is not necessarily competent to show that the allowance for demurrage does not begin till after obtaining a berth.[10] Parol evidence is held not admissible to show usage that such an expression as "to be discharged in fourteen days," means working days and excludes Sundays and custom-house holidays.[11]

ered, then the measure of damages would be the difference in the value of the goods at the point of shipment and at the point of destination. Parke *v.* McCaldin, 3 Misc. Rep. 14, 22 N. Y. Supp. 358.

A three weeks' delay of a vessel in her home port because of her master's rheumatism is unreasonable and her owners are liable for the loss to the charterer caused by that delay. The Giulio, 34 Fed. Rep. 909.

Where a vessel was delayed through the negligence of the engineer and the defective condition of her machinery the loss incurred because of such delay together with the amount of prospective profits lost, where such loss is clearly proved is recoverable. Seaman *v.* Slater, 49 Fed. Rep. 37.

[7] Murrell *v.* Whiting, 32 Ala. 54, 67.

[8] Although no provision be made in the contract for demurrage, damages in the nature of demurrage may be recovered for detention. Morse *v.* Pesant, 3 Abb. Ct. App. Dec. 321.

[9] Norden Steamship Co. *v.* Dempsey, L. R. 1 C. P. Div. 654, s. c., 18 Moak's Eng. 252.

[10] Phil., etc., R. R. Co. *v.* Northam, 2 Ben. 1.

[11] See Cochran *v.* Retberg, 3 Esp. N. P. 121. *Contra*, chapter XVI, paragraph 9; and chapter XIX, paragraph 17, of this vol. Lying days mean working days. Commercial Steamship Co. *v.* Boulton, L. R. 10 Q. B. 346, s. c., 13 Moak's Eng. 288.

IV. COVENANTS FOR TITLE

33. Implied Covenants.

By statute in New York [12] and some other States, no covenant is implied in any conveyance of real estate. But leases for not more than three years [13] and conveyances of incorporeal hereditaments [14] are not within this rule.

34. Covenant of Warranty.

An actual eviction or ouster from the possession of the whole or part of the premises conveyed, by force of a paramount title, must be shown.[15] Actual sale under judicial

[12] 1 N. Y. Real Property Law, § 251. So, to some extent, by the American doctrine of the common law. Frost *v.* Raymond, 2 Cai. 188; Van Rensselaer *v.* Kearney, 11 How. (U. S.) 297, 322; Barden *v.* Stickney, 130 N. C. 62, 40 S. E. Rep. 842. For the rule as to implied covenants, in case of a conveyance made in one State, of land in another, see Bethell *v.* Bethell, 54 Ind. 428, s. c., 23 Am. Rep. 650; Thompson *v.* Schenectady Ry. Co., 124 Fed. Rep. 274.

There is an implied warranty of title in an executory contract for the sale of real estate, though there is no such warranty implied in a deed of conveyance. Burwell *v.* Jackson, 9 N. Y. 535.

[13] Moffet *v.* Strong, 9 Bosw. 57; Lynch *v.* Onondaga Salt Co., 64 Barb. 558.

An instrument under seal leasing the right to collect wharfage is not a "conveyance of real estate" so as to forbid the implication of a covenant of title. New York *v.* Mabie, 13 N. Y. 151, 64 Am. Dec. 538.

[14] Mayor, etc., of N. Y. *v.* Mabie, 13 N. Y. 151, rev'g 2 Duer, 401.

Where an instrument purports to include only personal property, the words "grant, bargain, sell and convey," even if sufficient to carry any realty that may be included in the property named, cannot be construed as a covenant of title or right to convey any interest in real estate. Falls City Lumber Co. *v.* Watkins, 53 Ore. 212, 99 Pac. Rep. 884.

[15] Blydenburgh *v.* Cotheal, 1 Duer, 176, 195, and cases cited. Troxwell *v.* Stevens, 57 Nebr. 329, 77 N. W. Rep. 781; Cheney *v.* Straube, 35 Nebr. 521, 53 N. W. Rep. 479; Rindskopf *v.* Farmers' L. & T. Co., 58 Barb. (N. Y.) 36; Wiggins *v.* Pender, 132 N. C. 628, 44 S. E. Rep. 362, 61 L. R. A. 772; Burns *v.* Vereen, 132 Ga. 349, 64 S. E. Rep. 113; McMullen *v.* Butler, 117 Ga. 845, 45 S. E. Rep. 258.

"There is an actual eviction

process is sufficient evidence of the eviction.[16] The judgment is in any case competent evidence of the fact of its recovery; but the paramount character of the title is not proved by the judgment,[17] unless defendant was a party or privy to the judgment. If the covenantor was not a party on the record in the evicting judgment, the judgment will still be conclusive on him, if distinct and unequivocal notice was given him expressly requiring him to appear and defend the adverse suit, and giving him reasonable opportunity to do so.[18] If such notice appear upon the record of that suit,

when the grantee is dispossessed by process of law. There is a constructive eviction when he yields possession to a title which is actually paramount. There is neither actual nor constructive eviction while he continues in possession. And without an eviction, actual or constructive, there can be no recovery on a covenant of warranty or of quiet enjoyment." Mead *v.* Stackpole, 40 Hun (N. Y.), 473.

Where plaintiff's claim is founded upon a constructive eviction he must prove that the title to which he yielded was actually paramount. Walker *v.* Kirshner, 2 Kan. App. 371, 42 Pac. Rep. 596; Cheney *v.* Straube (above).

A judgment against the plaintiff in an ejectment suit is not, of itself, such an eviction as will support an action for breach of warranty. Lundgren *v.* Kerkow, 1 Nebr. (Unof.) 66, 95 N. W. Rep. 501.

Where the covenantee, in order to prevent ejectment, buys in the paramount title, he can maintain an action on the covenant of warranty for the amount paid for the outstanding title. Barlow *v.* Delancey, 40 Fed. Rep. 97.

[16] Cowdrey *v.* Coit, 44 N. Y. 382, rev'g 3 Robt. 210. Compare Furnas *v.* Durgin, 119 Mass. 500, s. c., 20 Am. Rep. 341.

Where there is no ouster, the fact that the land of the warrantee has been sold in pursuance of a void judgment does not constitute a breach of warranty. Pritchard *v.* Smith, 107 Ky. 483, 54 S. W. Rep. 717, 21 Ky. Law Rep. 1197.

[17] On this subject, see also chapter XIII, paragraph 15, of this vol.

"It requires more than the judgment of court to constitute a breach of warranty. There must be an ouster, on a disturbance of the possession equivalent to an ouster." Ravenal *v.* Ingram, 131 N. C. 549, 42 S. E. Rep. 967.

A judgment may, however, amount to a constructive eviction, if its effect is to deprive the covenantees of the beneficial enjoyment of the premises. Ensign *v.* Colt, 75 Conn. 111, 52 Atl. Rep. 829, 946.

[18] Rawle on Cov. 232; Williams

the court may instruct the jury that the recovery in that suit is conclusive on the present defendant, as if he had been a party on the record in the former suit. If the notice do not thus appear on the record, the question of the conclusiveness of the judgment will depend upon the belief of the jury as to the reception of the notice.[19]

If the record of the former action does not exhibit on its face the title under which the recovery was had, the plaintiff in the present action must, notwithstanding proper notice

v. Burg, 9 Lea (Tenn.), 455; Osburn *v.* Pritchard, 104 Ga. 145, 30 S. E. Rep. 656; Taylor *v.* Allen, 131 Ga. 416, 62 S. E. Rep. 291; Greenlaw *v.* Williams, 2 Lea (Tenn.), 533. But see Wheelock *v.* Overshiner, 110 Mo. 100, 19 S. W. Rep. 640.

"The overwhelming weight of authority is, that where a covenantor is notified by his covenantee or a subsequent grantee of the estate to whom his covenant has run, that proceedings have been instituted to recover the land by one claiming to hold the title, accompanied with a demand that he be bound by the judgment in the case, whether he becomes a party thereto after notice given or not and the judgment will be conclusive proof in an action on his covenant that the title of the successful claimant was good." Leet *v.* Gratz, 92 Mo. App. 422. Where the covenantor had no notice of the suit against the plaintiff and was not a party thereto, the judgment therein is not even *prima facie* evidence of plaintiff's eviction by paramount title. Wallace *v.* Pereles, 109 Wis. 316, 85 N. W. Rep. 371, 53 L. R. A. 644, 83 Am. St. Rep. 898. Nor does plaintiff make out a *prima facie* case by showing that, in an action of trespass instituted by him, he was non-suited: he must show that the court in rendering the judgment of non-suit necessarily passed upon the validity of the title held by the warrantor at the date of the warranty sued on. Burns *v.* Vereen, 132 Ga. 349, 64 S. E. Rep. 113. Formal notice in writing is not necessary. Walton *v.* Campbell, 51 Nebr. 788, 71 N. W. Rep. 737. But in order to conclude a warrantor by a judgment of eviction the notice must be distinct and unequivocal, and expressly require the party bound by the covenant to appear and defend the adverse suit. Wheelock *v.* Overshiner (above). The requirement of an express request is not sanctioned by many of the authorities. Somers *v.* Schmidt, 24 Wis. 417, 1 Am. Rep. 191; and see chapter XIII, paragraph 15, of this vol.

[19] Id.

"Notice on the part of the defendant will be implied from knowledge of the pendency of the suit and participation in the defense thereof." Meyer *v.* Purcell, 214 Ill. 62, 73 N. E. Rep. 392.

has been given, prove that such title did not accrue subsequently to the deed to himself.[20]

If plaintiff does not rely on the judgment as evidence of the adverse title, he need not prove that defendant had notice of the suit.

35. — of Seizin and Right to Convey.

Formerly the rule was that the defendant had the burden of proving the seizin denied by the plaintiff; but since the passage of the recording acts the rule has been changed and it is now practically settled in most jurisdictions that the party asserting want of seizin must prove it.[21] The true consideration, and its non-payment, may be shown by parol, notwithstanding the receipt for a different consideration in the deed.[22]

[20] Rawle on Cov. 232.

[21] Woolley *v.* Newcombe, 87 N. Y. 605, in which Rapallo, J., in a very learned opinion, states the grounds for changing the rule in the following language: "Before the recording acts, it is easy to understand why it should be held that in an action on the covenants of seizin the vendor was bound to disclose his title. He was allowed to retain the evidences thereof for the very purpose of answering to these covenants. It is equally manifest that under our present system of conveyancing and making the title to real estate matter of public record as accessible to the vendee as to the vendor, the reason for the former rule entirely fails, and in this state it no longer has any foundation whatever to rest upon; and if the common law system of pleading still prevailed, the plaintiff, in replying to a plea of seizin, would doubtless be required to state, as in other actions of covenant, the particulars of the breach, and thus assume the affirmative. An action of this description would no longer be an exception to the general rules of pleading. Under the code, however, no replication is necessary. Issue is joined by the service of the answer. The defendant is not bound to set up in his answer performance of the covenant, and throws upon the plaintiff the burden of proving it." See also Wine *v.* Woods, 158 Ind. 388, 63 N. E. Rep. 759; Zarkowski *v.* Schroeder, 71 App. Div. 526, 75 N. Y. Supp. 1021; Zerfing *v.* Seelig, 14 S. D. 303, 85 N. W. Rep. 585.

[22] Bingham *v.* Weiderwax, 1 N. Y. 509.

"'As between an immediate vendee with warranty and his warrantor, the warrantor may show

36. — Against Incumbrances.

The burden is on plaintiff to prove the incumbrance.[23] The injury sustained must be indicated in the pleading to admit evidence of special damage.[24] Extrinsic evidence that the parties did not intend the covenant to extend to a particular incumbrance not specified, or did intend it to extend to one which is excepted, is not competent.[25] But where consequential damages are claimed of the grantor resulting from a breach of the covenant by the grantee, the grantor may show in mitigation of damages that the grantee knew of the existence of these restrictions upon the use of the premises when he purchased.[26] And on the question of what is an

what was the real consideration paid for the land, the title to which was warranted, but between a remote vendee and a warrantor the consideration expressed in the deed is conclusive, and cannot be questioned in a suit on the warranty." Blackwell *v.* McBride, 14 Ky. L. 760.

It may be shown, in reduction of damages, that the portion of the land to which the grantor had no title, was included in the deed by mistake and that no consideration was paid for it. Such evidence however is admissible only in mitigation of damages and not for the purpose of negativing a breach of the covenant. Rook *v.* Rook, 111 Ill. App. 398.

[23] Rawle on Cov. 114; Parker *v.* Lindsay (Tex. Civ. A.), 37 S. W. Rep. 482.

An actual eviction need not be shown. McCrillis *v.* Thomas, 110 Mo. App. 699, 85 S. W. Rep. 673.

He must show that the encumbrance was a valid and subsisting one. Robinson *v.* Bierce, 102 Tenn. 428, 52 S. W. Rep. 992, 47 L. R. A. 275.

[24] Id. 116. In an action to recover damages for the breach of a covenant against incumbrances in a deed of property which was subject to certain restrictions in its use, prohibiting its occupation, among other things, for the purposes of a saloon, it is improper to allow a witness to state what his judgment is as to the difference in value between the property if it were free from incumbrances and the property subject to the restrictions. Charman *v.* Hibbler, 31 31 App. Div. (N. Y.) 477.

[25] Harlow *v.* Thomas, 15 Pick. 66; Rawle on Cov. 119, 120, n., 12 Moak's Eng. R. 243, n.

Where the covenant against incumbrances excepted "the taxes assessed for the year 1893," the written contract of sale, in pur-

[26] Charman *v.* Hibbler, 31 App. Div. 477.

incumbrance, within the meaning of the covenant, evidence of the surrounding circumstances, of the relation of the parties to the subject of the conveyance, of notice to the purchaser, and of local usage, if any, is competent.[27] Evidence of declarations of a former owner, made during his ownership and tending to prove existence of a right of way admitted, is competent against the present owner; but such declarations, tending to disprove the existence of the right of way are incompetent in favor of the present owner.[28] If the breach consists in an incumbrance of record,—such as a judgment [29] or a tax sale,[30]—the record, or the material part of it, must be produced or accounted for.

37. — for Quiet Possession or Enjoyment.

The burden is on plaintiff to show eviction, actual or constructive,[31] unless defendant has assumed the burden of proof by affirmative allegations in his answer. A purchaser is presumed to know what the property is which he buys, unless deception is practiced upon him.[32] Plaintiff need not show that the paramount title was established by judgment.[33] The judgment against the plaintiff is competent evidence against defendant; [34] but if he relies on his surrender with-

suance of which the deed and covenant was given, is inadmissible to show that the exception was meant to read: "The taxes assessed on May 1, 1893." Smith *v.* Abington Sav. Bank, 171 Mass. 178, 50 N. E. Rep. 545.

[27] Rawle on Cov. 113.

[28] Blake *v.* Everett, 1 Allen, 248.

[29] Waldo *v.* Long, 7 Johns. 173; Cooper *v.* Watson, 10 Wend. 202.

[30] Kennedy *v.* Newman, 1 Sandf. 187.

[31] Rawle on Cov. 194.

[32] Spoor *v.* Green, L. R. 9 Ex. 99, s. c., 8 Moak's Eng. 540.

[33] McGary *v.* Hastings, 39 Cal. 360, s. c., 2 Am. Rep. 456.

[34] Rickert *v.* Snyder, 9 Wend. 416; and see preceding paragraphs; Walsh *v.* Dunn, 34 Ill. App. 146; Adams *v.* Conover, 87 N. Y. 422, 41 Am. Rep. 381 [aff'g 22 Hun, 424].

Where the warrantor is not made a party to the suit against the warrantee, judgment therein is not conclusive against the warrantor, but it is admissible to show an eviction of the warrantee. McGregor *v.* Tabor (Tex. Civ. A.), 26 S. W. Rep. 443.

Where, by law, a public easement in land conveyed with covenants is held not to be a breach of the covenants, if the easement is in use and visible, a judgment against

out judgment, he must show that the title was paramount, and could not justly have avoided yielding.[35] It is not enough to show that the defendants had notice of the claim against him.[36]

the covenantee establishing the right of the public to the easement and decreeing the eviction of the covenantee from the premises subject to the easement is not conclusive against the covenantor, since the judgment did not adjudicate the question whether the easement was used and visible, upon which question the covenantor's liability depended. Hymes *v.* Esty, 116 N. Y. 501, 22 N. E. Rep. 1087, 15 Am. St. Rep. 421.

[35] Rawle on Cov. 150.

[36] Kelly *v.* Dutch Church, 2 Hill, 105.

The covenantee, having given notice to the covenantor of a suit against him (the covenantee) to enforce an incumbrance on the premises, and, upon the covenantor's failure to defend, having himself defended the suit, may recover from the covenantor the amount paid to extinguish the incumbrance and his costs and disbursements in defending the action. Olmstead *v.* Rawson, 188 N. Y. 517, 81 N. E. Rep. 456 [mod'f'g 110 N. Y. App. Div. 809, 97 N. Y. Supp. 239].

CHAPTER XXVIII

ACTIONS ON LEASES

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1. Allegation of Lease.

Under the new procedure a written contract is admissible in evidence under a general allegation that the party contracted, without indicating how,[37] and conversely if the allegation is of a written contract, evidence of an oral contract, if valid, is admissible by an amendment,[38] unless the adverse party is surprised. At common law, a parol contract is not admissible under an allegation of a specialty; [39] but the variance may be cured by amendment,[40] if defendant has not been misled to his prejudice. Even if the action is for use and occupation, the court may allow a lease to be proved

[37] Note 44 below; and see Tuttle *v.* Flannegan, 54 N. Y. 686, affi'g 4 Daly, 92.

[38] Thomas *v.* Nelson, 4 Law & Eq. Rep. 40; Houghton *v.* Koenig, 18 C. B. 235.

[39] Phillips & Colby Construction Co. *v.* Seymour, 91 U. S. (1 Otto) 646. Compare Rosc. N. P. 343; Dougherty *v.* Matthews, 35 Mo. 520, 528.

[40] Houghton *v.* Koenig, 18 C. B. 238.

under amendment, and a recovery thereon had; [41] and conversely, if the action is on a deed, recovery for use and occupation may be had by amendment.[42] Under an allegation describing the lease as for the original term, the lease may be admitted in evidence though extended by virtue of a covnant therein contained, for an additional period and at a different rent.[43]

Compliance with the statute of frauds need not be alleged, but if the contract is denied or the statute of frauds pleaded, compliance must be proved.[44]

2. Mode of Proving the Contract.

Where a lease may be proved by parol, the fact and terms of tenancy may be shown by evidence that plaintiff informed defendant what they would be if he occupied, and that he thereafter did so without dissent.[45] A memorandum of

[41] Bedford *v.* Terhune, 30 N. Y. 453, affi'g 1 Daly, 371; and see chapter XVII, paragraph 3, of this vol.

[42] Houghton *v.* Koenig (above).

[43] Phelps *v.* Van Dusen, 3 Abb. Ct. App. Dec. 604.

[44] Marston *v.* Sweet, 66 N. Y. 206, rev'g 4 Hun, 156. The mode of proving a memorandum which satisfies the statute has already been indicated, Chapter XVI, paragraph 7, of this vol. And see Baumann *v.* James, L. R. 3 Ch. App. 508; Hand *v.* Hall, 25 Weekly R. 734, s. c., L. R. 2 Exch. D. 355; Chretien *v.* Donney, 1 N. Y. 419; Western Trans. Co. *v.* Lansing, 49 N. Y. 499.

Proof of a telegram accepting a written offer to lease property is sufficient to take the contract out of the statute of frauds. Gaines *v.* McAdam, 79 Ill. App. 201.

[45] Despard *v.* Walbridge, 15 N. Y. 374.

Where the issue was as to whether the tenancy was one from month to month, it was held error to exclude the tenant's evidence that he had been required to make certain repairs in compliance with others of the board of health and pay water rent, where it appeared that such requirements were not incidental to a hiring from month to month. Cohen *v.* Green, 21 Misc. 334, 47 N. Y. Supp. 136.

Where in an action by a present landlord the terms of hiring were in issue, it was competent for the tenant, who had been in continuous occupancy for some eleven years past under different landlords, to offer in evidence, there being no definite agreement with her present landlord, receipts of monthly payments of rent given by former

terms, read over at the time of contract, and assented to, may be put in evidence, or may be used to refresh the memory of a witness.[46] But such an unsigned paper, though read or delivered as a description of the premises, or a statement of terms of letting, is not necessarily such a contract in writing as to be the primary evidence, and exclude oral proof.[47]

The fact of tenancy is conclusively proved by an adjudication in summary proceedings between the same parties, to recover possession for non-payment of rent.[48]

If a written contract is to be proved, the mode of proof is governed by rules already stated.[49]

If the instrument be in *duplicates*, each containing the whole contract, each is primary evidence against the one who signed it; [50] and the production of the one signed by defendant, is enough, without producing or accounting for the

landlords and conversations had with agents with whom she had dealt to the effect that she was a tenant from month to month. Schloss *v.* Huber, 21 Misc. 28, 46 N. Y. Supp. 921.

[46] Bolton *v.* Tomlin, 5 Ad. & El. 856.

The jury may find that in entering into a contract on a week day, the parties adopted the contract they had previously attempted to make on a Sunday but which was of no effect because made on the Sabbath. Miles *v.* Ganvrin, 200 Mass. 514, 86 N. E. Rep. 785.

[47] Ramsbottom *v.* Tunbridge, 2 M. & S. 434; Trewhitt *v.* Lambert, 10 Ad. & El. 470. And see Bolton *v.* Tomlin, 5 Ad. & El. 856.

[48] Jarvis *v.* Driggs, 69 N. Y. 143. *Contra*, Boller *v.* Mayor, etc., of N. Y., 40 Super. Ct. (J. & S.) 523. In Evans *v.* Post, 5 Hun, 338, it was held that the adjudication was not legal evidence of the tenancy.

Likewise, in a summary proceeding to recover possession, the law raises a presumption of tenancy when the plaintiff proves title in himself and possession by the defendant. Butler *v.* Bertrand, 97 Mich. 59, 56 N. W. Rep. 342.

[49] For handwriting, see chapter XXI, paragraphs 4 and 24 of this vol.; for rules applicable to sealed and witnessed instruments, see chapter XXVII, paragraphs 2 and 3; for rules applicable to corporate contracts, see chapter III, paragraphs 32, etc. Under the statute of frauds an agent's authority must be in writing. Post *v.* Martens, 2 Robt. 437. But may be proved by admission. Blood *v.* Goodrich, 12 Wend. 525.

[50] See Lewis *v.* Payn, 8 Cow. 71.

"Where a document is executed in several parts, each part is pri-

other duplicate.[51] If one party produces one of the duplicates signed by the other party, the presumption is, that the other part, signed by himself, is in the hands of the other party.[52]

If the lease is in *counterparts*, one containing the stipulations on the part of the lessor only, the other those on the part of the lessee, both must be produced or accounted for if required,[53] whenever the whole contract is material. If the action is on the covenant of the defendant only, the production and proof of the part signed by him containing it, is enough, without the counterpart signed by the covenantee,[54] unless the terms of the counterpart become material. The existence of the other may be presumed in the first instance;[55] and this presumption excludes oral evidence in substitution for it, unless its absence is accounted for; and equally excludes oral evidence in variance of it.[56] Defendant may show that no counterpart was executed.[57]

mary evidence of the document." Steph. Ev., Chap. 9, § 64. See also Martin *v.* Martin, 1 Misc. 181, 20 N. Y. S. 685.

[51] Hallett *v.* Collins, 10 How. (U. S.) 174, 184; chapter XVI, paragraph 5 of this vol., and 1 Greenl. Ev., 13th ed. 120.

[52] Hallett *v.* Collins (above).

[53] Dobbin *v.* Watkin, Col. & C. Cas. 39, s. c., 3 Johns. Cas., 2d ed. 415. *Contra*, Houghton *v.* Koenig, 18 C. B. 238; Doe d. West *v.* Davis, 7 East, 363.

[54] Gates *v.* Graham, 12 Wend. 55; Houghton *v.* Koenig, 18 C. B. 235; Woodf. 85, 676. And see Pearse *v.* Morris, 3 B. & Ad. 366. Compare chapter XVI, paragraph 5 of this vol.

The plaintiffs in an action for rent under a lease offered in evidence the counterpart signed by the defendant and containing a statement that the parties had interchangeably set their hands and seals. The defendant contended that the evidence offered did not show a contract as alleged in the complaint. It was held, however, that as the action was on the defendant's covenant to pay rent, the counterpart offered by the plaintiffs was direct primary evidence of a binding contract of lease. Roosevelt *v.* Smith, 17 Misc. (N. Y.) 323, 40 N. Y. Supp. 381.

[55] Cleves *v.* Willoughby, 7 Hill, 83; Mayer *v.* Moller, 1 Hilt. 491.

[56] Cleves *v.* Willoughby, 7 Hill, 83; Mayer *v.* Moller, 1 Hilt. 491.

[57] Woodf. 676.

In an action for rent under a lease, the plaintiffs offered in evidence a counterpart signed by the tenant only, but which stated that the parties had interchangeably set their hands and seals.

A discrepancy between duplicates may be explained by parol evidence, showing a mistake in one.[58] But an essential discrepancy between two counterparts, one of which is the consideration for the other, so that the contract cannot be proven without both is fatal, if the writing is essential under the statute of frauds.[59] The rules as to proving modifications of such contracts, have been already stated.[60]

3. Conditional Delivery.

If the contract was in writing, evidence of an oral agreement that it was to have no effect, or none except on a condition which has never happened,[61] is admissible; but evidence of an oral agreement that it was to have only a partial effect, is not.[62]

The defendant claimed that the other part had not been executed by the lessors, and that the clause of the statute of frauds which required some note or memorandum signed by the one making the lease had not been satisfied. It was held, however, that the statement in the part produced, which was signed by the lessee, was in effect an admission by him that the lessors had executed and delivered a counterpart and the lessee was thus estopped from invoking the statute of frauds. Furthermore, the defendant was estopped to deny the truth of the statements of that part offered in evidence by the fact that he had entered into possession with the permission of the lessors who had relied upon the counterpart of the lease in their hands. Roosevelt *v.* Smith, 17 Misc. (N. Y.) 323, 40 N. Y. Supp. 381.

[58] McNulty *v.* Prentice, 25 Barb. 204.

[59] Compare Burchell *v.* Clark, 2 C. P. Div. 602, s. c., 18 Moak's Eng. 232.

[60] See chapter XVI, paragraph 27, and chapter XXVII, paragraph 15 of this vol.

[61] For instance, the approval of a third person. 6 El. & B. 370, 374; Wallis *v.* Littell, 11 C. B. N. S. 369.

In an action for rent due under the terms of an alleged lease, the trial court properly admitted parol evidence to show that the lease had been executed upon the condition that it was to be binding only in the event that the demised premises should be delivered to the lessee two weeks before the commencement of the term stated in the lease. Corn *v.* Rosenthal, 1 Misc. 168, 20 N. Y. Supp. 632.

[62] For instance, that it was made only for the purpose of securing a license, and was to determine as soon as the premises could be sold. 2 Fost. & F. 86.

4. General Rule as to Oral Evidence to Vary.

Oral evidence is not competent (in the absence of fraud or mistake) to show that the parties stipulated, at or before [63] the execution of the writing, for something contrary to what is there expressed, or to what is legally implied.[64] But a collateral agreement may be made in consideration of one of the parties executing the lease although under seal, and may be proved by parol if it is not contradictory to the terms of

[63] Brigham *v.* Rogers, 17 Mass. 571; D'Aquin *v.* Barbour, 4 La. Ann. 441; Ross *v.* Griebel, 136 Ill. App. 399.

"It is a well established general rule, that if the parties reduced their entire contract or agreement to writing, whether under seal or not, the court will not hear parol evidence to vary or change it unless for fraud, mistake or the like." Cumming *v.* Barber, 99 N. C. 332, 5 S. E. Rep. 903.

Thus where a lease stipulated that the tenant should give the landlord twenty bales of cotton as rent, the landlord was not allowed to introduce parol evidence of a contemporary oral agreement whereby he was to have all the cotton seed in addition to the cotton itself. Powell *v.* Thompson, 80 Ala. 51.

All prior agreements are merged in the written lease. Carey *v.* Kreizer, 26 Misc. 755, 57 N. Y. Supp. 79.

[64] See this subject in chapter XVI, paragraph 8 of this vol. As, for instance, that certain repairs were to be made by the plaintiff (Mayor, &c., of N. Y. *v.* Price, 5 Sandf. 542; Brigham *v.* Rogers (above); Mayor *v.* Moller, 1 Hilt. 491; *contra*, Mann *v.* Munn, L. J. 43 C. P. 241); or that lights were not to be obstructed, (Johnson *v.* Oppenheim, 55 N. Y. 280, affi'g 35 Super. Ct. (3 J. & S.) 440); or that a covenant in restraint of occupation should not be enforced so long as occupation should be orderly, (Dodge *v.* Lambert, 2 Bosw. 570, 579). So where a mining lease fixes a price for the coal mined, it is inadmissible to prove by parol that when the lease was preparing the quantity of coal to be mined under the lease was omitted at the request of the defendant (the lessee), and that he, the lessee, then agreed to mine all that he could dispose of, the lease containing no such provision. Lyon *v.* Miller, 24 Penn. St. 392.

Where there is no ambiguity in the lease "the court, in its construction, cannot indulge in conjecture or resort to parol evidence, but the language of the instrument itself must control its construction." Ballance *v.* Peoria, 180 Ill. 29, 54 N. E. Rep. 428.

Proof of a contemporaneous or prior oral contract to make repairs is inadmissible. Ross *v.* Griebel, 136 Ill. App. 399.

the deed itself.[65] So an oral agreement to which the instrument was subsidiary, being given in part execution of it may be proved.[66] So evidence of possession under an oral agree-

[65] Erskine *v.* Adeane, L. R. 8 Ch. App. 756, s. c., 6 Moak's Eng. 594. Thus, where to induce a tenant to sign a lease which, like other leases on the estate, reserved all game, etc., and the right to preserve and shoot, the lessor promised that after a certain letting should shortly expire all game should be killed down, etc.—*Held*, that parol evidence of this was admissible. Id. s. p., Remington *v.* Palmer, 62 N. Y. 31, rev'g 1 Hun, 619, s. c., 4 Supm. Ct. (T. & C.) 696. Compare Dubois *v.* Kelly, 10 Barb. 496; Morgan *v.* Griffith, L. R. 6 Exch. 70; Angell *v.* Duke, 32 L. T. N. S. 320, Q. B.; Steph. Ev., 90. A part of the apparent conflict in the decisions may be explained, if we observe that it is one question whether such a collateral agreement may be proved for the purpose of sustaining an action for its breach; and a different question whether it may be proved for the purpose of defeating an action on the written lease.

"If it appear that the entire agreement was not reduced to writing, or if the writing itself leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent not to contradict, but to show and make certain what was the real agreement of the parties." Cumming *v.* Barker, 99 N. C. 332, 5 S. E. Rep. 903.

Where the whole contract has not been reduced to writing, that part which was separable and distinct could be proved by oral evidence "without infringing the principle that such evidence (was) inadmissible to vary the legal effect of a written instrument." Murphy *v.* Farley, 124 Ala. 279, 27 So. Rep. 442.

"Where, for example, a tenant promises in writing to pay a stipulated rent to his landlord, and so much of the contract as was intended to state the liability of the landlord is not reduced to writing, but was left to rest in parol, it may be shown by oral evidence that he agreed with the tenant, although contemporaneously with the execution of the tenant's rent note to make repairs on the rented premises, or incurred other liability." Powell *v.* Thompson, 80 Ala. 51.

[66] Hope *v.* Balen, 58 N. Y. 380, affi'g 35 Super. Ct. (J. & S.) 458.

Under the terms of the lease of a mill, the lessee was required to insure it for $1500, and upon its destruction by fire, either to rebuild or make good the loss as determined by the difference between the value of the mill and the insurance. The lessee offered parol evidence to show that by the terms of an oral agreement made contemporaneously with the lease, the lessee, in the event of his deciding to rebuild, was to have the insurance money with which to do so. This evidence was admitted over an ob-

ment, prior to the term fixed in the written agreement, is competent, for the one does not contradict the other, although they were made simultaneously.[67] Nor does the rule exclude parol evidence of the representations made as a part of the negotiation, if adduced, not for the purpose of varying the terms of the writing, but of showing deceit,[68] or the effect those terms would have had if the representations had been true.[69] Evidence of the surrounding circumstances is competent, as in the case of other contracts.[70]

jection. Cumming *v.* Barber, 99 N. C. 332, 5 S. E. Rep. 903.

[67] Hubbell *v.* Clark, 1 Hilt, 67.

Where it appeared that originally there existed a verbal lease of certain animals and that subsequently a written lease was executed, it was held that in a dispute over the number of animals involved, parol evidence was admissible even though the number so orally testified to did not conform to that stated in the written instrument. Lemmon *v.* Sibert, 15 Colo. App. 131, 61 Pac. Rep. 202.

[68] Allaire *v.* Whitney, 1 Hill, 484; Whitney *v.* Allaire, 1 N. Y. 305, affi'g 4 Den. 554. But see Bauer *v.* Taylor, 4 Nebr. (Unoff.) 710, 98 N. W. Rep. 29.

A tenant when sued for rent counterclaimed for damages and offered parol testimony to show that he had leased the plaintiff's farm upon the faith of the latter's false statements that there was an abundant water supply thereon. The objection to this evidence placed upon the ground that the action was not brought for reformation and that parol evidence was inadmissible as tending to contradict a written agreement was overruled, on the theory that the counterclaim was not based upon the written lease and that the oral testimony was offered for the purpose of establishing fraud. Sisson *v.* Kapper, 105 Iowa, 599, 75 N. W. Rep. 490.

[69] Sharp *v.* Mayor, etc., of N. Y., 40 Barb. 256, s. c., 25 How. Pr. 389.

[70] See, for instance, Ayer *v.* Kobbe, 59 N. Y. 454, affi'g 36 Super. Ct. (J. & S.) 158.

Where the language of a lease was not clear upon the question of the length of a subsequent term of leasing, "the circumstances attending its execution, and the acts of the parties subsequent thereto, (could) be scrutinized in ascertaining the intention of the parties." Swigert *v.* Hartzell, 20 Pa. Sup. Ct. 56. Citing Berridge *v.* Glassey, 112 Pa. 442, 3 Atl. Rep. 583, 56 Am. Rep. 522.

Where under the terms of a written lease the lessor was required to put in order a certain water pipe and air compressor, it was competent for the lessee to introduce oral testimony to show for what purpose the machinery mentioned was to be used. Equator

5. Parties.

If the lease was made by plaintiffs, in their individual names, a recital that they were acting as a committee by authority of a corporate body, does not prevent them from recovering. The principle that the lessee cannot dispute his lessor's title applies.[71] The fact that the landlord has taken summary proceedings under the statute, against a third person, to recover possession of the premises, does not preclude him from showing that the defendant was, in fact, his lessee, or liable to him under an agreement creating a tenancy.[72] The landlord may recover if his action is on an express covenant to pay rent, though prior to the accruing of the rent sued for, a renewal of the lease was assigned to third persons, and the plaintiff accepted subsequent rent from them.[73]

6. Usage.

In respect to matters on which the written agreement is silent,[74] as well as in ascertaining the proper interpretation of language not having a fixed legal meaning,[75] every demise

Min., etc., Co. *v.* Guanella, 18 Colo. 548, 33 Pac. Rep. 613.

[71] Stott *v.* Rutherford, 93 U. S. (2 Otto) 107. And see Dolby *v.* Iles, 11 Ad. & El. 335; Churchward *v.* Ford, 2 H. & N. 446, L. J. 26 Ex. 354. The rules as to oral evidence to show the real party in interest in agreements under seal, and not under seal respectively, are stated in chapter XVI, paragraphs 10–13 and chapter XXVII, paragraphs 2 and 3 of this vol. See also Mason *v.* Breslin, 2 Sweeny, 386, 395; Jackson *v.* Foster, 12 Johns. 488.

A lease signed by certain parties as "agents of the St. Cyr heirs" renders the persons so signing personally liable and enables them to maintain an action thereon. Hunter *v.* Adoue, 38 Tex. Civ. App. 542, 86 S. W. Rep. 622.

[72] La Farge *v.* Park, 1 Edm. 223.

[73] Phelps *v.* Van Dusen, 3 Abb. Ct. App. Dec. 604. The retention of rent notes by a principal and his consent to the occupancy of the farm by the tenant is evidence of a ratification of an authorized lease by his agent. Noble *v.* White, 103 Iowa, 352, 72 N. W. Rep. 556.

[74] Van Ness *v.* Packard, 2 Pet. 137, 148; Mangum *v.* Farrington, 1 Daly, 236, 238; and see chapter XVI, paragraph 9, chapter XIX, paragraph 15 of this vol.

[75] See, for instance, Clayton *v.* Gregson, 4 Nev. & M. 602; Wilcox

is open to explanation by the general usage and custom of the country, or of the district where the land lies. Every person, under such circumstances, is supposed to be conversant of the custom, and to contract with a tacit reference to it.[76]

7. Practical Construction.

An agreement additional to the stipulations of the lease, may be inferred from the repeated demand of one party and compliance therewith by the other, on a point on which the lease is silent,—for instance, the time when rent is payable,[77] —but if the lease expresses the obligation, the conduct of the parties in departure from it, is not evidence of a contrary agreement.[78] An unambiguous instrument cannot be varied by evidence of the adverse party's declarations of his understanding of its terms, nor of his practical concessions during a former quarter,[79] unless the evidence establishes an estoppel.

8. Implied Covenants.

A covenant for quiet enjoyment is implied in every mutual contract for the leasing and demise of land by whatever form of words the agreement is made,[80] unless it contains an

v. Wood, 9 Wend. 346; and see p. 1002 of this vol.

[76] So held of a usage allowing a tenant to remove his building. Van Ness *v.* Packard (above).

When the lease entitled the landlord to recover possession at a stated time, the tenant could not show a general custom in the city to the effect that where a tenant holds over for two weeks with the knowledge and consent of the landlord, he thereby becomes a tenant for another year on the same terms. Werner *v.* Footman, 54 Ga. 128.

[77] Long Island R. R. Co. *v.* Marquand, 6 N. Y. Leg. Obs. 160.

[78] Giles *v.* Comstock, 4 N. Y. 270. But their conduct may be evidence of their understanding of ambiguous terms. Pease *v.* Christ, 31 N. Y. 141.

But when the language of the lease is ambiguous the courts will call in aid the acts done under it as a clue to the intention of the parties. Matter of Coatsworth, 37 N. Y. App. Div. 295, 55 N. Y. Supp. 753.

[79] Bigelow *v.* Collamore, 5 Cush. 226.

[80] Mack *v.* Patchin, 42 N. Y.

express covenant on the subject.[81] This covenant means only that tenant shall not be evicted by paramount title.[82]

There is usually, also, an implied warranty of title or power to demise, in leases containing no express covenant[83] (except by statute, leases exceeding three years);[84] and the existence and extent of the covenant depend on the words of demise.[85]

In a lease of real property only, the common law raises no

167 (and cases cited), affi'g 29 How. Pr. 20; Maxwell *v.* Urban, 22 Tex. Civ. App. 565, 55 S. W. Rep. 1124; Herpolsheimer *v.* Funke, 1 Nebr. (Unof.) 471, 95 N. W. Rep. 688; Hanley *v.* Banks, 6 Okl. 79, 51 Pac. Rep. 664.

"The law implies from the use in a lease of the word "let" or the word "lease" a covenant with the lessee for the latter's quiet enjoyment of the premises leased against the lessor and against all claiming under him." Kemmerer *v.* Midland Oil, etc., Co., 229 Fed. Rep. 872, 880, 144 C. C. A. 154.

But see Merson *v.* Williams, 63 N. J. Law, 398, 44 Atl. Rep. 211, where it was said: "It has been settled in this state that a covenant for quiet enjoyment as one of the covenants of title, cannot be implied from the mere relation of landlord and tenant, even when that relation is created by deed."

The covenant does not extend to things not *in esse* at the time of the demise. Shaft *v.* Carey, 107 Wis. 273, 83 N. W. Rep. 288.

The implication of a covenant of quiet enjoyment in a lease of agricultural lands for less than twenty-one years is not within the inhibition of the statute of this state providing that no covenant shall be implied in any conveyance of real estate, because such a lease is not, in a legal sense, a conveyance of the realty, but merely a grant of a term of years. Conley *v.* Schiller, 24 N. Y. Supp. 473.

"If the tenant yields his possession; in pursuance of the judgment of a court of competent jurisdiction, to the person adjudged to be the real owner of the paramount title, it is, in law, an eviction" and discharges him of further obligation to pay rent. Conley *v.* Schiller, 24 N. Y. Supp. 473.

[81] Burr *v.* Stenton, 43 N. Y. 462.

[82] Howard *v.* Doolittle, 3 Duer, 464.

The covenant extends only to the lessor and those claiming title paramount. Hastings *v.* Burchfield, 28 Pa. Super. Ct. 309.

[83] Vandekarr *v.* Vandekarr, 11 Johns. 122, Rawle on Cov. 462–8.

[84] Moffat *v.* Strong, 9 Bosw. 57; and see chapter XXVII, paragraph 33 of this vol.; Koeber *v.* Somers, 108 Wis. 497, 84 N. W. Rep. 991, 52 L. R. A. 512.

[85] Grannis *v.* Clark, 8 Cow. 36.

implied warranty of tenantableness or fitness for use,[86] (although it may be otherwise of a lease of a furnished house,[87] or of chattels); nor is there any implied covenant to repair [88]

[86] McGlashan *v.* Tallmadge, 37 Barb. 313, and cases cited; Mayor *v.* Moller, 1 Hilt. 491; Erskine *v.* Adeane, L. R. 8 Ch. 756, 761; Hanson *v.* Cruse, 155 Ind. 176, 57 N. E. Rep. 904; Hanley *v.* Banks, 6 Okl. 79, 51 Pac. Rep. 664.

Where the property is leased for a specific purpose there is no implied covenant that it shall remain fit for such purpose. Felton *v.* Cincinnati, 95 Fed. Rep. 336, 37 C. C. A. 88.

But see Thompson *v.* Walker, 6 Ga. App. 80, 64 S. E. Rep. 336, holding that "it was the duty of the landlord to have the tenement suitable for the purposes for which it had been rented, or at least as suitable as it was on the day the lease was executed; and the defendants had a right to refuse to enter under the lease, if the landlord failed in this respect."

The owner of private property owes the prospective lessee no duty to exercise ordinary care to appraise him of unknown defects in the property where such prospective lessee has equal opportunity to ascertain such defects. Bennett *v.* Sullivan, 100 Me. 118, 60 Atl. Rep. 886.

The recital in a lease "'to be used and occupied for the printing business,'" cannot be construed to contain the implied warranty that the loft in question was suitable and fitted for the establishment of twelve printing presses running at a high rate of speed. Scheffler Press *v.* Perlman, 130 N. Y. App. Div. 576, 115 N. Y. Supp. 40.

The lessor will not be held liable to the lessee for injuries on the theory that "he might have obtained knowledge of the dangerous defect by the exercise of ordinary diligence in the inspection of his premises." Howell *v.* Schneider, 24 App. Cas. (D. C.) 532.

[87] Compare Cæsar *v.* Karutz, 60 N. Y. 229; Wallace *v.* Lent, 1 Daly, 481; Wilson *v.* Finch-Hatton, L. R. 2 Ex. D. 336; and cases cited in 16 Alb. L. J. 195, 17 Id. 208; Dutton *v.* Gerrish, 6 Cush. (Mass.) 94.

[88] Howard *v.* Doolittle, 3 Duer, 464; Bennett *v.* Sullivan, 100 Me. 118, 60 Atl. Rep. 886; Kennedy *v.* Fay, 31 Misc. 776, 65 N. Y. Supp. 202; Hanson *v.* Cruse, 155 Ind. 176, 57 N. E. Rep. 904.

The rule extends to portions of the property not expressly demised but which are necessary to the tenant's use, such as the common roof. Hanley *v.* Banks, 6 Okl. 79, 51 Pac. Rep. 664.

There is no obligation on the lessor to rebuild a house destroyed by fire, in the absence of an express covenant to that effect. Arbenz *v.* Exley, 52 W. Va. 476, 44 S. E. Rep. 149.

As a general rule the covenant of the lessor, if any, to repair and that of the lessee to pay rent are

or to maintain.[89] Where the contract of hiring contains no warranty, express or implied, that the premises are fit for the purpose for which they are hired, the declarations of the

independent. Rubens *v.* Hill, 213 Ill. 523, 72 N. E. Rep. 1127.

"Failure to repair does not warrant abandonment, unless the property is therefrom untenantable." Arbenz *v.* Exley, 52 W. Va. 476, 44 S. E. Rep. 149, 161 L. R. A. 957.

Where the lease provided that the lessee should "keep the plant and buildings in repair during the term of the lease," which provision was followed by a covenant that it should "replace at its own expense all glass broken during the tenancy, and restore any damage caused by the bursting of water pipes," it was held that "the intention of the parties was, that the repairs to be made by the lessee during the lease, were only the ordinary repairs indicated by the particular description used, such as broken glass, bursting water pipes, etc." Richmond Ice Co. *v.* Crystal Ice Co., 99 Va. 239, 37 S. E. Rep. 851.

"The tenant may, in a suit for rent, recoup damages for failure of a lessor's covenant to repair." Arbenz *v.* Exley, 52 W. Va. 476, 44 S. E. Rep. 149, 61 L. R. A. 957.

"A contract to repair does not contemplate, as damages for a failure to perform it, that any liability for personal injuries shall grow out of the defective condition of the premises." Spero *v.* Levy, 43 Misc. Rep. 24, 86 N. Y. Supp. 869.

Where the lease is silent as to who is to make repairs the lessee is liable for injuries to a third person caused by a defective condition of the leased premises, although the landlord had in fact made all repairs. Weber *v.* Lieberman, 47 Misc. Rep. 593, 94 N. Y. Supp. 460.

"The liability of a landlord to a tenant for injuries resulting from defects existing at the time premises are leased extends only to defects which he knows or which he should know, and which are not open to the observation of the tenant." Rhoades *v.* Seidel, 139 Mich. 608, 102 N. W. Rep. 1025.

[89] Erskine *v.* Adeane, L. R. 8 Ch. 756, 762; and see Gallup *v.* Albany Ry. Co., 65 N. Y. 1.

"If a landlord retains in his possession and control approaches, halls or passages, to be used in common by different tenants, or by himself and tenants, the law implies from these relations a duty on his part to keep them in a safe condition except as to obvious risks from the mode of construction or other permanent conditions, of which the tenant takes the risk because impliedly there is to be no change in these particulars." Miles *v.* Janvrin, 200 Mass. 514, 86 N. E. Rep. 785.

The lessor of a railroad is not "liable for the expense of rebuilding . . . bridges . . . or other similar improvements, whether regarded as repairs or as reconstruction, by which 'a new and different

lessor to that effect, made at the time of the hiring, do not prove a contract.[90]

A covenant on the part of the lessee to use the premises in a proper manner, is implied in absence of any express covenant.[91]

9. Identifying the Premises.

If the designation of the premises is ambiguous,—as, for instance, where a street number only is used in the lease of a house, without indicating whether it was intended to include a yard or an alley,[92] or where a building is leased as a "Hotel," without indicating whether shops on the ground floor were included or not,[93]—oral evidence of the declara-

thing' is substituted for the old." Felton *v.* Cincinnati, 95 Fed. Rep. 336, 37 C. C. A. 88.

A landlord is under no duty to call the tenant's attention to any defects that come into existence during the term of the lease. Lyon *v.* Buerman, 70 N. J. L. 620, 57 Atl. Rep. 1009.

[90] Dutton *v.* Gerrish, 9 Cush. (Mass.) 89, 94; Schermerhorn *v.* Gouge, 13 Abb. Pr. 315. Compare paragraph 4.

Nor can one who entered into possession of premises under a five year written lease but who, after threatening to withdraw, promised to remain if the premises were made suitable for his purposes, prove that he signed the lease relying upon the lessor's oral agreement to render the premises fit for his purposes. Hall *v.* Beston, 26 N. Y. App. Div. 105, 49 N. Y. Supp. 811.

[91] Woodf. 123.

A covenant on the part of the lessee to surrender the premises on the expiration of the lease is also implied. Harvin *v.* Blackman, 112 La. 24, 36 So. Rep. 213.

[92] Cary *v.* Thompson, 1 Daly, 35; People *ex rel.* Murphy *v.* Gedney, 10 Hun, 151. See Bulkley *v.* Devine, 127 Ill. 406, 20 N. E. Rep. 16, 3 L. R. A. 330, and notes thereunder.

"The appurtenances of ingress and egress, essential to use and reasonably within the contemplation of the parties at the time of the leasing, are as much a part of the estate conveyed as the premises specifically described." Shaft *v.* Carey, 107 Wis. 273, 83 N. W. Rep. 288.

[93] Sargent *v.* Adams, 3 Gray, 72, 77. So where the agreement was that "the present lessee and occupant of the first floor," etc., might "continue to use" the same, it being conceded that he did not have a literally exclusive possession of the whole first floor, parol evidence was admitted to show what he actually used and occupied before the agreement was executed. Steffens *v.* Collins, 6 Bosw. 223; and see

tions of the parties at and before the execution of the writing, and of the usage of language, etc., is admissible. A variance in the location [94] or quantity [95] of land held by an assignee of part of the premises, is not necessarily fatal.

10. The Date and Term.

Parol evidence is admissible to show the date of delivery of a lease, though the effect be to fix a different time than that expressed in the lease; [96] and a mistake in a date may be corrected by parol. In the absence of any evidence to the contrary, if a lease is expressed to take effect *in præsenti*, and possession under it is averred, the *prima facie* presumption is that the lease and possession of the premises were delivered on the day of the date of the lease.[97]

In tenancies under agreements mentioning no time, and not reserving an annual rent, the period fixed for payment of rent, as monthly or weekly, etc., implies that the tenancy is of the same duration,[98] unless otherwise regulated by

Corbett *v.* Costello, 8 La. Ann. 427.

[94] Rosc. N. P. 342.

[95] Van Rensselaer *v.* Jones, 2 Barb. 643, 654.

[96] Steele *v.* Mart, 4 B. & C. 272.

It seems, however, that where the lease expressly stated that rent should be computed only from the time when the premises, which were then in process of alteration, were "ready for occupancy" parol evidence is inadmissible to explain that "ready for occupancy" meant when fixtures were installed and the premises were thus ready for the conduct of the defendant's business, since the lease contained no clause requiring the owner to install such fixtures. Gerry *v.* Siebrecht, et al., 88 N. Y. Supp. 1034.

[97] Rhone *v.* Gale, 12 Minn. 54.

If there is nothing to indicate the contrary, the term is presumed to begin on the date of the lease. Keyes *v.* Dearborn, 12 N. H. 52.

[98] Steffens *v.* Earl, 40 N. J. L. (Vroom) 128.

"A tenant at will is always in by right, evidenced by permission, express or implied, of the landlord. A tenant at sufference holds over by wrong, and he is in possession, not by permission of the landlord, but as a result of his laches or neglect. . . . It takes very little to convert a tenancy at sufferance into a tenancy at will. Receipt of rent, demand for rent, or anything that indicates the permission of the landlord for the tenant to remain in possession will have this

statute, as in the city of New York.[99] The fact that a notice to quit on a day specified was served personally on the tenant, and that he made no objection to the time, is *prima facie* evidence which sustains a finding that the tenancy commenced and ended at that period.[1]

Where a lease is from a day named, proof of a local custom that the term commences at noon of that day, and terminates at noon, is admissible; for custom is good to authorize taking possession under a lease.[2] A lessee sued for rent, upon his covenant, is not estopped by the covenant from show-

effect." Willis *v.* Harrell, 118 Ga. 906, 45 S. E. Rep. 794.

"Although a parol lease for more than one year is invalid under the statute of frauds, yet if a person enters into possession under a parol lease for four years, and holds over into a second year, he becomes a tenant from year to year upon the terms of the parol lease and so continues as long as he remains in possession without any new or other agreement." Arbenz *v.* Exley, 52 W. Va. 476, 44 S. E. Rep. 149, 61 L. R. A. 957. Quoting from Allen *v.* Bartlett, 20 W. Va. 46.

[99] 1 N. Y. Real Property Law, § 232. It will be presumed, in the absence of evidence to the contrary, in an action of forcible entry and detainer against the lessee of a life tenant, that the life tenant, in executing the lease, did not make it for a longer period than his own term. Peters *v.* Balke, 170 Ill. 304, 48 N. E. Rep. 1012.

Under the Civil Code of Georgia, § 3132 if no time is specified for the termination of the tenancy the law construes it to extend to the end of the calendar year. Willis *v.* Harrell, 118 Ga. 906, 45 S. E. Rep. 794.

[1] Doe *v.* Forster, 13 East, 405; Doe *v.* Briggs, 2 Taunt. 109.

In the case of a tenant at will, however, no notice to quit is necessary. Simpson *v.* Applegate, 75 Cal. 342, 17 Pac. Rep. 237.

But where a monthly tenancy began on the 10th day of a month and the notice to quit required the tenant to surrender the premises on the first day of a subsequent month the court held on the question of the sufficiency of the notice that to be effective the date of quitting should be the same as the date when the tenancy began. Finkelstein *v.* Herson, 55 N. J. Law, 217, 26 A. 688.

And where a tenant asked for a reduction of rent to which the landlord's agent replied that she could get out if she did not like it, this was held to be evidence that the tenant did not lease the premises by the year. Schloss *v.* Huber, 21 Misc. 28, 46 N. Y. Supp. 921.

[2] Wilcox *v.* Wood, 9 Wend. 346.

ing that the lessor's estate ended before the rent accrued.[3]

11. Rate of Rent.

If the rent is not fixed by writing, it is to be ascertained on principles stated in respect to actions for use and occupation. If the agreement was in writing, oral evidence that the rent, even for a particular season, was fixed by the parties at a different rate from that stated in the writing, is inadmissible.[4] The fact that rent was due,[5] but not the amount,[6] may be proved by an adjudication in summary proceedings between the same parties, to recover possession for non-payment. The amount may be proved by a judgment between the same parties, for the rent of the same premises for a previous quarter.[7]

12. Plaintiff's Title.

Where the lessor sues, the lease,[8] or the fact of possession

[3] Lamson *v.* Clarkson, 113 Mass. 348, s. c., 18 Am. Rep. 498.

[4] Patterson *v.* O'Hara, 2 E. D. Smith, 28. Compare Preston v. Mercereau, 2 W. Bl. 1249; Remmington *v.* Palmer, 62 N. Y. 31, rev'g 1 Hun, 619, s. c., 4 Supm. Ct. (T. & C.) 696.

In order that a parol agreement to reduce the rent reserved in a written lease may have such an effect, there must be a new consideration as the tenant is already in possession, and entitled to possession, under the prior agreement. Where the lessee has not covenanted and is not bound to remain in possession for any purpose, continuing in possession at the request of the lessor may be a sufficient consideration for an agreement to reduce the rent. Bowman *v.* Wright, 65 Nebr. 661, 91 N. W. Rep. 580, 92 N. W. 580.

[5] Jarvis *v.* Driggs, 69 N. Y. 143.

Where the tenant has executed his rent note for a particular year evidence as to the rental of the premises for other years was inadmissible in an action for the rent. Simpson *v.* East, 124 Ala. 293, 27 So. Rep. 436.

[6] Id. *Contra*, Brown *v.* Mayor, &c. of N. Y., 5 Daly, 481.

[7] Kelsey *v.* Ward, 38 N. Y. 83.

And where a party contended that sums stated in a landlord's memorandum were yearly rentals, the fact as evidenced by receipts produced that he had for several years previously paid the same sums monthly branded his claim as "essentially dishonest." Kuntz *v.* Mahrenholtz, 88 N. Y. Supp. 1002.

[8] Lush *v.* Druse, 4 Wend. 313, Rosc. N. P. 343.

under an agreement of tenancy,[9] or even the payment of rent [10] under it, is sufficient evidence of his title. In an action against the tenant, by one claiming the reversion, plaintiff should prove his derivative title; [11] and if the lessor had only a particular estate, must show its commencement, and the authority to grant the lease.[12]

13. Possession Not Essential.

If an express covenant is proved, an action for the rent does not require from plaintiff proof of the fact of occupation or enjoyment, but the action may be maintained though the tenant abandoned possession.[13]

See also Brown *v.* Sullivan, 1 Misc. 161, 20 N. Y. Supp. 634.

[9] Id.

Where a vendor of property which he had previously leased made an agreement with his vendee that he should retain possession of the rent notes which the tenant had given him, collect them when due and credit the same to the account of the vendee, it was held that he had no interest sufficient to enable him to maintain an action in his own name on the rent notes. Moses *v.* Ingram, 99 Ala. 483, 12 So. Rep. 374.

[10] Chapman *v.* Beard, 3 Anstr. 942.

"The relation of landlord and tenant . . . may be proved and established to the satisfaction of a jury . . . by acts or facts which clearly show it, as well as by direct evidence, and the payment of rent for the premises occupied by one person to another, and so received by the other, has always been considered the strongest kind of evidence of that character to prove that the relation of landlord and tenant by the recognition of both parties then existed between them as to the premises." Doe *v.* Jefferson, 10 Del. 477.

It was proper to admit in evidence proof of the fact that one had paid rent to the plaintiff for several years, as well as a rent note for the year following for the purpose of showing the relation of landlord and tenant. Kelly *v.* Eyster, 102 Ala. 325, 14 So. Rep. 657.

[11] Schott *v.* Burton, 13 Barb. 173, Tayl. L. & T. 482.

"The general rule is that a sale of the reversion carries with it, unless expressly reserved in the conveyance, all rents under a lease previously given that may subsequently become due, and that the grantee may recover them in an action in his own name." Page *v.* Culver, 55 Mo. App. 606.

[12] Woodf. 687.

[13] Gilhooley *v.* Washington, 4 N. Y. 217, affi'g 3 Sandf. 330. Other-

14. Tenant's Estoppel.

A tenant who has entered into possession,[14] or who, without actual possession, has had a permissive potential possession,[15] whether under a written [16] or an oral lease,[17] or who holds over without any new agreement or claim,[18] is estopped

wise, in an action for use and occupation. Id.

[14] Otherwise, if he merely attorned by mistake. Rosc. N. P. 335. And see 2 Abb. N. Y. Dig. new ed. 809.

With respect to the rule that a tenant cannot deny his landlord's title, it does not make any difference that the tenant was in possession at the time the lease was executed. Barkman *v.* Barkman, 107 Ill. App. 332. Even if he was in possession under a claim of ownership. Johnson *v.* Thrower, 117 Ga. 1087, 44 S. E. Rep. 846.

[15] 6 Am. Law Reg. 19.

Where the lease ran from two parties as owners, evidence is inadmissible in an action against the lessee for rent to show that one of the lessors was the sole owner. Moore *v.* Gair, 108 N. Y. App. Div. 23, 95 N. Y. Supp. 475.

[16] Blight *v.* Rochester, 7 Wheat. 535; Ballance *v.* City of Peoria, 180 Ill. 29, 54 N. E. Rep. 428.

[17] The main, if not the only foundation of the rule (as to oral leases) is in the injustice of allowing one who obtained possession by admitting the title of another to deny that title, and in case of failure of proof of it to hold the premises himself. Hilbourn *v.* Fogg, 99 Mass. 12; Moffat *v.* Strong, 9 Bosw. 57, Art. in 6 Am. Law. Rev. 1. In the case of a written lease there is the additional sanction of his formal covenant, without violating which he cannot set up the title of another. Blight *v.* Rochester, 7 Wheat. 535. For the history of the technical origin of these estoppels, see 6 Am. L. Rev. 1. In the case of an indenture, as distinguished from a deed poll, whatever force, if any, remains in the old doctrine of estoppel by deed, may be invoked. See Averill *v.* Wilson, 4 Barb. 180; Champlain, &c. R. R. Co. *v.* Valentine, 19 Id. 484. The estoppel, if it arise from an indenture alone, must be mutual, if it exist at all; and if the lessor is not capable of being estopped the tenant is not estopped. Rowe *v.* Scarrot, 4 H. & N. 723, L. J. 28 Ex. 325. But in case of a purely equitable estoppel arising from possession, mutuality is not always essential. At least the party entitled to set it up may have an election. See Conway *v.* Starkweather, 1 Den. 113. *Contra*, Welland Canal Co. *v.* Hathaway, 8 Wend. 480.

The tenant can no more show that the title is in the State than that it is in himself. Ballance *v.* City of Peoria, 180 Ill. 29, 54 N. E. Rep. 428.

[18] Osgood *v.* Dewey, 13 Johns.

in respect of the period during which the term[19] or the possession, as the case may be, continued, to deny that the lessor had title. The estoppel, when founded on possession (as distinguished from an estoppel by deed), is conclusive in respect to the period of possession under the relation, after as well as during the term expressly agreed for, being simply concurrent with the possession.[20] But neither possession, without the conventional relation of landlord and tenant,[21] nor the conventional relation without the possibility of possession,[22] will raise this equitable estoppel. If there be any estoppel without at least potential possession, it must rest on the ancient technical estoppel by indenture, duly pleaded.

But the tenant is not estopped to deny that, since his own entry, his lessor's title has ceased; and he may do this by showing either that it has expired by its own limitation, or has ended by the act of the lessor, or by eviction by title

240. See McKissick *v.* Ashby, 98 Cal. 422, 33 Pac. Rep. 729.

"No proof of title is required by the landlord since if the tenant has once recognized the title of the plaintiff and treated him as his landlord, by accepting a lease from him or the like, he is precluded from showing that the plaintiff had no title at the time the lease was granted. . . . And this rule extends to a tenant holding over." Voss *v.* King, 33 W. Va. 236, 10 S. E. Rep. 402.

[19] See Child *v.* Chappell, 9 N. Y. 246; Harvin *v.* Blackman, 112 La. 24, 36 So. Rep. 213; Turner *v.* Gilliland, 4 Ind. Ter. 606, 76 S. W. Rep. 253.

[20] 6 Am. Law. Rev. 21.

"The only tenant's estoppel known when Lord Coke wrote was that strictly by indenture. But the tenant's estoppel is now no longer thus restricted, as it is founded on the possession and not the instrument of demise, and is as operative after the conclusion of the lease as before, and until that possession is ended." Voss *v.* King, 33 W. Va. 236, 10 S. E. Rep. 402.

[21] Sands *v.* Hughes, 53 N. Y. 287; Buell *v.* Cook, 4 Conn. 238, 245.

"To the enforcement of the estoppel, the relation of landlord and tenant must be established." Crim *v.* Nelms, 78 Ala. 604.

[22] Andriot *v.* Lawrence, 33 Barb. 142.

"The defendant did not take the right to occupy under any agreement with the plaintiff, nor in any way accept him as his landlord. There is, therefore, no estoppel." Davis *v.* Delaware, etc., Canal Co., 109 N. Y. 47, 15 N. E. Rep. 873, 4 Am. St. Rep. 418.

paramount.[23] To show a change in the title once admitted is no denial, and therefore not precluded by the estoppel.[24] If the expiration of the term is relied on as having ended the estoppel, it must be shown either that the lessee surrendered possession, or attorned,[25] or at least that he held in hostility,[26] and gave notice to his landlord that he thereafter claimed under another title, the validity of which he must be

[23] Heitzel *v.* Barber, 69 N. Y. 1; Hilbourn *v.* Fogg (above). Compare Rosc. N. P. 343.

"Though the tenant cannot show that the lessor had no title to the premises when the tenancy commenced, he may show that the lands had been sold at tax sales, and the landlord's title had thereby been extinguished. The estoppel extends only to the title which the landlord had at the time of leasing." Jenkinson *v.* Winans, 109 Mich. 524, 67 N. W. Rep. 549.

Eviction by paramount title. Cook *v.* Basom, 164 Mo. 594, 65 S. W. Rep. 227; Keys *v.* Forrest, 90 Md. 132, 45 Atl. Rep. 22. See also Lang *v.* Crothers, 21 Tex. Civ. App. 118, 51 S. W. Rep. 271; Winn *v.* Strickland, 34 Fla. 610, 16 So. Rep. 606.

[24] Despard *v.* Walbridge, 15 N. Y. 374, 6 Am. Law Rev. 21.

"It is true that the tenant can not controvert the title of his landlord; . . . but the averment that after the relation of landlord and tenant was formed . . . (the landlord) conveyed away his interest to a third person is not disputing the title of the lessor, nor is such averment an allegation controverting the title of the original lessor." Boyd *v.* Sanetz, 17 Misc. (N. Y.) 728, 40 N. Y. Supp. 1070.

The tenant may show, that although the landlord had an interest in the premises at the time of the making of the lease, such interest had terminated before the alleged cause of action arose. Voss *v.* King, 33 W. Va. 236, 10 S. E. Rep. 402.

[25] Miller *v.* Lang, 99 Mass. 13.

In fact the tenant should always surrender the premises before litigating the title with the landlord. Johnson *v.* Thrower, 117 Ga. 1007, 44 S. E. Rep. 846; Anderson *v.* Smith, 63 Ill. 126.

[26] Conway *v.* Starkweather, 1 Den. 113.

The doctrine of adverse possession rests upon the acquiescence of the party against whom the property is held, and there cannot be acquiescence without knowledge. Such knowledge, however, "need not be actual, or such as would be imputed by express notice. . . . It may be a knowledge imputed impliedly by collateral facts of such nature as to cast on the party the legal duty of not being willfully or neglectfully ignorant of all proper inferences to be drawn from such facts." Wells *v.* Sheerer, 78 Ala. 142.

prepared to prove,[27] unless, by lapse of time, it has become the foundation of an adverse possession which will bar the landlord's claim.[28] When the estoppel is set up by the assignee of the lessor, the tenant is not estopped from impeaching the assignment; [29] and for this purpose he may show that the lessor's title at the time of demise was a limited one.[30]

An equitable estoppel of the tenant need not be pleaded; but is conclusive when the undisturbed possession appears in evidence under a denial.[31] It applies to every form of action in which the lessor, or those claiming under him, seek to assert against the lessee, and those holding under him, the rights reserved or possessed in the lease.[32] And it not only precludes the tenant from proving want of title, but equally from availing himself of want of title brought out by plaintiff's own evidence.[33] Eviction need not be

[27] Miller *v.* Lang (above).

[28] Willison *v.* Watkins, 3 Pet. 48. Compare Tompkins *v.* Snow, 63 Barb. 525.

Where a tenant has openly disavowed the landlord's title, "and notoriously held adversely to him by clear and positive claim, . . . with the knowledge of the landlord, (he) will be protected by the statute of limitation after the lapse of the statutory period." South *v.* Marcum, 22 Ky. Law Rep. 641, 48 S. W. Rep. 527.

Though a tenant could not deny his landlord's title at the time the tenancy commenced, he could "show that the interest of the landlord as it then existed had terminated as by efflux of time, etc." Robinson *v.* Troup Mining Co., 55 Mo. App. 662.

[29] Despard *v.* Walbridge; Hilbourn *v.* Fogg (above).

[30] Doed. Strode *v.* Seaton, 2 Carr. M. & R. (Exch.) 728, and cases cited.

[31] Prevot *v.* Lawrence, 51 N. Y. 219, S. P., 6 Am. Law Rev. 10, 12.

"One in possession of land, as owner of an individual share, having accepted a lease of the other interest, may, without first giving up possession, assert an adverse title against the lessor in an action by the latter of trespass to try title, and for partition. . . . The rule, that a tenant cannot deny his landlord's title, is limited to suits for possession only, and does not apply in an action of trespass to try title and for partition in which the title itself is put in issue." Young *v.* Severy, 5 Okla. 630, 49 Pac. Rep. 1024 (quoting from McKie *v.* Anderson [Tex. Cr.], 148 S. W. Rep. 576.)

[32] Tayl. L. & T. 485; Hilbourn *v.* Fogg (above).

[33] Dolby *v.* Isles, 11 Ad. & E. 335; but compare 1 Greenl. Ev. 13th ed. 249, § 211.

shown, if actual cessation of title is proven, and the tenant has made a valid attornment,[34] or upon a valid claim by a third person, under title paramount, has yielded up or abandoned possession.[35] An attornment, made under proper circumstances,[36] to one having paramount title, is equivalent to proof of going out of possession and coming in again under the new landlord.[37] If the eviction was not by judgment of law, the burden is on the tenant to prove the paramount title, and that he yielded in good faith to compulsion.[38] If there was eviction by judgment of law, evidence that the landlord was privy to the action, or had due notice and adequate opportunity to assume charge of the litigation, renders the judgment conclusive on him as evidence of eviction.

A mere acknowledgment or attornment by one already in possession, though evidence of a tenancy, does not raise a conclusive estoppel; but the tenant may show in such case that the party claiming the estoppel was a stranger to the land until the acknowledgment or attornment, or did not

[34] Jackson *v.* Harper, 6 Wend. 666, 670; and see Den *v.* Ashmore, 2 Zab. 261.

[35] Whalin *v.* White, 25 N. Y. 465.

[36] See N. Y. Real Property Law, § 224; Lawrence *v.* Brown, 5 N. Y. 394.

The tenant may show that the landlord had been divested of his title by operation of the law and that he was thereby justified in making an attornment. Rhyme *v.* Guevara, 67 Miss. 139, 6 So. Rep. 736.

[37] Austin *v.* Ahearne, 61 N. Y. 19, per DWIGHT, C.

"Evidence that the landlord has assigned the reversion, and that the tenant has attorned to the assignee; or that, under a judgment and execution, the reversion has been bought in by the tenant, or by a third person, to whom he subsequently attorns to avoid eviction, will make a good defense to an action by the landlord for the recovery of rent, or of possession." Farris *v.* Houston, 74 Ala. 162.

[38] Moffat *v.* Strong (above), 6 Am. Law Reg. 34, 35.

"A person entering under one landlord, and then attorning to another under the belief that the latter has the title and should receive the rent, must certainly be permitted to show that such belief was founded on a misapprehension of the facts, and that the title claimed by the second landlord has been adjudged to be in the first." Anderson *v.* Smith, 63 Ill. 126.

legally succeed to the original lessor, and that the tenant himself has a paramount title, and the acknowledgment or attornment was made under mistake or induced by fraud.[39]

15. Adverse Title.

Where title in a third person is competent, it should be shown by the usual muniments of title, or by evidence of possession for such a period as raises a presumption of title,[40] or by a former adjudication between the same parties, or their privies, establishing it.[41]

16. Forfeiture.

Where the occurrence of a ground of forfeiture has been shown, the acceptance of subsequent rent is presumptive, but not conclusive, evidence of intent to waive the forfeiture.[42]

[39] Ingraham *v.* Baldwin, 9 N. Y. 47, and cases cited; 6 Am. Law Reg. 27, and cases cited. Compare Austin *v.* Ahearne (above) and Hardy *v.* Akerly, 57 Barb. 148.

"A plain mistake of facts constitutes one of the exceptions. The tenant may show that he attorned to the landlord, or accepted a lease from him, under mistake and in ignorance of the true state of the title, and that the title was in himself, or out of the lessor. 2 Greenl. Ev., § 305; 2 Smith's Lead. Cases, 752; Taylor on Land, & Tenant, §§ 707–708. Fraud, or imposition, or undue advantage, the same authorities show is another exception to the rule, whenever, by the fraud, or misrepresentation of the lessor, the lessee is induced to accept the lease, he may impeach the title of the lessor." Farris *v.* Houston, 74 Ala. 162.

"If the landlord has transferred his interest in the premises, the tenant, though estopped to deny that title of the landlord from whom he received possession, may still show that the transfer was invalid and passed no title to the claimant. . . . And this, too, notwithstanding he has paid rent to the claimant, or made an express agreement, to become his tenant. If such payment or agreement, were made in ignorance of, or under a mistake or apprehension as to the title." De Wolf *v.* Martin, 12 R. I. 533.

[40] Treadwell *v.* Bruder, 3 E. D. Smith, 596.

[41] See, for instance, Yonkers & N. Y. Fire Ins. Co. *v.* Bishop, 1 Daly, 449.

[42] Manice *v.* Millen, 26 Barb. 41; Dumpor's Case, 1 Smith's L. Cas. 93, 100. See also Marshall *v.* Davis, 122 Ky. 413, 91 S. W. Rep. 714, 28 Ky. L. 1327.

But the rent money must have been accepted with knowledge on

Lapse of time, and any other circumstance rendering it inequitable to enforce the forfeiture, strengthens the evidence of waiver.[43] In strictness, the question is whether the lessor has manifested an election either way, or none.[44]

If defendant relies on the lessor's consent to the act claimed to be ground of forfeiture, the burden of proof is on the defendant to prove consent.[45]

the part of the payee of the facts constituting the forfeiture. Mulligan *v.* Hollingsworth, 99 Fed. Rep. 216.

"When the forfeiture has been determined by entry, and the lessee still in possession waives his rights, accruing from that determination, by the payment of after accruing rent, and the lessor, by the acceptance of that rent, treats the lessee as still his tenant and not as a continuing trespasser, there is a waiver of the forfeiture, binding alike upon the lessor and lessee." Hartford Wheel Club *v.* Travelers Ins. Co., 78 Conn. 355, 62 Atl. Rep. 207.

Where the landlord proceeds to make a distress for rent after a forfeiture, he thereby affirms the tenant's possession and waives his right of re-entry. Chase *v.* Knickerbocker Phosphate Co., 32 N. Y. App. Div. 400, 53 N. Y. Supp. 200.

Where a landlord waives a forfeiture incurred by the lessee by his breach of a covenant against subletting he thereby renders the sub-tenant's occupation of the premises lawful. Smith *v.* Edgewood Casino Club, 19 R. I. 628, 35 Atl. Rep. 884, 36 A. 128.

[43] Dumpor's Case, 1 Smith's L. Cas. 93, 97.

An agreement that past due rents may remain unpaid until a specified future date will amount to a waiver. Sauer *v.* Meyer, 87 Cal. 34, 25 Pac. Rep. 153. See also Fisher *v.* Smith, 48 Ill. 184.

Where it appeared that the landlord had the leased premises and built another structure thereon, it was held that there had been an eviction whereby the tenant could defeat the landlord's action based on forfeiture. Witte *v.* Quinn, 38 Mo. App. 681.

[44] Clough *v.* London & Northwestern Railway Co., L. R. 7 Exch. 26, 34, s. c., 1 Moak's Eng. 148, 157.

Even though it was provided in the lease that upon failure to pay rent when due or upon a default in any of the covenants of the lease, the lessor might lawfully end the term of the lease, she nevertheless had the right to waive such provisions made for her benefit, and it was held that it would be so presumed in the absence of some act manifesting an intention to declare a forfeiture. Gradle *v.* Warner, 140 Ill. 123, 29 N. E. Rep. 1118.

[45] Lawrence *v.* Williams, 1 Duer, 585.

17. Assignment.

Under an allegation that defendant is in as assignee, his title as heir,[46] or liability on other equitable grounds,[47] may, under the new procedure, be proved if amendment be allowed. So, under an allegation that he was assignee of the whole premises, proof that he was assignee of part only is admissible.[48] The burden of proof is upon the plaintiff to prove the assignment.[49] An assignment by writing, though not under seal, is good.[50] But direct evidence is not required. To charge an assignee with rent, evidence that he held himself forth as such is enough.[51] It is competent to prove his acts and admissions without any express assignment.[52] Having proved the lease, it is *prima facie* sufficient to show any facts from which an assignment may be inferred.[53]

"Even where there is an agency to collect rent, that of itself is not sufficient to confer upon the agent the power to waive the forfeiture." Mulligan *v.* Hollingsworth, 99 Fed. Rep. 216.

[46] Derisley *v.* Custance, 4 T. R. 75.

[47] See Mason *v.* Breslin, 2 Sweeny, 386, 395.

[48] Van Rensselaer *v.* Gallup, 5 Den. 454; Main *v.* Davis, 32 Barb. 461. *Contra*, Hare *v.* Cator, Cowp. 766.

It will not be presumed that the lessee has assigned his lease where it is not proven that another than the lessee was in possession of the entire premises. Ely *v.* Winans, 88 N. Y. Suppl. 929.

[49] Lansing *v.* Van Alstyne, 2 Wend. 561.

"When a party is found in the possession of leased premises, having succeeded to the tenant's occupation, without the knowledge or consent of the landlord, he is presumed to have taken an assignment of the lease; but this presumption is *prima facie* only, and the party may show that he is a sub-tenant or merely a licensee of the tenant, and so not bound by the terms of the lease." Washington Real Estate Co. *v.* Roger Williams Silver Co., 25 R. I. 483, 56 Atl. Rep. 686.

[50] Holliday *v.* Marshall, 7 Johns. 211, 213. For other rules as to proving assignment, see Chap. I. of this vol.

[51] Carter *v.* Hammett, 12 Barb. 253, again, 18 Id. 608.

The assignees of a lease, though not liable for the payment of rent under the instrument by which they took the assignment, nevertheless did incur this liability by an entry and occupancy of the said premises. Sharon Cong. Soc. *v.* Rix (Vt.), 17 Atl. Rep. 719.

[52] Adams *v.* French, 2 N. H. 387.

[53] Such, for instance, as that he occupied, and either acknowledged

Defendant may prove that he is *not* assignee,—as by showing that the estate created by the lease declared on ceased before his entry,[54] or that he claimed to hold under an adverse title.[55] To entitle him to show eviction from part, as a ground of apportionment, the eviction should be pleaded accordingly.[56] If the defendant relies on the fact that his assignors have paid the rent, the burden is on him to show it.[57] If he relies on the fact that he assigned to another, that assignment may be shown by indirect evidence,[58] as already stated. It is not necessary for him to show that he has divested himself of a paper title and a legal right.[59]

Defendant is not liable on parol evidence merely that he took a general assignment of all the lessee's property *in trust*.[60] If the lease is not specified in the assignment, the assignee in trust is not liable without evidence manifesting an intent to accept the lease;[61] and he may rebut the presumption arising from his temporary occupation, and prove that he did not accept the lease under the assignment.[62]

18. Demand.

In an action for rent, as distinguished from a proceeding to forfeit the term for non-payment, a demand need not be

that he held under the lease (Main *v.* Davis, 32 Barb. 461, and cases cited; Van Rensselaer *v.* Secor, Id. 469); or that he paid rent upon the lease (Bedford *v.* Terhune, 30 N. Y. 453, affi'g 1 Daly, 371); or that he has claimed to be assignee of the term (Lush *v.* Druse, 4 Wend. 313); or has rented out the premises as his own (Armstrong *v.* Wheeler, 9 Cow. 88); or even that he is in possession (Williams *v.* Woodard, 2 Wend. 487; Lansing *v.* Van Alstyne, Id. 561, 563; Armstrong *v.* Wheeler, 9 Cow. 88).

[54] Williams *v.* Woodard, 2 Wend. 487.

[55] City of Boston *v.* Binney, 11 Pick. 1.

[56] Lansing *v.* Van Alstyne, 2 Wend. 561.

[57] Jones *v.* Hausmann, 10 Bosw. 168.

[58] Carter *v.* Hammett, 12 Barb. 253, again, 18 Id. 608.

[59] Astor *v.* L'Amoureux, 4 Sandf. 524; Carter *v.* Hammett, 18 Barb. 608.

[60] Carter *v.* Hammett, 12 Barb. 253.

[61] Lewis *v.* Burr, 8 Bosw. 140.

[62] Bagley *v.* Freeman, 1 Hilt. 196; In re Ten Eyck & Choate, 7 Nat. Bankr. R. 26.

proved.[63] At common law, where a right of re-entry is claimed on the ground of forfeiture for the non-payment of rent, there must be proof of a demand of the precise sum due, at a convenient time before sunset upon the day when the rent is due upon the land, at the most notorious place on it though there be no person on the land to pay.[64]

Where demand is made by agent, oral evidence of authority is enough,[65] unless it appear that the authority was in writing and some question is made as to its terms.[66]

19. Repairs.

In an action for rent plaintiff need not, in the first instance, prove performance of his covenant to put in repair.[67] A plaintiff, alleging a breach of a covenant to make repairs, must give some evidence that they were not made, if it be in issue.[68] If he allege that he made repairs, for which he is entitled to recover, he must prove the affirmative, if in issue.[69] He should show that the prices paid were fair and reasonable.[70]

[63] Livingston *v.* Miller, 11 N. Y. 80; Gruhn *v.* Gudebrod Bros. Co., 21 Misc. 528, 47 N. Y. Supp. 714. See also Witte *v.* Quinn, 38 Mo. App. 681.

Where a written lease expressly states the amount of the rent payable in monthly instalments, a demand each month is not necessary. Gruhn *v.* Gudebrod Bros. Co., 21 Misc. 528, 47 N. Y. Supp. 714.

[64] Prout *v.* Roby, 15 Wall. 471, and cases cited. See also Johnston *v.* Hargrove, 81 Va. 118.

[65] Sheets *v.* Selden's Lessee, 2 Wall. 178.

[66] See chapter XII, paragraph 7 and chapter XXV, paragraph 5 of this vol.

[67] Harger *v.* Edmonds, 4 Barb. 256.

[68] Belcher *v.* M'Intosh, 8 C. & P. 720, 721.

Where the issue between the landlord and tenant was as to whether the landlord had agreed to make repairs on the premises, and the direct evidence was of about equal weight on both sides, the fact that the landlord had made some repairs was held not to be evidence sufficient to decide in favor of the alleged agreement. Mattler *v.* Strangmeier, 1 Ind. App. 556, 27 N. E. Rep. 985.

[69] See Levy *v.* Bond, 1 E. D. Smith, 169.

[70] Hausman *v.* Mulheran, 68 Minn. 48, 70 N. W. Rep. 866.

20. Surrender; Destruction of Premises.

Under the statute of frauds,[71] which forbids any estate in lands for more than one year, to be created or surrendered "unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party" or his agent authorized, in writing,—a surrender by act or operation of law may be inferred from circumstances,[72] and may be proved by evidence that the parties, without express surrender, did some act which implies that they both agreed to consider the surrender as made;[73]—for instance, by evidence that with the assent of the parties, a new and valid lease, wholly inconsistent with the continuance of the former, was made, and possession taken under it.[74] If the unexpired term was

[71] The present statute is N. Y. Real Property Law, § 259, which is different in its terms.

[72] Bailey *v.* Delaplaine, 1 Sandf. 5.

"While it is true, as a general proposition, that a surrender of a lease, considered as a conveyance of an interest in realty, can only be effected by some deed or other writing, under the statute of frauds, when such writing is necessary to creation of the lease, it is equally true, under the authorities, that a surrender may result either from the express agreement of the parties, if acted upon, or by operation of law." Hart *v.* Pratt, 19 Wash. 560, 53 Pac. Rep. 711.

[73] Beall *v.* White, 94 U. S. (4 Otto), 382, 389; Walker *v.* Richardson, 2 M. & W. 882, 892.

"Any acts which are equivalent to an agreement on the part of the tenant to abandon, and on the part of the landlord to resume, possession of the demised premises, amount to a surrender of the term by operation of law." Hart *v.* Pratt, 19 Wash. 560, 53 Pac. Rep. 711. White *v.* Beny, 24 R. I. 74, 52 Atl. Rep. 682.

A surrender may be "either in express words by which the lessee manifests his intention of yielding up his interest in the premises, or by operation of law where the parties without express surrender do some act which implies that they have both agreed to consider the surrender made." Robertson *v.* Winslow Bros., 99 Mo. App. 546, 74 S. W. Rep. 442.

Where it appeared that the lessee had moved all her property from the premises and delivered the key to the lessor, this was held sufficient to show a surrender. Channel *v.* Merrifield, 206 Ill. 278, 69 N. E. Rep. 32.

[74] Coe *v.* Hobby, 72 N. Y. 141, affi'g 7 Hun, 159, and cases cited; Amory *v.* Kannoffsky, 117 Mass. 351, s. c., 19 Am. Rep. 416. Bowman *v.* Wright, 65 Neb. 661, 91 N. W. Rep. 580, 92 N. W. Rep.

not more than one year, a parol surrender may be proved.[75] But abrogation of a written lease cannot be shown by evi-

580; Duncan *v.* Moloney, 115 Ill. App. 522.

In the absence of a clause permitting the landlord to relet for the tenant's account the fact that the landlord without consulting the tenant did relet may constitute acceptance of a surrender. Jutman *v.* Conway, 45 Misc. 363, 90 N. Y. Supp. 290. See also Barkley *v.* McCue, 25 Misc. 738, 55 N. Y. Supp. 608.

The landlord's conduct in entering and taking possession of the premises; in advertising the same to let; in making repairs thereon; in actually reletting the same; and in failing to consult with the tenant in any way regarding said proceedings, or to make any claim upon him for rent, were held inconsistent with the idea that he had not accepted a surrender of the premises. White *v.* Berry, 24 R. I. 74, 52 Atl. Rep. 682.

Proof that the tenant removed all of his property from the premises, that he surrendered the keys to the landlord's janitor; that the landlord put a "to let" sign on the property and entered into negotiations with other parties for the leasing of the premises, and allowed those parties to enter upon the premises, is sufficient to establish a surrender and acceptance. Krumdieck *v.* Ebbs, 84 N. Y. Supp. 525.

Where it appeared that the tenant called upon the agent of the plaintiff and said that she would give up the apartment and would pay one month's rent in advance to give him an opportunity of renting it, and the agent said that was all right and accepted the payment of one month's rent in advance, and the tenant acting on the agreement delivered possession of the premises to the landlord who, under the agreement, took possession of the premises and, without notice to the tenant that it was for her account, rented them for a term extending beyond the tenant's term, there was evidence to justify a finding that the agent for a valuable consideration had accepted a surrender of the term. Goldsmith *v.* Schroeder, 93 App. Div. 206, 87 N. Y. Supp. 558.

An agent of the lessor who had the right "to modify a lease by reducing the rent," also had authority to modify the lease by accepting a surrender of the premises and a right to modify or waive a "written provision in the lease that no surrender would be valid except in writing." Id.

[75] For instance, by the substitution of another tenant, and receipt of rent from him. Wilson *v.* Lester, 64 Barb. 433, and cases cited. But this is only a presumption which cannot be indulged against the apparent intent of the parties. Van Rensselaer *v.* Penniman, 6 Wend. 569.

A parol surrender, though not enforcible, will, when acted upon, give rise to a surrender by opera-

dence of a mere oral disclaimer,[76] or an oral promise to release from further liability.[77]

Evidence of surrender by act of the parties, should bring the fact home to all of them.[78] It will not be implied against the intent of the parties, as manifested by their acts.[79]

A parol relinquishment of part of the premises in consideration of a reduction of the rent, may be proved, notwithstanding the statute of frauds, as a lease from year to year.[80]

tion of law. Tobener *v.* Miller, 68 Mo. App. 569; Miller *v.* Dennis, 68 N. J. Law, 320, 53 Atl. Rep. 394.

[76] Jackson *v.* Kisselbrack, 10 Johns. 336; and see Pugsley *v.* Aiken, 11 N. Y. 494, rev'g 14 Barb. 114.

A parol agreement to vacate the leased premises at a stated time, prior to the expiration of the term does not amount to a surrender, where the lessee continues in possession after the expiration of the time mentioned without objection from the landlord. Duncan *v.* Moloney, 115 Ill. App. 522.

[77] Goelet *v.* Ross, 15 Abb. Pr. 251.

On the issue as to whether a lessee had, upon removing from the premises, been released from his obligation to pay further rent, it was held improper to allow him to testify: "'I spoke to Mr. M. (the landlord's agent) stating that I contemplated moving out of the premises and, of course, I did not wish any after-clap of any kind, and he said that could be arranged all satisfactory. And I saw him on another occasion, and he then stated that he had not seen P. and S. (the landlords) but that I could rest assured there would be no trouble about that, later on, regarding the matter of rent and unexpired lease." Price *v.* Coblitz, 21 Oh. Cir. Ct. 732, 12 Oh. Civ. Dec. 34.

[78] Beall *v.* White, 94 U. S. (4 Otto) 382; s. p., Bedford *v.* Terhune, 30 N. Y. 453, affi'g 1 Daly, 371.

The surrender must be the mutual and voluntary action of the parties to the lease. Wray-Austin Mach. Co. *v.* Flower, 140 .Mich. 452, 103 N. W. Rep. 873.

[79] Coe *v.* Hobby (above).

The landlord's consent to a surrender cannot be inferred from the unsuccessful attempt of his agent to rent the premises. Gaines *v.* McAdam, 79 Ill. App. 201.

Evidence that the landlord refused to take the premises off the tenants' hands but offered to lease the same for his account is sufficient to rebute the inference of an accepted surrender. Gutman *v.* Conway, 45 Misc. 363, 90 N. Y. Supp. 290. On the other hand a letting in the landlord's own name operates as an acceptance of the tenant's offer to surrender. Gray *v.* Kaufman Dairy, etc., Co., 162 N. Y. 388, 56 N. E. Rep. 903, 76 Am. St. Rep. 327, 49 L. R. A. 580.

[80] Lounsbery *v.* Snyder, 31 N. Y. 514.

If defendant relies on the fact that money has been or might have been realized, by letting the premises to others when defendant refused to occupy, the burden is on him to show it.[81]

A written stipulation cancelling a lease, does not merge the previous oral agreement fixing the terms of the surrender, so as to exclude parol proof of that agreement.[82]

The fact that the tenant or sub-tenant continues to occupy part of the premises after a fire, is not of itself conclusive evidence that the premises are tenantable. Evidence of the circumstances which induced remaining is proper.[83]

21. Apportionment.

One of two joint lessees may prove by parol an apportionment of the premises and rent.[84]

21a. Alteration of Instrument.

Where the terms and stipulations of the lease have been altered, and the contract is declared on as altered, the alteration may be proved under a denial.[85] But under a denial of

But where the lease is under seal, no oral agreement for the reduction of rent is admissible, and an indorsement on the lease agreeing to a reduction, not being itself under seal, will not validate an oral agreement for which there was no consideration. Loach *v.* Farnum, 90 Ill. 368.

[81] Green *v.* Waggoner, 2 Hilt. 297.

[82] Hope *v.* Balen, 58 N. Y. 380.

If a surrender is pleaded, the presumption is that the *status* thus created continued and it is not necessary to allege that the tenant remained out of possession. Jennings *v.* Bond, 14 Ind. App. 282, 42 N. E. Rep. 957.

[83] Kip *v.* Merwin, 52 N. Y. 542; compare Johnson *v.* Oppenheim, 55 Id. 280.

At common law the tenant is required to pay rent although the building is wholly destroyed by accidental fire, flood or the like, unless there be stipulation otherwise. Arbenz *v.* Exley, 52 W. Va. 476, 44 S. E. Rep. 149, 61 L. R. A. 957.

Where the tenant fails to surrender the leased premises on the expiration of the lease, the landlord may treat the tenant as a hold-over and recover the rent. Ballance *v.* Peoria, 180 Ill. 29, 54 N. E. Rep. 428.

[84] Van Rensselaer *v.* Gifford, 24 Barb. 349.

[85] Schwarz *v.* Oppold, 74 N. Y. 307.

the execution of the lease, the defendant while admitting its execution, cannot prove subsequent alterations which avoided it, and discharged its obligation.[86]

22. Payment.

Evidence of payment and acceptance of rent, for one quarter or period, raises a legal but not conclusive presumption that previous rent had been paid.[87] This presumption is one which requires strong evidence to rebut it.[88] Production of receipts for the former periods, not expressed to be in full, does not suffice to rebut it.[89]

Rent, even though reserved by parol, is not merged by taking a sealed security.[90] If reserved by deed, payment is not necessarily presumed from lapse of time.[91]

23. Eviction.

Under an allegation of wrongful eviction by the landlord, as a defense to claim for rent, a constructive eviction may be proved.[92] A mere trespass is not enough; [93] nor is a failure

[86] Roberts *v.* Nelson, 65 Minn. 240, 241, 68 N. W. Rep. 14.

[87] Brewer *v.* Knapp, 1 Pick. 332, 336; Ottens *v.* Fred Krug Brewing Co., 58 Nebr. 331, 78 N. W. Rep. 622.

A receipt for rent covering a particular month affords presumptive evidence that rent previously occurring has been paid. Ottens *v.* Fred Krug Brewing Co., 58 Nebr. 331, 78 N. W. Rep. 622.

[88] Pow. on Ev. 97. See Sharon Cong. Soc. *v.* Rix (Vt.), 17 Atl. Rep. 719.

[89] Patterson *v.* O'Hara, 2 E. D. Smith, 58.

[90] Cornell *v.* Lamb, 20 Johns. 407.

[91] Lyon *v.* Adde, 63 Barb. 89.

[92] Dyett *v.* Pendleton, 7 Cow. 727. In an action to recover rent to which the defenses of eviction from and surrender and acceptance of the demised premises are interposed, proof of a judgment recovered in a previous action between the same parties for rent due under the same lease is a conclusive answer to such defenses, as to any matters occurring prior to its rendition. Zerega *v.* Will, 34 N. Y. App. Div. 488. *Contra*, Miland *v.* Meiswinkel, 82 Ill. App. 522.

[93] Lounsbery *v.* Snyder, 31 N. Y. 514, and cases cited.

"Physical expulsion is not now considered necessary to constitute an eviction. Any act of a landlord which deprives his tenant of that

to give possession.[94] But an eviction from part is enough,[95] and so is an obstruction to the beneficial enjoyment of the whole property, and a diminution of the consideration of the contract, by the landlord's acts,[96] unless the tenant remained

There cannot be a constructive eviction without a surrender of the premises. George A. Fuller Co. *v.* Manhattan Constr. Co., 43 Misc. 219, 88 N. Y. Supp. 1049.

Where the tenant failed to show that the acts complained of as an eviction were done with the authority of the landlord or with his consent, evidence as to the acts was not competent to go to the jury. John Anisfield Co. *v.* Covey, 140 Ill. App. 364.

"The answer set out relies on a constructive eviction as a defense to the action for rent. That such an eviction, on the part of the landlord, affords a good defense to the action for rent seems to be settled law." Jennings *v.* Bond, 14 Ind. App. 282, 42 N. E. Rep. 957.

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beneficial enjoyment of the premises to which he is entitled under a lease will amount in law to an eviction and suspend the rent." Accordingly failure to furnish heat and light to the tenant may amount to a substantial eviction. McSorley *v.* Allen, 36 Pa. Super. Ct. 271.

"'In order to constitute a constructive eviction the acts of the landlord must clearly indicate an intention on the part of the landlord that the tenant shall no longer have the full beneficial enjoyment of the premises, and such acts must be of a grave and permanent character which, in their nature, do deprive the tenant of the full and beneficial enjoyment of the demised premises.'" John Anisfield Co. *v.* Covey, 140 Ill. App. 364.

[94] Vanderpool *v.* Smith, 4 Abb. Ct. App. Dec. 461.

Eviction is a question of fact for the jury. Rubens *v.* Hill, 213 Ill. 523, 72 N. E. Rep. 1127.

[95] Christopher *v.* Austin, 11 N. Y. 216, affi'g 2 E. D. Smith, 203, 209, note; Peck *v.* Hiler, 24 Barb. 178, s. c., 14 How. Pr. 155; compare a further decision, in 31 Barb. 116; Colburn *v.* Morrill, 117 Mass. 262, s. c., 19 Am. Rep. 415.

"Nothing less than an entire abandonment or surrender will operate as a dissolution of the tenancy, and a suspension or discharge of the whole rent. The rent is discharged only *pro tanto*, to the extent of the value of the use and occupation of the part of the premises of which the tenant is dispossessed, if he remains in undisturbed possession of the residue." Anderson *v.* Winton, 136 Ala. 422, 34 So. Rep. 962.

[96] Dyett *v.* Pendleton, 8 Cow. 727, rev'g 4 Id. 581; and see 106 Mass. 201.

When a landlord by repeated

in possession of the entire premises until the rent fell due.[97]

23a. Letting of Premises for Illegal Purpose.

Where the defense is that plaintiff leased the premises to the lessee with the knowledge and under the agreement and understanding that she was to use them as a house of ill fame, and that during all the time she occupied them she did so use them, evidence of the reputation of the house among the neighbors is competent, to prove that it is a house of ill fame.[98]

and insolent demands for possession of leased premises and threats of bringing action for ejection caused the plaintiff to give up a school which he conducted on the leased premises, the averment of these facts in the answer to an action for rent was held sufficient against a demurrer. Jennings *v.* Bond, 14 Ind. App. 287, 42 N. E. Rep. 957.

[97] Edgerton *v.* Page, 10 Abb. Pr. 119, s. c., 20 N. Y. 281, 18 How. Pr. 359, affi'g 1 Hilt. 320, 5 Abb. Pr. 1, 18 How. Pr. 116; Academy of Music *v.* Hackett, 2 Hilt. 217, and cases cited; De Witt *v.* Pierson, 112 Mass. 8, s. c., 17 Am. Rep. 58.

To constitute a defense to an action for rent, the eviction must take place before the rent becomes due. Gugel *v.* Isaacs, 21 N. Y. App. Div. 504, 48 N. Y. Supp. 594; George A. Fuller Co. *v.* Manhattan Constr. Co., 44 Misc. 219, 88 N. Y. Supp. 1049.

[98] Egan *v.* Gordan, 65 Minn. 505, 506–507, 68 N. W. Rep. 103. "Evidence of specific acts done on the premises, tending to show that the place was a house of ill fame, is also competent, though plaintiff was not present at the time, and no knowledge of the particular acts were brought home to him. It is necessary for defendant to prove (1) that the place was a house of ill fame, and (2) that plaintiff had knowledge of that fact when he made the lease. But in proving the latter fact it was not necessary to show that plaintiff had knowledge of every such act given in evidence to prove the former fact." Id. See also People *v.* Woods, 3 Park. Cr. Rep. 681; Bielschofsky, 3 Hun, 40; Weyman *v.* People, 4 Hun, 511, 517; Hall *v.* Naylor, 18 N. Y. 588; Plath *v.* Kline, 18 App. Div. 240, 242.

"Whether or not the reputation of the house, itself, as one of ill-fame may be shown, is a question about which the cases are somewhat conflicting; but we think that the weight of authority, and the better reason, support the affirmative of the proposition." (See cases cited.) The court further stated that the line of cases which, while excluding evidence of the reputation of the house, permitted evi-

24. Acts of Waste.

The intent is not essential; and under an allegation that the waste was wrongfully committed, plaintiff may prove that it was negligently committed.[99] The opinion of a qualified witness is competent as to the amount of waste committed,—for instance, the number of acres from which timber has been cut, and the like;[1] but not whether the cutting of timber was a benefit or injury to the estate,[2] nor, if an injury, how much.[3] Evidence of the value of timber cut may be received, and of what part of it was suitable for timber.[4]

dence of the inmates of the house for the purpose of showing that it was a house of prostitution, created a distinction without a meaning. Demartini *v.* Anderson, 127 Cal. 33, 59 Pac. Rep. 207.

Where a landlord was indicted for a statutory offense in that he rented a house knowingly kept as a resort of ill fame, the court held that when the state proved the alleged use to which the house was put and that it was a matter of general repute in the community in which the defendant lived, a *prima facie* case was made. It was then incumbent on the defendant to show that he had no knowledge or that the circumstances were such that he may have remained ignorant of the facts. Graeter *v.* State, 105 Ind. 271, 4 N. E. Rep. 461.

Where a house is rented for purposes of public prostitution in violation of a penal statute no rent can be recovered under the lease. Burton *v.* Dupree, 19 Tex. Civ. App. 275, 46 S. W. Rep. 272.

Where a lease is void because made for an unlawful purpose, as when the premises are to be occupied as a house of ill fame, it is not sufficient to create a tenancy from month to month or at will. Berni *v.* Boyer, 90 Minn. 469, 97 N. W. Rep. 121.

[99] Robinson *v.* Wheeler, 25 N. Y. 252.

[1] Woodward *v.* Gates, 38 Geo. 205.

It was held error, however, to permit the admission of the tenant's saw-mill books in evidence for the purpose of showing what timber had been taken from the

[2] McGregor *v.* Brown, 10 N. Y. 114.

[3] Van Deusen *v.* Young, 29 N. Y. 9, rev'g 29 Barb. 9; Robertson *v.* Knapp, 35 N. Y. 91, s. c., 33 How. Pr. 309.

[4] Rutherford *v.* Aiken, 3 Supm. Ct. (T. & C.) 60. Compare Harder *v.* Harder, 26 Barb. 409.

It is competent to establish by the testimony of a witness that the defendants have cut down only

premises when the tenant had testified before the production of such books that he had kept no separate accounts of timber taken from various tracts of land. It was further held that evidence as to the number of stumps counted by witnesses tend to fix the amount of timber taken away. Learned *v.* Ogden, 80 Miss. 769, 32 So. Rep. 278, 92 Am. St. Rep. 621.

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certain poplar trees which were dying. Morris *v.* Knight, 14 Pa. Super. Ct. 324.

CHAPTER XXIX

ACTIONS ON JUDGMENTS

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I. GENERAL PRINCIPLES

1. The Several Modes of Proof.

There are four methods of proving a judgment; viz., by producing 1, a certified copy; 2, a sworn copy; 3, an exemplification; and 4, the original record.[5] Oral evi-

[5] Lansing *v.* Russell, 3 Barb. Ch. 325; Baker *v.* Kingsland, 10 Paige, 366; Handly *v.* Greene, 15 Barb. 601. Statutes prescribing formali-

dence,[6] the transcript filed and docketed in another county,[7] or the production of process issued on the judgment,[8] is not competent except as secondary evidence after proper foundation has been laid for it.

2. Certified Copies.

Proof by certified copy, permitted at common law in case

ties for certified copies do not by implication affect the common-law modes of proof in other ways. Peck *v.* Farrington, 9 Wend. 94, N. Y. Code Civ. Pro., § 962.

The text rule is quoted with approval in Non-Electric Fibre Mfg. Co. *v.* Peabody, 28 N. Y. App. Div. 442, 51 N. Y. Supp. 111.

The judgment or determination of a court, or of an officer thereof authorized to render one, may be proved in two ways; by the original records duly identified, and, if from another court, duly proved; or by a duly certified and authenticated copy. Sheriff *v.* Turner, et al., 119 Fed. Rep. 782, 788, and cases cited.

Judicial records may be proved by either an exemplified or certified copy, made by the officer in custody of the judicial record, or by a sworn copy which is proved by producing a witness who has compared the copy with the original record word for word, or who has examined the copy while another person read the original. Traction Co. *v.* Camden Board of Works, 57 N. J. Law, 313, 30 Atl. Rep. 581.

A decree in chancery is admissible in evidence to show collaterally that such a decree was made; but if offered to establish particular facts or to show an adjudication upon the subject matter it is admitted only together with a duly authenticated copy of the proceedings in which the decree was rendered. Kerchner *v.* Frazier, 106 Ga. 437, 32 S. E. Rep. 351.

Where the statutes provide for exemplification of the judgment a certified copy will not suffice. Schwab Clothing Co. *v.* Cromer, 1 Ind. Ter. 661, 43 S. W. Rep. 951.

Under a general denial the burden is on the plaintiff to prove the judgment. Clarion First Natl. Bank *v.* Hamor, 47 Fed. Rep. 36.

[6] Gass *v.* Stinson, 2 Sumn. 605; Schwab Clothing Co. *v.* Cromer, 1 Ind. Ter. 661, 43 S. W. Rep. 951.

In general, the contents of a judgment cannot be proved by parol evidence. Cody *v.* First Natl. Bank, 103 Ga. 789, 30 S. E. Rep. 281; Rosenberg *v.* Goldstein, 38 Misc. Rep. 753, 78 N. Y. Supp. 831.

[7] Handly *v.* Greene, 15 Barb. 601.

Although an execution referring to the judgment which it is based contains the expression "as appears of record," it is not proper evidence of such judgment. Waterbury Lumber, etc., Co. *v.* Hinckley, 75 Conn. 187, 52 Atl. Rep. 739.

[8] Smallwood *v.* Violet, 1 Cranch C. Ct. 516.

of domestic judgments of courts of general jurisdiction,[9] is now generally, expressly sanctioned by statute, requiring the whole record to be certified; and is usually the most convenient. Proof of the official character of the authenticating officer, his signature, and that it was made within his jurisdiction, is not necessary, except so far as made so by the statute.[10] The certificate must be under the seal of the court, if any,[11] unless produced in the same court or a branch thereof.[12]

The clerk's certificate of the existence of a judgment is not evidence of it unless made so by statute; [13] and statute authority to certify a copy for specific purposes, does not authorize to make certified copies which shall be generally admissible in evidence.[14]

3. Exemplifications.

An exemplification may be said to be a duplicate of the

[9] Fort *v.* Burch, 6 Barb. 60, 76; and see Bergen *v.* Bradley, 36 N. Y. 316; U. S. *v.* Percheman, 7 Pet. 85; but compare Errickson *v.* Smith, 2 Abb. Ct. App. Dec. 70.

Such is the case in Illinois. Garden City Sand Co. *v.* Miller, 157 Ill. 225, 230, 41 N. E. Rep. 753.

The fact that the certified copy of a judgment offered in evidence is attached to the pleadings in the case is no objection to its admission even though it is provided by statute that the pleadings cannot be deemed evidence. Day *v.* Crosby, 173 Mass. 433, 53 N. E. Rep. 880.

[10] Thurman *v.* Cameron, 24 Wend. 87; Hatcher *v.* Rocheleau, 8 N. Y. 94; Merritt *v.* Lyon, 3 Barb. 110.

[11] N. Y. Code Civ. Pro., § 958.

[12] Id., § 959. In New York the word "seal" or letters "L. S." are now sufficient. General Construction Law, § 44.

[13] Lansing *v.* Russell, 3 Barb. Ch. 325.

A judgment of a court consisting of a transcript filed therein of a judgment of another court cannot be proved by a certificate of the clerk of the court from which such transcript was obtained. Peterson *v.* Gittings, 107 Iowa, 306, 77 N. W. Rep. 1056.

The original file of papers in an action together with testimony of the clerk of the court that judgment had been entered by default does not constitute proper proof of the judgment. Waterbury Lumber, etc., Co. *v.* Hinckley, 75 Conn. 187, 52 Atl. Rep. 739.

[14] Coolidge *v.* N. Y. Firemen Ins. Co., 14 Johns. 314.

record, authenticated under the great seal of the State, or the seal of the court, with a certificate from the authorities appearing to have official custody of the record, that they have caused it to be exemplified. It is admissible without a certificate that it has been compared and contains the whole of the record, etc., as in case of a certified copy.[15]

4. Sworn Copies.

Notwithstanding the statute, a copy may be proved by producing it, with a witness to testify that he compared it with the original record, in the proper court. But it is essential to show, by evidence extrinsic to the paper, that the record was found in the proper place of deposit, or in the hands of the officer in whose custody the records of the court are kept; this cannot be shown by any light reflected from the record itself.[16] If a certified copy or exemplification is is rejected for defect of authentication, counsel may fall back on this mode of proof.

5. Imperfect Records, &c.

Where the law does not require a formal record to be made up, the entries which are permitted to stand in its place are admissible; [17] but in such case, if the judgment be not one

[15] Merritt *v.* Lyon, 3 Barb. 110; Lazier *v.* Wescott, 26 N. Y. 146; Vadevoort *v.* Smith, 2 Cai. 155. In the case even of an inferior domestic court, an exemplification is sufficient. Vail *v.* Smith, 4 Cow. 71; Robert *v.* Good, 36 N. Y. 411.

"An exemplified copy at common law was obtained by removing the record into the Court of Chancery by certiorari. The Great Seal was attached to the copy, which was transmitted by a mittimus to the court in which it was used as evidence. In this country . . . the great seal being usually if not always kept by the secretary of state, a different course prevails, and an exemplified copy under the seal of the court is usually admitted, even upon a plea of nul tiel record, as sufficient evidence." Traction Co. *v.* Camden Board of Works, 57 N. J. Law, 313, 315, 30 Atl. Rep. 581.

[16] Hutchins *v.* Gerrish, 52 N. H. 205, s. c., 13 Am. Rep. 19. See 1 Greenleaf Ev., § 508.

[17] Rosc. N. P. 135; Philadelphia, &c. R. R. Co. *v.* Howard, 13 How. U. S. 307; Washington, &c., Steam Packet Co. *v.* Sickles, 24 Id. 333.

of the same State or of the United States, there should be evidence of the law sanctioning such entries as sufficient.[18] Otherwise they are not competent[19] except as secondary evidence. In proving a judgment had under the new procedure, for the purpose of an action therein, whatever is made by law a part of the record or judgment-roll should be proved; and this is enough in the first instance.[20] At common

The court will not presume that numerals contained in the abstract of a justice's judgment represent dollars and cents and the record is therefore inadmissible. Hopper *v.* Lucas, 86 Ind. 43.

Under code provisions which require the "proceedings of the court to be entered in the record book" and provide for the keeping of a "judgment book" containing an "abstract of the judgment," the record book is the best evidence of a judgment. Baxter *v.* Pritchard, 113 Iowa, 422, 85 N. W. Rep. 633.

"Whenever the judgment entry is not clear and perfect on its face it should be interpreted in the light of the pleadings and of the entire record." Flack *v.* Andrews, 86 Ala. 395, 5 So. Rep. 452.

[18] Taylor *v.* Runyan, 3 Iowa, 474, 9 Id. 522.

[19] Levering *v.* Dayton, 4 Wash. C. Ct. 698. Enrollment is not necessary to make the bill, answer, and original decree, evidence (Winans *v.* Dunham, 5 Wend. 47; and see Bates *v.* Delavan, 5 Paige, 299; Fort *v.* Burch, 6 Barb. 60), unless required by law. But that which has been enrolled cannot be contradicted or set aside by what is not enrolled. Crosswell *v.* Byrnes, 9 Johns. 287; McKnight *v.* Dunlop, 4 4 Barb. 36; Waldron *v.* Green, Wend. 409.

[20] Clark *v.* Depew, 25 Penn. St. 509; Knapp *v.* Abell, 10 Allen, 485; Barringer *v.* King, 5 Gray, 9. If a judgment is relied upon to establish any particular state of facts upon which the judgment was based, or as a matter of estoppel, then a duly authenticated copy of the proceedings in which the judgment was rendered ought to be introduced. But in cases where it is only sought to prove contents and the existence of a judgment, it is only necessary to produce a duly authenticated copy of the judgment itself. Rainey *v.* Hines, 121 N. C. 318, 321, 28 S. E. Rep. 410; Davidson *v.* Sharpe, 6 Ired. Law, 14; Edwards *v.* Jones, 113 N. C. 453; Gibson *v.* Robinson, 90 Ga. 756, 16 S. E. Rep. 969; Anthanissem *v.* Dart, 20 S. E. Rep. 124.

But where it is sought to prove only that a judgment was rendered nothing need be produced except the judgment entry. Watson *v.* Jones, 41 Fla. 241, 25 So. Rep. 678.

Where a chancery decree is offered in evidence simply for the purpose of proving that it was made it is not necessary to also introduce the record in the case,

law it is enough alike in case of a domestic judgment or one of a sister State, to prove the record of judgment alone, without the writ or other proceedings before or after judgment,[21] and defendant may prove these if he wish. Signature of an original record by the clerk is not essential, unless made so by statute.[22] The omission, if a defect, is amendable.[23] To

but where it is intended to avail of the decree as an adjudication upon the questions involved it is necessary to introduce the pleadings as well as the decree itself. Kerchner *v.* Frazier, 106 Ga. 437, 32 S. E. Rep. 351.

It has been said that a decree offered for the purpose of establishing the granting of a divorce need not be accompanied by a transcript of the entire record of the case. Alexander *v.* Grand Lodge, A. O. U. W. 110 Iowa, 519, 93 N. W. Rep. 508.

A judgment is not a written instrument within the meaning of a statute requiring a copy of a written instrument sued on to be filed with the pleadings. Hopper *v.* Lucas, 86 Ind. 43.

A transcript of a judgment used as an exhibit attached to the petition in an action brought on such judgment need not be authenticated at all. White *v.* Treon, 25 Kan. 484.

[21] Rathbone *v.* Rathbone, 10 Pick. 1; Miller *v.* White, 10 Abb. Pr. N. S. 385, s. c., 59 Barb. 434. Compare, *contra*, Irvine *v.* Lumberman's Bank, 2 Watts & S. 190; Edmiston *v.* Schwartz, 13 Serg. & R. 135; Ashley *v.* Laird. 14 Ind. 222. At common law a duly authenticated copy of parts of a record is properly admissible in evidence. The whole is not necessary. It is sufficient that extracts are furnished to show *prima facie* the facts sought to be proved. Gardere *v.* Col. Ins. Co., 7 Johns. 518; Packard *v.* Hill, 7 Cow. 434, 5 Wend. 375; and see 8 N. Y. 92, and Code Civ. Pro., § 958. If the decree or judgment shows jurisdiction and contains all the facts required, the proceedings on which it was founded are not essential to its competency; but if the particular issue raised is material, the pleadings, and whatever else is relevant, should appear. Rosc. N. P. 128.

But under the Federal statute the transcript should contain the complete record in the case. Pepin *v.* Lachenmeyer, 45 N. Y. 27.

[22] Goelet *v.* Spofford, 55 N. Y. 647; Secombe *v.* Steele, 20 How. U. S. 94. Compare Morris *v.* Patchin, 24 N. Y. 394.

See Lythgoe *v.* Lythgoe, 75 Hun 147, 26 N. Y. Supp. 1063, Jt. aff. 145 N. Y. 641, 41 N. E. Rep. 89.

A verdict alone is not admissible in evidence to prove a judgment. Hincle *v.* Carruth, 6 S. C. L. 471.

[23] Van Alstyne *v.* Cook, 25 N. Y. 489; Artisans' Bank *v.* Treadwell, 34 Barb. 553.

A record which has been amended

prove a judgment by confession, the warrant or consent should also be proved.[24]

The question whether the document is only an extract or a copy of the whole record, is determined not by its appearance, but by the attestation.[25] And, for this purpose, a certificate substantially importing that it is a faithful and complete copy is enough, though it do not use the most appropriate words.[26] Otherwise, if the writing certified does

on notice so as to show service on the defendant is admissible although this fact did not affirmatively appear originally. Cunningham *v.* Spokane Hydraulic Min. Co., 20 Wash. 450, 55 Pac. Rep. 756, 72 Am. St. Rep. 113.

[24] Rathbone *v.* Rathbone, 10 Pick. 1; Hill *v.* Tiernan, 4 Mo. 316; Rape *v.* Heaton, 9 Wisc. 328.

The courts of New Jersey recognize the conclusiveness of Foreign Judgments entered upon the authorization of a warrant of attorney to appear for the defendant. Hazel *v.* Jacobs, 78 N. J. L. 459, 75 Atl. Rep. 903, 27 L. R. A. N. S. 1066, 20 Ann. Cas. 260. See also Henry *v.* Estes, 127 Mass. 474; National Exchange Bank *v.* Wiley, 195 U. S. 257, 25 S. Ct. 70, 49 L. ed. 184; Grover, etc., Sewing Mach. Co. *v.* Radcliffe, 137 U. S. 287, 11 S. Ct. 92, 34 L. ed. 670.

In an action to vacate a judgment confessed during vacation in a court of record the court held that the plaintiff was required to file with the clerk of the court a declaration upon his cause of action, the warrant of attorney authorizing the confession of judgment, and an affidavit proving the execution thereof and a cognovit, whereupon the clerk was authorized to enter judgment. Gardner *v.* Bunn, 132 Ill. 403, 23 N. E. Rep. 1027, 7 L. R. A. 729. Citing Roundy *v.* Hunt, 24 Ill. 598. See also Desnoyers Shoe Co. *v.* First Natl. Bank, 188 Ill. 312, 58 N. E. Rep. 994.

[25] Voris *v.* Smith, 13 Serg. & R. 333. "If the copy produced purports to be a record, and not a mere transcript of minutes from the docket, and the clerk certifies that it is truly taken from the record, and his attestation is certified to be in due form of law by the presiding judge, it will be presumed that the paper is a full copy of the entire record, and will be sufficient." McMillan *v.* Lovejoy, 115 Ill. 498, 4 N. E. Rep. 772. Citing 1 Greenl. on Ev. secs. 504, 505.

[26] Thus, "a true copy," or "a copy of the record," or a "true transcript of the record and proceedings" . . . "as fully as they now exist among the records of my office;" or, "that the foregoing is truly taken from the record of the proceedings" of the court, or, "a copy of records truly taken and correctly copied from records;" —imports a complete copy, unless the contrary appears from the

not purport to be a record; [27] or if the form of the certificate is prescribed by the statute.[28]

The fact that the judgment roll or exemplification contains alterations or interlineations marked and verified as such by the initials of the clerk,[29] or that the roll contains no summons, nor the order of reference on which the judgment was obtained, does not render it wholly incompetent,[30] if jurisdiction appears.[31] Amendments duly authenticated may be relied on to support the judgment.[32] The mere fact that a paper was found on file amongst the papers in a cause is not evidence that it is part of the record.[33]

face of the papers. Edmiston *v.* Schwartz, 13 Serg. & R. 135; Voris *v.* Smith, Id. 334; McCormick *v.* Deaver, 22 Md. 187; Ferguson *v.* Harwood, 7 Cranch, 408; Reber *v.* Wright, 68 Penn. St. 471; Case *v.* McGill, 8 Md. 10; Caulfield *v.* Bullock, 18 B. Monr. 494.

In an action upon a sister-state judgment, the clerk's certificate stating that the transcript was a "true and correct copy" instead of a "complete" copy was held sufficient. Ind. 103, 21 N. E. Rep. 346. See also Shilling *v.* Seigle, 207 Pa. St. 381, 56 Atl. Rep. 957.

[27] Ferguson *v.* Harwood (above).

[28] The New York statute (Code Civ. Pro., §957, reproducing 3 R. S. 6th ed. 668), requires that the person authorized to certify, must state, in his certificate, that it has been compared by him with the original, and that it is a correct transcript therefrom, and of the whole of the original.

[29] Lazier *v.* Westcott, 26 N. Y. 146.

In an action on a judgment of a sister-state a clerical error in computation which is apparent on the face of the judgment may be corrected. Reynolds *v.* Powers, 96 Ky. 481, 29 S. W. Rep. 299, 17 Ky. L. 1059.

[30] Calkins *v.* Packer, 21 Barb. 275. *Contra*, James *v.* Stookey, 1 Wash. C. Ct. 330.

On a question of *res adjudicata* the fact that the judgment entries are brief or somewhat indefinite does not render them inadmissible where they sufficiently indicate that the prior action went to final judgment. Extrinsic evidence may be received to establish the identity of the issues involved. Holford *v.* James, 136 Fed. Rep. 553, 69 C. C. A. 263.

[31] See the statute of jeofails, N. Y. Code of Civ. Pro., § 721.

[32] Wetherill *v.* Stillman, 65 Penn. St. 105.

[33] Sargent *v.* State Bank of Indiana, 12 How. U. S. 371, affi'g 4 McLean, 339. Compare Bosworth *v.* Vanderwalker, 53 N. Y. 597.

6. Lost Judgment.

Proof that the judgment roll is not found in the office of the clerk whose duty it is to keep it [34] admits secondary evidence of its former existence and contents.[35] A copy of a duly authenticated copy, not apparently within the power of the party to produce, may be received as secondary evidence.[36] The destruction, or loss from the files, of the papers by which the court acquired jurisdiction, does not divest the jurisdiction; for having been once there, that court is presumed to know their contents, and may act on that knowledge, and may resort to parol proof to aid its memory.[37]

7. Date.

The record ought to indicate the time and place of the recovery of the judgment.[38] The text of the record is evidence of the time of rendition, and cannot strictly be corrected by the date of the signing, except on amendment in the

[34] N. Y. Code Civ. Pro., § 921.

The facts with regard to a lost petition and citation may be proved by testimony of the clerk and attorney who issued the citation and prepared the petition respectively. Bailey *v.* Martin, 119 Ind. 103, 21 N. E. Rep. 346.

[35] Mandeville *v.* Reynolds, 68 N. Y. 528, 533, affi'g 5 Hun, 338. If a replevin bond which forms the basis of a suit on a judgment is not within the jurisdiction of the courts of the state, secondary evidence of its contents is admissible. Knickerbocker *v.* Wilcox, 83 Mich. 200, 21 Am. St. Rep. 595, 47 N. W. Rep. 123. See Mason *v.* Bull, 26 Ark. 164.

An entry in the judgment book is admissible where the clerk testifies that the judgment roll cannot be found. Simmons *v.* Threshour, 118 Cal. 100, 50 Pac. Rep. 312.

[36] Cornett *v.* Williams, 20 Wall. 226.

The contents of a lost judgment are supplied by parol on the same principle as that of a lost deed. Morrison *v.* Price, 130 Ky. 139, 112 S. W. Rep. 1090.

[37] Railw. Co. *v.* Ramsey 22 Wall. 322, and see 6 Cent. L. J. 100.

[38] Phelps *v.* Tilton, 17 Ind. 427.

If, from the whole record the date and amount, the parties between and against whom the judgment was given and the court in which it was given, appear, the judgment is not defective. Flack *v.* Andrews, 86 Ala. 395, 5 So. Rep. 452.

The omission to date a judgment is merely an irregularity. Burwell,

court where the judgment was had;[39] but the error may be shown and cured by the clerk's certificate.[40] If the date be blank, it may be supplied by extrinsic evidence in aid of the record.[41] In the absence of proof of the hour, the judgment may, for reasons of public policy, be presumed to have been entered at the begining of the day.[42]

8. Identity of Parties.

In addition to the principle already stated,[43] it may be observed that, if the names are different, extrinsic evidence of identity is competent [44] and necessary.[45]

etc., Co. *v.* Chapman, 59 S. C. 581, 38 S. E. Rep. 222.

[39] Vail *v.* Smith, 4 Cow. 71. As to effect of a date apparently on a *dies non*, see Moore *v.* Tracy, 7 Wend. 229; and Re Worthington, 16 Alb. L. J. 63.

[40] Jackson *v.* Davis, 18 Johns. 7.

[41] See McKnight *v.* Devlin, 52 N. Y. 399. The fiction of law, that a term consists of but one day, cannot be invoked to antedate the judicial rejection of a claim, so as to render operative a grant which would otherwise be without effect. Newhall *v.* Sanger, 92 U. S. (2 Otto) 761.

The fact that the clerk by error filled in the blank left for the date of a judgment so that it appeared to have been rendered six days before the time when it was signed by the judge did not render it invalid. Warner *v.* Miner, 41 Wash. 98, 82 Pac. Rep. 1033.

[42] Boyer's Estate, 51 Penn. St. 432, STRONG, J., dissented.

Where it was attempted to prove a judgment by producing the original minute book of the court wherein the judgment was rendered, the court held that the entry showed that the trial was held on a day which it would judicially know "was one of the days of a regular term of the . . . court." Ayers *v.* Roper, 111 Ala. 651, 20 So. Rep. 460.

[43] Chapter V, paragraph 49 of this vol.

An action on a judgment must be brought by the real owner thereof whose title should appear either from the record itself or by some transfer of such title duly proved. Hunt *v.* Monroe, 32 Utah, 428, 91 Pac. Rep. 269, 11 L. R. A. N. S. 249.

[44] Evans *v.* Patterson, 4 Wall. 231; Stevelie *v.* Read, 2 Wash. C. Ct. 274.

Where it appeared from the record produced that the title of the action as brought differed from

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[45] Berber *v.* Kerzinger, 23 Ill. 346; Williams *v.* Bankhead, 19 Wall. 570.

There is no legal presumption as to identity of the parties although the family names and ini-

9. Docketing.

Docketing may be proved by evidence that a transcript of judgment was received by the country clerk, and that he furnished a transcript thereof, which is produced.[46]

10. Impeaching.

In any action, on any judgment recovered in any court, jurisdiction may always be impeached,[47] unless the party is

the title of the action in which the judgment was obtained, the variance was held immaterial as it was in evidence that the cases had been consolidated. Brady *v.* Palmer, 19 Ohio Cir. Ct. Rep. 687, 10 O. C. D. 27.

The fact that in an action by the "United States National Bank of New York" on a foreign judgment, it appeared that the judgment sued on was rendered in favor of the "United States National Bank" does not constitute a material variance, the identity of the two institutions being proved by extrinsic evidence. U. S. Nat. Bank *v.* Venner, 172 Mass. 449, 52 N. E. Rep. 543.

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tials are the same. Bennett *v.* Libhart, 27 Mich. 489.

Although the name of the defendant is misspelled in the process which was personally served upon him, the judgment is nevertheless valid, the defendant having failed to appear on being given notice of an application to amend the process in this particular. Blankenship *v.* King, 85 C. C. A. 348, 157 Fed. Rep. 676, affi'g 137 Fed. Rep. 222.

It was held that a declaration on a judgment against "Barnard Hysinger" could not be supported by proof of a judgment against "Barent Hysinger." Ducommun *v.* Hysinger, 14 Ill. 294.

[46] Lewis *v.* Ryder, 13 Abb. Pr. 1.

A county clerk's certificate required by statute to be given to the owner of a judgment is not objectionable because the page of the record is not given thereon. Weinert *v.* Simang, 29 Tex. Civ. App. 435, 68 S. W. Rep. 1011.

[47] Thompson *v.* Whitman, 18 Wall. 457. Including fraud in inducing the exercise of jurisdiction. Stanton *v.* Crosby, 9 Hun, 370. *Contra*, see Luckenbach *v.* Anderson, 47 Penn. St. 123; Adams *v.* Saratoga & Washington R. R. Co., 10 N. Y. 328.

"The doctrine of absolute verity of a record does not apply when the want of jurisdiction in the court to make the record assailed is the very question in issue to be determined." Mullins *v.* Rieger, 169 Mo. 521, 70 S. W. Rep. 4, 92 Am. St. Rep. 651.

A judgment rendered without service of the defendant although such service is falsely recited is

estopped.[48] At common law a judgment of a court having jurisdiction (except judgments by cognovit or warrant of attorney) could be impeached by a party, only by error, new trial or bill in equity.[49] Under the new procedure, any ground which would sustain a bill in equity for relief,[50] may

void. Dashner *v.* Wallace, 29 Tex. Civ. App. 151, 68 S. W. Rep. 307.

Equity will enjoin the enforcement of a judgment rendered without jurisdiction. Tucker *v.* Williams (Tex.), 56 S. W. Rep. 585; Jennings *v.* Shiner (Tex.), 43 S. W. Rep. 276.

See with regard to a suit brought in Federal court on the ground of the defendant's alienage. Broadis *v.* Broadis, 86 Fed. Rep. 951; Grover, etc., Sewing Mach. Co. *v.* Radcliffe, 137 U. S. 287, 11 S. Ct. 92, 34 L. ed. 670.

[48] Dyckman *v.* Mayor, &c. of N. Y., 5 N. Y. 434, affi'g 7 Barb. 498; Sheldon *v.* Wright, 5 N. Y. 497.

Where a party in securing a divorce recognized the jurisdiction of the state in which the divorce was granted, it was held that in a subsequent action in a sister state the divorce decree could not be attacked on the ground of jurisdiction. Matter of Morrisson, 52 Hun (N. Y.), 102, 5 N. Y. Supp. 90; jt. affi. 117 N. Y. 638, 22 N. E. Rep. 1130.

Where, in summary proceedings in an inferior court, a party had the opportunity to appear and contest the jurisdiction of that court but did not, as appeared from the record of the judgment there obtained and offered in evidence in a subsequent collateral action, it was held that it was then too late to raise the question of the jurisdiction of the inferior court. Reich *v.* Cochran, 105 N. Y. App. Div. 542, 94 N. Y. Supp. 404. See also case there cited.

[49] See Christmas *v.* Russell, 5 Wall. 305.

See also Pratt *v.* Dow, 56 Me. 81, where it is said that a domestic judgment of a court of general jurisdiction proceeding according to the course of the common law, cannot be impeached by the parties to it where a want of jurisdiction is not apparent upon the record, while it remains neither annulled nor reversed; and Reinhardt *v.* Nealis, 101 Tenn. 169, 46 S. W. Rep. 446, and cases cited.

[50] See Crim *v.* Handley, 94 U. S. (4 Otto) 652; Stilwell *v.* Carpenter, 2 Abb. New Cas. 238, and see 7 Am. Rep. 136, n.

"The code authorizes a defendant to plead the equitable, as well as the legal defenses he may have to an action; and whatever is sufficient in equity to defeat a judgment, or its enforcement, is a valid equitable defense to an action brought upon it." Kingsborough *v.* Tousley, 56 Ohio St. Rep. 450, 462, 47 N. E. Rep. 541.

Likewise, in a proceeding to set aside a judgment on default on the ground of accident, the court held

be proved under a proper answer, in defense of an action on the judgment.[51] A denial of the existence of the judgment does not admit evidence in contradiction of the record, that it was without jurisdiction,[52] but an answer putting in issue its legality will.[53]

11. Reversal.

Reversal may be proved under a general denial; [54] vacatur, it is held, should be specially pleaded,[55] but amendment

that accident was a well known ground of equity jurisdiction to vacate a judgment. Kansas City *v.* Union Pac. R. R. Co., 192 Fed. Rep. 316, 114 C. C. A. 1. See also Gardiner *v.* Van Alstyne, 22 N. Y. App. Div. 579, 48 N. Y. S. 114, aff'd in 163 N. Y. 573, 57 N. E. Rep. 1110, where fraud was set up. Bailey *v.* Willeford, 136 Fed. Rep. 382, 69 C. C. A. 226.

[51] Mandeville *v.* Reynolds, 68 N. Y. 528, 542, affi'g 5 Hun, 338; Dobson *v.* Pearce, 12 N. Y. 165; Rogers *v.* Gwinn, 21 Iowa, 58. Compare Stanton *v*, Crosby, 9 Hun, 370. The defendant is not necessarily entitled to read the testimony contained in the record in support of impeachment. Tappan *v.* Beardsley, 10 Wall. 427.

"The rule is that impeachment of a judgment can be had only upon grounds which either could not have been made available to the complaining party at law, or which he was prevented from setting up by fraud, accident or the wrongful act of the other party without any negligence or fault on his part." Barron *v.* Feist, 122 N. Y. App. Div. 687, 107 N. Y. Supp. 494, and cases cited.

[52] Hill *v.* Mendenhall, 21 Wall. 455.

"The general denial is a denial only of the fact of the existence of the judgment, and the plaintiff, in producing a duly attested copy of the judgment, has met all the requirements of the case." Rice *v.* Coutant, 38 N. Y. App. Div. 543, 56 N. Y. Supp. 351.

An allegation in the defendant's answer that the plaintiff never recovered "any such judgment against him as alleged in such complaint, that the court was wholly without jurisdiction of the person of the defendant and said judgment is a nullity" is sufficient to require the plaintiff to prove the foreign judgment sued upon. Schwab Clothing Co. *v.* Cromer, 1 Ind. Ter. 661, 43 S. W. Rep. 951.

[53] Kinsey *v.* Ford, 38 Barb. 195.

[54] Briggs *v.* Bowen, 60 N. Y. 454.

The same rule has obtained in Indiana. See Redelsheimer *v.* Miller, 107 Ind. 485, 8 N. E. Rep. 447; Bridges *v.* Branam, 133 Ind. 488, 33 N. E. Rep. 271.

[55] Carpenter *v.* Goodwin, 4 Daly, 89. *Contra*, Kinsey *v.* Ford, 38 Barb. 195.

should be allowed, if defendant is not misled. If the judgment is proved by record, an order or minute, not of record, is not competent primary evidence of reversal.[56]

12. Satisfaction.

Although accord and satisfaction is not enough,[57] payment may be proved by parol. The issue of execution is not presumptive evidence of payment,[58] but may be with further evidence of levy and of circumstances from which to infer satisfaction.[59] A satisfaction piece is evidence of payment,[60] but not conclusive.[61]

[56] McKnight *v.* Dunlop, 4 Barb. 36; Niles *v.* Totman, 3 Id. 594.

An order enjoining the enforcement of a judgment should be specially pleaded to be admissible. Palmer *v.* Palmer, 2 Miles (Pa.), 373.

[57] Mitchell *v.* Hawley, 4 Den. 414, and cases cited.

The record is not the only means by which payment may be proved. Whiteside *v.* Hoskins, 20 Mont. 361, 51 Pac. Rep. 739.

Any legal evidence tending to show that a judgment has not been satisfied is competent. Day *v.* Crosby, 173 Mass. 433, 53 N. E. Rep. 880.

Payment of a note before entry of the judgment thereon is no defense to an action on the judgment. Hazel *v.* Jacobs, 78 N. J. L. 459, 75 Atl. Rep. 903, 27 L. R. A. N. S. 1066, 20 Ann. Cas. 260.

[58] Runyan *v.* Weir, 8 N. J. L. (Halst.) 286; Maddox *v.* Summerlin, 92 Tex. 483, 49 S. W. Rep. 1033, 50 S. W. Rep. 567.

[59] Miller *v.* Smith, 16 Wend. 425, 445, rev'g 14 Id. 188.

An allegation "which judgment remains in full force and unsatisfied in part to wit, for the sum of $8,123.17" sufficiently states that such judgment is unsatisfied. Bellows *v.* Sowles, 71 Vt. 214, 44 Atl. Rep. 68.

Under a statute providing that a judgment continues in force for ten years, a judgment will be presumed to be unpaid for that period and the party who claims payment must prove it. Maddox *v.* Summerlin, 92 Tex. 483, 49 S. W. Rep. 1033, 50 S. W. Rep. 567.

[60] Booth *v.* Farmers' & Mechanics' Bank, 50 N. Y. 396, rev'g 4 Lans. 301. A receipt over twenty years old, purporting to be executed by attorney of record for the plaintiff in a judgment, acknowledging the satisfaction of the judg-

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[61] Lownds *v.* Remsen, 7 Wend. 35.

The consideration for a satisfaction of judgment is sufficient although less than the amount of the judgment. People *v.* Devlin, 63 Misc. 363, 118 N. Y. Supp. 478.

II. JUDGMENTS OF COURTS WITHIN THE STATE

13. The New York Practice.

The most convenient way, in case of courts of record, is to produce a copy of the judgment roll, certified as already stated.[62] The jurisdiction of the superior city courts was presumed by force of the statute.[63] The judicial presumptions of jurisdiction, which are stated below, respecting judgments of sister States,[64] are in their nature equally applicable in favor of domestic judgments.

14. Justice's Judgment.

A judgment of a justice of the peace in New York is proved in a court of the same State, by a transcript from his docket, subscribed by him, and authenticated by a sealed certificate of the county clerk, to the effect that the person subscribing the transcript was, at the date of the judgment therein mentioned, a justice of the peace of that county, and that the clerk is aquainted with his handwriting, and verily believes that the signature to the transcript is genuine,[65] provided the transcript shows upon its face that he had jurisdiction both of the person and the subject-matter.[66]

ment, is admissible in evidence to show such satisfaction, without proof of its execution. Woods *v.* Montevallo Coal, &c. Co., 84 Ala. 560, 5 Am. St. Rep. 393, 3 So. Rep. 475.

"A satisfaction of a judgment by one partner is the satisfaction of the debt and a complete discharge of the debtor from all partnership claims." People *v.* Devlin, 63 Misc. Rep. 363, 118 N. Y. Supp. 478.

[62] Paragraph 2, Code Civ. Pro., §§ 933, 962.

[63] Code Civ. Pro., former § 266.

[64] Paragraphs 22 to 25.

[65] N. Y. Code Civ. Pro., § 939.

Where the defendant's objections to the justice's jurisdiction to grant an adjournment were overruled, he does not waive such objections by cross-examining the plaintiff's witnesses at the adjourned date. Moody *v.* Becker, 70 N. Y. Supp. 543.

[66] Benn *v.* Borst, 5 Wend. 292.

"At common law actions upon a judgment obtained in a justice's court of a sister state may be maintained in the courts of this state (New York) upon proof of the statute governing the justice's jurisdiction." Bent *v.* Glaenzer, 17 Misc. 569, 40 N. Y. Supp. 657.

The transcript is conclusive evidence of all but the jurisdictional facts.[67]

Or it may be proved by producing the docket, and proving it by his oath; [68] or, in case of his death or absence, producing the original minutes, with proof of his handwriting, or a copy of the minutes sworn to by a witness as having been compared with the original minutes, with proof that they were in his handwriting.[69]

It may be proved by the parol testimony of the justice only by consent.[70] In a second action before the same justice, his docket, or a transcript certified by him, is evidence, *per se*, of the former judgment.[71]

The justice's acquiring jurisdiction of the person may be proved in a collateral proceeding, by either 1. The constable's return; 2. An entry on the justice's docket, made at the time; 3. Direct evidence of the service; or 4. The testimony of the justice, showing positively that the service was proved before him.[72]

[67] Hard *v.* Shipman, 6 Barb. 621; and see Brintnall *v.* Foster, 7 Wend. 103; Smith *v.* Compton, 20 Barb. 262.

A certified copy of a transcript of the judgment of a justice of the peace, docketed in the county clerk's office was held admissible and raised a presumption of the jurisdiction of the justice over the person of the defendant. Belgarde *v.* McLaughlin, 44 Hun (N. Y.), 557.

In Agar *v.* Tibbets, 46 Hun, 52, the transcript of a justice's judgment was held insufficient in that it did not show the jurisdiction of the justice.

[68] N. Y. Code Civ. Pro., § 940; Boomer *v.* Laine, 10 Wend. 525. Notwithstanding that on removing from the town he failed to deposit his docket-book with the town clerk. Carshore *v.* Huyck, 6 Barb. 583.

[69] N. Y. Code Civ. Pro., § 939; Baldwin *v.* Prouty, 13 Johns. 530; Pratt *v.* Peckham, 25 Barb. 195.

Though the transcript of a judgment of a Municipal Court of the City of Buffalo was not signed by a judge of the court or by the clerk,

[70] Lawrence *v.* Houghton, 5 Johns. 129; Webb *v.* Alexander, 7 Wend. 281.

[71] Smith *v.* Frost, 5 Hill, 431; Groff *v.* Griswold, 1 Den. 432, N. Y. Code Civ. Pro., § 938.

[72] Reno *v.* Pinder, 20 N. Y. 298, rev'g 24 Barb. 423.

On an appeal from a justice's judgment, it was held that the written return of the constable to the effect that the had personally

A judgment of a district court of the city of New York is proved by producing the summons, with entry of judgment indorsed.[73]

III. RULES PECULIAR TO JUDGMENTS OF COURTS OF SISTER STATES, &c.

15. Different Methods of Proof.

Judicial proceedings of any other State in the Union, are entitled to full faith and credit under the Constitution,[74] but to secure the constitutional effect for a judgment of a sister State, it must be proved in conformity with the act of Congress,[75] if it is within the act.[76] The act of Congress

and therefore improperly authenticated, it was held that this defect was cured by the defendant's stipulation that a stenographer of the court might certify that the copy was a true copy. Levin *v.* Robie, 5 Misc. 529, 25 N. Y. Supp. 982.

served the summons upon the defendants presumptively gave the justice jurisdiction of their persons, even though the return did not state the place where such service had been made. Beach *v.* Baker, 25 N. Y. App. Div. 9, 48 N. Y. Supp. 1042.

[73] Carpenteri *v.* Willett, 6 Bosw. 25, s. c., 18 How. Pr. 400.

[74] Const. of U. S., art. 4, § 1; Cook *v.* Thornhill, 13 Tex. 293, 65 Am. Dec. 63.

Although a state may limit the time within which actions may be commenced on judgments of sister states, it cannot absolutely prevent the maintenance of such actions, as by a statute barring actions on judgments recovered on claims barred by the statute of limitations of the state in which the action is sought to be maintained but not by that of the state in which the judgment was recovered. Keyser *v.* Lowell, 54 C. C. A. 574, 117 Fed. 400.

One state is not required however to enforce the penal laws or the local police regulations of another. Schuler *v.* Schuler, 209 Ill. 522, 71 N. E. Rep. 16.

[75] Act of May 26, 1790; same stat. U. S. Rev. St. § 905; U. S. Comp. St., § 1519; Smith *v.* Brockett, 69 Conn. 492, 38 Atl. Rep. 57. If the laws of another state are relied upon for the purpose of showing what faith and credit should be given to a judgment entered therein, they must be proved, like other facts. Osborn *v.* Blackburn, 78 Wis. 209, 23 Am. St. Rep. 400, 47 N. W. Rep. 175.

A record which is not properly attested is inadmissible. Lehmann *v.* Rivers, 110 La. 1079, 35 So. Rep. 296.

[76] Davis, J., Caperton *v.* Ballard, 14 Wall. 242; Homer *v.*

passed to give effect to this provision,[77] does not enable us to prove all judgments of sister States, but only those of courts having a record and a clerk; but, on the other hand, the mode of proof it gives extends to judgments of courts of territories, including the District of Columbia,[78] and those of any country under the jurisdiction of the United States. The act does not exclude other modes of authentication.[79]

Spellman, 78 Ill. 206. And to secure a review in the U. S. Supreme Court of a refusal of the right, the record must show that the provision of the constitution and the claim thereon were brought to the notice of the State court. Hoyt *v.* Sheldon, 1 Black, 518.

When it appeared that the court of a sister state had no clerk "either in the person of the judge ex officio or otherwise," it was held that the method of authentication provided by the act of Congress was inapplicable. Sloan *v.* Wolfsfeld, 110 Ga. 70, 35 S. E. Rep. 344.

[77] U. S. Rev. St., § 905, U. S. Comp. Stat., § 1519.

The filing of an abstract of a judgment of a Minnesota justice of the peace in the office of the clerk of the District Court does not make it a judgment of the District Court within the meaning of the U. S. Rev. St., § 905. Strecker *v.* Railson, 16 N. D. 68, 111 N. W. Rep. 612, 8 L. R. A. N. S. 1099. See also Phelps *v.* McCollam, 10 N. D. 536, 88 N. W. Rep. 292.

There are judgments which, although perfectly valid in the State where rendered, yet are not entitled to full faith and credit. Cuykendall *v.* Doe, 129 Iowa, 453, 105 N. W. Rep. 698, 113 Am. St. Rep. 472, 3 L. R. A. N. S. 449.

[78] Hughes *v.* Davis, 8 Md. 27. See also Savin *v.* Bond, 57 Md. 228, 232.

[79] Kingman *v.* Cowles, 103 Mass. 283; Snyder *v.* Wise, 10 Penn. St. 157; Ellmore *v.* Mills, 1 Haywood N. C. 359; Baker *v.* Fields, 2 Yeates, 532. *Contra*, State *v.* Twitty, 2 Hawks (N. C.), 441; Tarleton *v.* Briscoe, 1 Marsh. (Ky.) 66. The judgment of a court of another State, if authenticated as provided by the act of Congress, must be received in evidence; but it is admissible if authenticated according to the statute of the State, though such authentication may not be as full as that required by the act of Congress. In re Ellis' Estate, 55 Minn. 401, 43 Am. St. Rep. 514, 56 N. W. Rep. 1056; Thrasher *v.* Ballard, 33 W. Va. 285, 25 Am. St. Rep. 894, 10 S. E. Rep. 411; Garden City Sand Co. *v.* Miller, 157 Ill. 225, 231, 41 N. E. Rep. 753; Tomlin *v.* Woods, 125 Iowa, 367, 101 N. W. Rep. 135. See also Petty *v.* Hayden, 115 Iowa, 212, 88 N. W. Rep. 339.

"It is well settled that the method of authentication, pre-

The other modes, are, 1. That prescribed by the law of the forum; [80] 2. Those sanctioned by the common law,[81] viz., exemplification under the great seal of the State; [82] original

scribed by the act of Congress of 1790 is not exclusive of any other which the states may think proper to adopt." Droop *v.* Ridenour, 11 App. (D. C.) 224, 244. See also Sloan *v.* Wolfsfeld, 110 Ga. 70, 35 S. E. Rep. 344.

A state may provide other methods of proof providing the statute does not exclude records authenticated according to the federal statute. Willock *v.* Wilson, 178 Mass. 68, 59 N. E. Rep. 757.

And if the record is authenticated as prescribed by the Act of Congress the state court must admit it notwithstanding the provisions of the state statute. Kingman *v.* Cowles, 103 Mass. 283; McMillan *v.* Lovejoy, 115 Ill. 498, 4 N. E. Rep. 772.

[80] Latterett *v.* Cook, 1 Iowa, 1; English *v.* Smith, 26 Ind. 445; Phelps *v.* Tilton, 14 Id. 222; Ault *v.* Zehring, 38 Id. 429; Dragoo *v.* Graham, 17 Id. 427; Gatling *v.* Robbins, 8 Id. 184; Snyder *v.* Wise, 10 Penn. St. 157; Coffee *v.* Neatly, 2 Heisk. (Tenn.) 304; Capen *v.* Emery, 5 Metc. (Mass.) 436; Simons *v.* Cook, 29 Iowa, 324; Railroad Bank *v.* Evans, 32 Id. 202; Caulfield *v.* Bullock, 18 B. Monr. (Ky.) 494; Mangun *v.* Webster, 7 Gill (Md.), 178.

Thus, Hurd's Stat. 1899, Chap. 51, § 13, P. 860, provides the method in Illinois of authenticating both foreign and domestic judgments when the method set out by the act of Congress is not used. People *v.* Miller, 195 Ill. 621, 63 N. E. Rep. 504.

And the Minnesota courts will accept a copy of a sister court's proceedings duly authenticated under its own laws when not certified under the Federal Statute. In re Ellis, 55 Minn. 401, 56 N. W. Rep. 1056, 43 Am. St. Rep. 514, 23 L. R. A. 287.

In Georgia, under § 3825 of the Code, judgments of courts of sister states if not authenticated under the acts of Congress must be "authenticated under the great seal of their respective states." Hence where one attempted to prove the judgment rendered in another state by the parol testimony of the justice who had rendered the judgment, it was held insufficient. Tharpe *v.* Pearce, 89 Ga. 194, 15 S. E. Rep. 46.

[81] Goodwyn *v.* Goodwyn, 25 Geo. 203; Hutchins *v.* Gerrish, 52 N. H. 205, s. c., 13 Am. Rep. 19; Mahony *v.* Gunther, 10 Abb. Pr. 435; Peck *v.* Farrington, 9 Wend. 44.

"The act of Congress as to the manner of authentication of judgments of sister states does not abrogate the common law proof, and is not exclusive." Garden City Sand Co. *v.* Miller, 157 Ill. 225, 41 N. E. Rep. 753.

[82] Price *v.* Higgins, 1 Litt. (Ky.) 273; Haggin *v.* Squires, 2 Bibb, 334.

record, proved by witness; [83] and, examined copy proved by a witness who compared it.[84]

16. What Judgments May Be Proved Under the Act.

A jugment of any court of record [85] (or a court of chancery

See Garden City Sand Co. *v.* Miller, 157 Ill. 225, 41 N. E. Rep. 753.

In North Dakota it has been held that a judgment of a Justice of the Peace of another state could not be proved by an exemplified copy of the record, neither the local laws nor the Federal Statute being applicable to such judgments. Strecker *v.* Railson, 16 N. D. 68, 111 N. W. Rep. 612, 8 L. R. A. N. S. 1099.

In an action on a judgment of a sister state, an objection to the exemplified copy thereof on the ground that the statement of the certifying clerk that he found "a certain original record of judgment" did not show an entry in the judgment book was held to be without merit since it was to be presumed that the clerk kept a judgment book and made the entry therein. Wilson *v.* Durkee, 20 Cal. App. 492, 129 Pac. Rep. 617.

[83] Kean *v.* Price, 12 Serg. & R. 203.

[84] Hutchins *v.* Gerrish (above). Some courts also allow proof by a certificate conforming to the law of the State where the judgment was rendered. Belton *v.* Fisher, 44 Ill. 32, and see Williams *v.* Wilkes, 14 Penn. St. 228; Bissell *v.* Edwards, 5 Day, 263.

A judgment of a justice of the peace of a sister state was properly proved by evidence of the statute under which the court was held and that there was jurisdiction of the subject matter and of the person, together with the testimony of a witness who was present when the judgment was rendered and the transcript thereof made out. Winham *v.* Kline, 77 Mo. App. 36.

[85] Thurber *v.* Blackbourne, 1 N. H. 242; Judkins *v.* Union Mut. Fire Ins. Co., 37 Id. 470. According to the language of some authorities the record is not admissible unless founded on personal service or appearance. The better view is that this goes to the effect of the judgment, not to the admissibility of the document in evidence. Even if the rule be to some extent sound, it is too broadly stated, for a judgment on an award of arbitrators under the statute is admissible. Steeve *v.* Tenney, 50 N. H. 461. But a replevin bond declared by statute to have the effect of a judgment, is not within the act. Foote *v.* Newell, 29 Mo. 400. There is no presumption as to whether a justice's court is or is not a court of record within this rule. The State statute should be proved to show the fact. Pelton *v.* Platner, 13 Ohio, 209. A new record made by order of court, of a lost or destroyed judgment, may be authenticated under the act of Congress. Robinson *v.* Simmons,

though not technically a court of record),[86] within the United States,[87] or docketed in the office of a clerk of such a court, under a statute declaring that so docketed it shall be considered a judgment of that court,[88] may be proved under the act.

17. Requisites of Proof Under the Act.

Four things constitute this proof, 1. "A copy of the record or judicial proceeding at length.[89]

7 Phila. 127. A judgment of a proper court, though rendered by a temporary judge, is within the act (Walker *v.* Sleight, 30 Iowa, 310); but a judgment of special commissioners is not (Taylor *v.* Barron, 30 N. H. 78); unless by reason of its record being by law part of the records of a court. Taylor *v.* Barron, 35 Id. 484.

As to judgments of justices of the peace of sister states see Bent *v.* Glaenzer, 17 Misc. 569, 40 N. Y. Supp. 657.

[86] McKim *v.* Odorn, 12 Me. 94; Low *v.* Mussey, 41 Vt. 393; Evans *v.* Tatem, 9 Serg. & R. 852; Moore *v.* Adie, 18 Ohio, 430.

A decree of a court of chancery of one state, rendered against a corporation and its trustees, was held admissible in an action in a sister state against a stockholder of the corporation, when duly authenticated under the act of Congress. Lehman *v.* Glenn, 87 Ala. 618, 6 So. Rep. 44.

Action may be brought on a judgment although judgment has already been entered on it in another state. Lilly-Brackett Co. *v.* Sonnemann, 163 Cal. 632, 126 Pac. Rep. 483, 42 L. R. A. N. S. 360, Ann. Cas. 1914, A 364.

[87] Or a country subject to its jurisdiction. U. S. R. S., § 905. U. S. Comp. Stat., § 1519. Including courts of the United States. Buford *v.* Hickman, Hempst. 232. A judgment of a State court may be thus proved although at the time the judgment was rendered the State was in secession. Steeve *v.* Tenney, 50 N. H. 461. But the effect of such judgment is another question. Pennywit *v.* Kellogg, 1 Cin. Super. Ct. 17; Pennywit *v.* Foote, 27 Ohio St. 600. The question of full faith and credit is another matter.

It has been held that the courts of a state will not entertain an action to enforce a judgment for the recovery of money paid on a "future" transaction where the laws of that state do not recognize a right of recovery of money so paid. Minkus *v.* Armstrong, 90 Miss. 751, 44 So. Rep. 32, 12 L. R. A. N. S. 873.

[88] Upham *v.* Damon, 12 Allen, 98; S. P., Clemmer *v.* Cooper, 24 Iowa, 185. Compare Aldrich *v.* Chubb, 35 Mich. 350.

[89] A copy from the minutes is not

2. "The attestation of the clerk; and

3. "The seal of the court annexed, if there be a seal, together with;

4. "A certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form." [90]

18. Certifying Officers.

Where a judge is *ex officio* clerk, either by express statute or by implication—as may be the case with a surrogate or a justice of the peace whose court is a court of record,—he may [91-92] and must [93] certify. The attestation and certificate must make the identity of the certifying officers clear.[94] If

admissible under the act. Pepin *v.* Lachenmeyer, 45 N. Y. 27; Ferguson *v.* Narwood, 7 Cranch, 408.

A mere abstract signed by the clerk is not sufficient to prove a judgment. Thomson *v.* Mann, 53 W. Va. 432, 44 S. E. Rep. 246.

The judgment without the accompanying record is inadmissible. State *v.* Misenheimer, 123 N. C. 758, 31 S. E. Rep. 852.

Where the opinion in a case was certified under the Act of Congress as a part of the record it is error for the court to refuse to receive it in evidence. Burnham *v.* Pidcock, 58 N. Y. App. Div. 273, 68 N. Y. Supp. 1007.

Where the certificate states that the transcript is "truly taken and correctly copied" from the clerk's records, the presumption is that the whole record is included. Reber *v.* Wright, 68 Pa. 471.

[90] U. S. R. S., § 905. U. S. Comp. Stat., § 1519.

[91-92] Van Storch *v.* Griffin, 71 Penn. St. 240; Bissell *v.* Edwards, 5 Day (Conn.), 363; Martin *v.* Wells, 43 Vt. 428; Keith *v.* Stiles, 92 Wis. 15, 64 N. W. Rep. 860, 65 N. W. Rep. 860.

[93] Duvall *v.* Ellis, 13 Mo. 203; Catlin *v.* Underhill, 4 McLean, 199.

See Wilson *v.* Phœnix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. Rep. 1035, when it is said that if a judge is also clerk his certificate as judge is sufficient.

The certificate should affirmatively show that the judge was also the clerk if such was the case. Phillips *v.* Babcock Bros. Lumber Co., 5 Ga. App. 634, 63 S. E. Rep. 808; Lay *v.* Sheppard, 112 Ga. 111, 37 S. E. Rep. 132.

Under the Georgia code the certificate to an exemplification should show on its face whether signed by the ordinary himself acting as clerk or by another holding the office of clerk by appointment. Lay *v.* Sheppard, 112 Ga. 111, 37 S. E. Rep. 132.

[94] Kirkland *v.* Smith, 2 Mart.

there has been a subsittution of courts and transfer of record, the clerk and judge of the succeeding court may certify;[95] and a statement in the certificate of the clerk[96] or judge[97] showing the transfer of jurisdiction and change of name and seal, is sufficient *prima facie*, on those points, without other proof of the law.[98] But this is not essential. The court may even presume a change in the legislative apportionment of districts, in order to render the record and the certificate consistent.[99]

19. Clerk's Attestation.

The clerk's attestation is to be in a form sanctioned by the local law under which he acts; but the judge's certificate is conclusive evidence that it is so. The use of the word

(La.) N. S. 497; Harper *v.* Nichol, 13 Tex. 151; Phelps *v.* Tilton, 14 Ind. 222; Geron *v.* Felder, 15 Ala. 304.

In New Jersey the surrogate acts judicially and holds court; he is also the clerk of his own court and may consequently exemplify the records of such court. A mandamus will lie to compel him to perform this duty. Steele *v.* Queen, 67 N. J. L. 99, 50 Atl. Rep. 668.

[95] Thomas *v.* Tanner, 6 Monr. 52; Capen *v.* Emery, 5 Metc. (Mass.) 436; Manning *v.* Hogan, 26 Mo. 570.

In I. B. Rosen thal Millinery Co. *v.* Lennox (Tex. 1899), 50, S. W. Rep. 401 it was held that a copy of a judgment of a justice of the peace of the City of St. Louis certified by the clerk of the circuit court in whose office such judgment had been filed was inadmissible.

[96] Darrah *v.* Wilson, 36 Iowa, 116; Gatling *v.* Robbins, 8 Ind. 184; Willock *v.* Wilson, 178 Mass. 68, 59 N. E. Rep. 757.

The court cannot take judicial notice of the fact that one court has ceased to exist and another has succeeded to its jurisdiction. This fact should be shown by the party who seeks to offer the record in evidence. Comstock *v.* Kerwin, 57 Neb. 1, 77 N. W. Rep. 387.

[97] Capen *v.* Emery (above).

[98] Gatling *v.* Robbins (above).

But see I. B. Rosenthal Millinery Co. *v.* Lennox (Tex. 1899), 5 S. W. Rep. 401 where it was held that the court would not take judicial notice of a Missouri statute giving to certified copies of judgments of justices of the peace, when filed and recorded in the offices of clerks of circuit courts the effect of judgments of such courts.

[99] Hatcher *v.* Rocheleau, 18 N. Y. 86.

"record" is not essential.[1] It need not certify to the official character of the judge who authenticates the clerk's attestation;[2] but so doing does not prejudice.[3] An attestation signed by a deputy clerk is not sufficient, although the deputy clerk be authorized by the law of the State to certify,[4] and the judge's certificate states that he is.[5]

20. Seal.

The seal should be affixed to the clerk's attestation or to the record itself, rather than to the judge's certificate

[1] Grover *v.* Grover, 30 Mo. 400.

A transcript which shows that it contains a "full and complete copy of the complaint, answer, reply and judgment" is sufficient as against an objection that it was not a full and complete copy of the record. Chicago, &c. Ry. Co. *v.* Grantham, 165 Ind. 279, 75 N. E. Rep. 265.

The certificate of a justice of the peace as follows: "I hereby certify that the above and foregoing is a true and correct copy, as appears of record on my docket together with the costs as taxed at," etc., was held sufficient. Collier *v.* Collier, 150 Ind. 276, 49 N. E. Rep. 1063.

The clerk's attestation may be on a separate sheet of paper attached to the copy of the decree. Woodworth *v.* McKee, 126 Iowa, 714, 102, N. W. Rep. 777.

[2] Gavit *v.* Snowhill, 2 Dutch. 76.

The absence of a statement that the copy has been compared with the original and that it is a correct transcript therefrom renders the record inadmissible. Merz *v.* Chicago, &c. Ry. Co., 86 Minn. 33, 90 N. W. Rep. 7.

[3] Young *v.* Chandler, 13 B. Mon. 252.

Where the judgment is partly written and partly printed and the certificate is attached to only one part the question as to whether such certificate applies to the whole record is to be determined as one of fact by an inspection of the papers. Goodrich *v.* Stevens, 116 Mass. 170.

[4] Lathrop *v.* Blake, 3 Penn. St. 383. *Contra*, Greasons *v.* Davis, 9 Iowa, 219; Willock *v.* Wilson, 178 Mass. 68, 59 N. E. Rep. 757.

The deputy clerk of a federal court being authorized to perform the duties of the clerk in the absence of the latter another federal court will presume such absence in favor of the proper certification of a judgment by such deputy. Nat. Acc. Soc. *v.* Spiro, 37 C. C. A. 388, 94 Fed. Rep. 750.

[5] Morris *v.* Patchin, 24 N. Y. 394.

"To hold otherwise would leave it in the power of the state to change the Federal statute in respect to the persons who should certify records under it." Willock *v.* Wilson, 178 Mass. 68, 59 N. E. Rep. 757

attached.[6] If there be no seal that fact should be stated in the certificate of the clerk or judge.[7] A statement in an attestation expressed to be by the clerk of the court, that it is the seal of his office as such, sufficiently imports that it is the seal of the court.[8]

21. Judge's Certificate.

The certificate of the judge is indispensable,[9] and should be annexed to the copy record.[10] The record or certificate

[6] See Turner *v.* Waddington, 3 Wash. C. Ct. 126.

The failure of both the judge and clerk to attest the transcript renders it inadmissible as evidence for any purpose. Comstock *v.* Kerwin, 57 Neb. 1, 77 N. W. Rep. 387.

Under the California code provisions, it is not necessary that the clerk's certificate show that he was the "legal keeper" of the records. The fact that the clerk has attested the copy of the record and annexed the seal of the court is sufficient if there is attached thereto the certificate of the presiding judge of the court. Bean *v.* Loryea, 81 Cal. 151, 22 Pac. Rep. 513.

[7] Kirkland *v.* Smith, 2 Mart. (La.) N. S. 497; Alston *v.* Taylor, 1 Hayw. (Tenn.) 385; Kinseley *v.* Rumbough, 96 N. C. 193, 2 S. E. Rep. 174; Craig *v.* Brown, 6 Fed. Cas. No. 3328, Pet. C. C. 352.

[8] Clark *v.* Depew, 25 Penn. St. 509; Coffee *v.* Nealy, 2 Heisk. (Tenn.) 304.

"It is not necessary, under the act of Congress, that it shall appear, either by the attestation of the clerk or the certificate of the judge, that the seal annexed is the seal of the court, but in the present case it does appear in the attestation that the seal is the seal of the court, and the certificate of the judge is that the attestation is in due form," and therefore the objection that the court's seal is not annexed to the attestation is without merit. Hull *v.* Webb, 78 Ill. A. 617.

It will be presumed that the seal was affixed by the officer having lawful custody of it. Ducommun *v.* Hysinger, 14 Ill. 249.

[9] Hutchins *v.* Gerrish, 52 N. H. 205, s. c., Am. Rep. 19, and cases cited; Barbour *v.* Watts, 2 Marsh. (Ky.) 290; Craig *v.* Brown, Pet. C. Ct. 352.

Where a judge signed his last name in full prefixing the initials only of his christian name, it was held that the certificate was nevertheless valid. Old Wayne Mut.

[10] Norwood *v.* Cobb, 20 Tex. 588.

The fact that the transcript bears no caption is no reason for excluding it. Taylor *v.* Smith, 36 S. W. Rep. (Tenn. Ch. App.) 970.

must indicate that the certifying officer was *the* judge, chief justice or presiding magistrate.[11] His description as such appearing either upon the record or the certificate, is enough.[12] If it appear either by the certificate or the record that there was more than one judge, it must also appear that the certifying judge was the chief justice or presiding magistrate[13] of the court,[14] or was a legally equivalent officer,[15] or that there was no such officer.[16] If there is nothing

L. Ass'n *v.* McDonough, 164 Ind. 321, 73 N. E. Rep. 703.

The fact that the record as authenticated contains redundant matters and more certificates than are required does not render it inadmissible. Kinseley *v.* Rumbough, 96 N. C. 193, 2 S. E. Rep. 174.

[11] Kirkland *v.* Smith, 2 Mart. (La.) N. S. 497; Settle *v.* Alison, 8 Geo. 201.

Where the judge states in his certificate that he is "the judge," the fair inference is that he is the sole judge of the court and the proper person to sign the attestation. Willock *v.* Wilson, 178 Mass. 68, 59 N. E. Rep. 757.

[12] Mudd *v.* Beauchamp, Litt. Sel. Cas. 142; Willock *v.* Wilson, 178 Mass. 68, 59 N. E. Rep. 757.

[13] Stephenson *v.* Bannister, 3 Bibb (Ky.), 369.

The certificate of the presiding judge is indispensable. Hutchins *v.* Gerrish, 52 N. H. 205, 13 Am. Rep. 19.

A certificate is insufficient if it does not show that it was made by a "duly commissioned and qualified" presiding justice. Nolan *v.* Nolan, 35 N. Y. App. Div. 339, 54 N. Y. Supp. 975.

Where it was indisputed that the court was composed of more than one judge and that the certifying judge was not the chief judge or presiding magistrate and that an associate judge presided at the trial at which the judgment was recovered the record was not properly authenticated. Rich *v.* Cohen, 61 Misc. 148, 114 N. Y. Supp. 672.

[14] Settle *v.* Alison, 8 Geo. 201; Allen *v.* Allen, Min. (Ala.) 240.

A certificate signed by all of the judges who styled themselves presiding justices is sufficient when all the judges of the court were of equal rank. Arnold *v.* Frazier, 36 S. C. L. 33.

[15] A description that imports merely the fact of having presided (Stephenson *v.* Bannister, 3 Bibb [Ky.], 369); or of seniority (Id.); or of being the presiding magistrate of the county, not of the court (Settle *v.* Alison, 8 Geo. 201), is not enough. But a description which is apparently a legal title of the head of the court,

[16] Slaughter *v.* Cunningham, 24 Ala. 261.

It was held that where a judge in his certificate stated that there was no chief judge, that all the judges had concurrent jurisdic-

in the record or certificate to indicate that there was more than one judge of the court, it will not be presumed that there was another; but a certificate by the judge, whether stating that he is sole judge [17] or not,[18] is admissible; and the law of the State may be produced to show whether there was more than one,[19] and whether there was a chief justice or presiding magistrate.[20] It is essential that the certificate state that the attestation of the clerk is in due form.[21] On this point it is conclusive.[22]

such as "President" of the court is (Gavit *v.* Snowhill, 2 Dutch. 76. *Contra*, Hudson *v.* Daily, 13 Ala. 722). So if the court is chancery, the chancellor's certificate is enough (Scott *v.* Blanchard, 8 Mart. [La.] N. S. 303).

tion throughout his state, and that he was the resident judge of the county wherein the judgment was rendered, and a duly authenticated copy of the laws of the State was also offered in evidence showing the organization of the courts, there was a substantial compliance with the act of Congress and a certificate by the governor of the sister state was unnecessary. Andrews *v.* Flack, 88 Ala. 294, 6 So. Rep. 907.

[17] Van Storh *v.* Griffin, 71 Penn. 240; Pearl *v.* Wellmann, 3 Gilm. 311.

It is not necessary that the *status* of the judge be certified by the state executive or that the clerk certify to his due qualification. Kinseley *v.* Rumbough, 96 N. C. 193, 2 S. E. Rep. 174; see also McAllister *v.* Singer Mfg. Co., 64 Ga. 622.

[18] Central Bank *v.* Veasey, 14 Ark. 672; Butler *v.* Owen, 2 Eng. (Ark.) 369. Text cited with approval in Keyes *v.* Mooney, 13 Oregon, 179, 9 Pac. Rep. 400.

An objection to a certificate by "J. I. Clark Hare, the judge of the Court" on the ground that there was no certificate from the presiding magistrate, or chief judge of the court, was held to be without avail since without proof of the fact that there was more than one judge of the court there was no presumption to that effect. People *v.* Smith et al., 121 N. Y. 578, 24 N. E. Rep. 852. See also Hull *v.* Webb, 78 Ill. App. 617.

[19] Bennett *v.* Bennett, Deady, 299.

[20] Foster *v.* Taylor, 2 Overt. (Tenn.) 191, and see Huff *v.* Campbell, 1 Stew. & P. (Ala.) 543. See Arnold *v.* Frazier, 36 S. C. L. 33.

[21] Hutchins *v.* Gerrish, 52 N.

[22] Hatcher *v.* Rocheleau, 18 N. Y. 86, and cases cited. Ferguson *v.* Harwood, 7 Cranch, 408, 3 L. ed. 386; Andrews *v.* Flack, 88 Ala. 294, 6 So. Rep. 907.

A certificate of a prothonotary

The certificate itself is presumptive proof of the official character of the certifying magistrate.[23] It need not certify to the clerk's official character,[24] nor to his signature, nor to the seal.[25] The fact that its date is later than that of the clerk's attestation is held not an objection, even though it state that the clerk *is* clerk, not that he *was*.[26]

22. Presumption in Favor of Jurisdiction.[27]

The whole record of the proceedings on which the judgment depends should be produced, in order to show how far

H. 205, 13 Am. Rep. 19. See also Horner *v.* Spelman, 78 Ill. 206; Smith *v.* Blagge, 1 Johns. Cas. 238; Trigg *v.* Conway, Hempst. 538; Craig *v.* Brown, Pet. C. Ct. 352; Duvall *v.* Ellis, 13 Mo. 203, Snyder *v.* Wise, 10 Penn. St. 157; It is not necessary to say "in due form of law." Blair *v.* Caldwell. 3 Mo. 353 [249]; Grover *v.* Grover, 30 Mo. 400.

The fact that the judge's certificate uses the words "in due form of law" instead of "in due form according to the law," does not constitute a defect. Edwards *v.* Jones, 113 N. C. 453, 18 S. E. Rep. 500.

An objection that the certificate does not state that the attestation by the clerkis "in due form" is sufficient if taken in the following form: "That the same is not authenticated as required for the authentication of foreign records under the laws of this State or by act of Congress in such cases made and provided." Chapman *v.* Chapman, 74 Neb. 388, 104 N. W. Rep. 880.

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to a judgment of the Pennsylvania court of common pleas is sufficient, as he is in fact the chief clerk of the court. Sheriff *v.* Smith, 47 How. Prac. (N. Y.) 470.

[23] Hatcher *v.* Rocheleau, 18 N. Y. 86.

"The cases are uniform that under (the act of Congress) the certificate of the judge is *prima facie* evidence of his official character." Dusenberry et al. *v.* Abbott, 1 Nebr. (Unoff.) 101, 95 N. W. Rep. 466.

[24] Ducommon *v.* Hysinger, 14 Ill. 249; McQueen *v.* Farron, 4 Mo. 212; Linch *v.* McLemore, 15 Ala. 632.

[25] Cases in note (above).

[26] Lothrop *v.* Blake, 3 Penn. St. 483.

The certificate of the judge is not necessarily invalid because dated prior to the attestation of the clerk. Keyes *v.* Mooney, 13 Oregon, 179, 9 Pac. Rep. 400.

[27] The great conflict of opinion presented in the books, on this point, and on the connected question of the effect of a judgment, prevents the reader from reaching a firm conclusion as to how far he

it may be conclusive. The transcript must show that the proceedings are clothed with the forms necessary to the validity of a judgment in the State from which it comes.[28] Subject to this general rule, which, of course, involves a consideration of the requisites of a judgment by the law of the sister State, the following presumptions apply. Recitals of jurisdictional facts in the judgment are presumptive,

may rely on this presumption, unless he takes care to appreciate the change in the interpretation of common-law rules which a century of experience under the American judicial organization and practice has wrought. Anciently, tribunals of special statutory origin and powers were not favored with this this presumption by the great courts which represented the king and derived their authority from the royal writ; but by far the greater number of American courts of general jurisdiction, although proceeding by personal service and hearing, according to the methods of the great common-law and equity courts, have a statutory origin and rely upon the statute for the definition of their powers. Moreover, the universality of written records has confused the line of distinction between courts of record and not of record. Again, a judgment, once considered to be the voice of the court, and therefore the most solemn of utterances, importing absolute verity, is recognized, under the new procedure, as the act of the attorney, done under the supervision or sanction of the court or its clerk; and hence is open to inquiry on almost every point except the merits of the adjudication and the formality of proceeding and sufficiency of evidence by which that adjudication was reached. Lastly, great advance has recently been made in the application of the constitutional rule of "full faith and credit." The rules of presumption stated in the text are in consonance with the latest decisions of our courts having highest authority on these questions, but numerous earlier cases, contrary to these conclusions, which space does not allow us to cite, may be be found in the reports.

[28] McLaren *v.* Kehler, 23 La. Ann. 80, s. c., 8 Am. Rep. 591.

The record should contain "all the pleadings and proceedings on which the judgment was founded." McCarty *v.* Troll, 90 Ark. 199, 118 S. W. Rep. 416. See also to the same effect: Swing *v.* St. Louis Refrigerator, etc., Company, 78 Ark. 246, 93 S. W. Rep. 978, 115 Am. St. Rep. 38.

Were it appears that the judgment was entered by agreement, the omission of the pleadings and proceedings in the action is immaterial. Brady *v.* Palmer, 19 Ohio Cir. Ct. R. 687, 10 O. C. D. 27.

but not conclusive evidence of those facts.[29] To render the judgment presumptively valid, it is enough, in the first instance, if it appear either from averment or proof in the record, that the court had jurisdiction of the subject, and of the parties,[30] and that the judgment was actually rendered. The courts may take judicial notice as to whether the court of the other State is by its law a court of general jurisdiction;[31] or whether it had jurisdiction of a special and statutory proceeding;[32] and it is its duty to do so if the record is proved under the act of Congress.

[29] Cross *v.* Cross, 108 N. Y. 628, 15 N. E. Rep. 333; Porter *v.* Bronson, 19 Abb. Pr. 236, 29 How. Pr. 292; Splane *v.* Splane, 29 Pa. Super. Ct. 185; Price *v.* Schaeffer, 161 Pa. 530, 29 Atl. Rep. 279, 25 L. R. A. 699.

Where the proof shows that there was no personal service upon one of the defendants and that he did not authorize an appearance on his behalf, the action will be dismissed as to him. Sheriff *v.* Smith, 47 How. Pr. (N. Y.) 470.

The court cannot anticipate a reversal of the judgment sued upon. Lonergan *v.* Lonergan, 55 Neb. 641, 76 N. W. Rep. 16.

[30] Maxwell *v.* Stewart, 22 Wall. 77; Sweeny *v.* Lomme, Id. 213.

The presumption of jurisdiction of a court of one state in an action on its judgment in another state, extends to jurisdiction over the person of one within the territorial limits of the process of the court and to those procedures which the common law recognizes as within the radius of its adjudications. A. Wilhelm & Son *v.* Parker, 17 Ohio Cir. Ct. R. 234, 9 O. C. D. 724.

Where the bill of exceptions does not contain the certificate of the proceedings, the appellate court cannot find that the lower court was in error in finding that the court on whose judgment the action is brought was one of general jurisdiction. Willock *v.* Wilson, 178 Mass. 68, 59 N. E. Rep. 757.

[31] Rae *v.* Hulbert, 17 Ill. 572; Butcher *v.* Bank of Brownsville, 2 Kans. 70; Munn *v.* Sturges, 22 Ark. 389; Buffum *v.* Stimpson, 5 Allen, 591; Clarke's Adm'r *v.* Day, 2 Leigh (Va.), 172; Kemp *v.* Mundell, 9 Id. 12; Coffee *v.* Nealy, 2 Heisk. (Tenn.) 304.

The presumption is that a court is one of general rather than special jurisdiction. Baker & Co. *v.* Healey, 1 Alaska, 45.

Where it appears that the court had a judge, clerk and seal, the presumption is that it was one of general jurisdiction. American Mut. Life Ins. Co. *v.* Mason, 159 Ind. 15, 64 N. E. Rep. 525.

[32] Folger *v.* Columbian Ins. Co., 99 Mass. 267; S. P., Mills *v.* McCabe, 44 Ill. 194.

If the court be one of general jurisdiction in respect of subjects,[33] and proceeding within the general scope of its power although it be a local court,[34] the law presumes that it had jurisdiction of the subject-matter,[35] and that it acquired jurisdiction of the person,[36] unless something to indicate the contrary appears in the record.[37] The same principle applies, even though the proceeding be under a

[33] For the distinction between the territorial and the subject limits of jurisdiction, see Landers *v.* The Staten Island Ferry Co., 13 Abb. Pr. N. S. 338.

When the transcript showed that the court which rendered the judgment sued upon was a court of record, it was held that presumptively it was a court of general jurisdiction of the subject matter and the parties interested. Roberts *v.* Leutzke, 39 Ind. App. 577, 580, 78 N. E. Rep. 635.

Where it appeared from the transcript of a judgment of a foreign state that the court thereof had a judge, clerk and seal, the presumption was "that the same was a court of general jurisdiction, and that it had jurisdiction of the subject matter of the action and the parties thereto." Amer. Mut. Life Ins. Co. *v.* Mason, 155 Ind. 15, 19, 64 N. E. Rep. 525.

[34] Such as the usual American circuit courts, courts of common pleas (Harvey *v.* Tyler, 2 Wall. 328); and although it be subject to appeal (Id.). *Contra*, McLaughlin *v.* Nichols, 13 Abb. Pr. 244.

Where a copy of a record of the judgment of a court of a sister state showed that the court was a county court, with a clerk and a seal it was presumed to have been a court of general jurisdiction. Van Norman *v.* Gordon, 172 Mass. 576, 53 N. E. Rep. 267, 70 Am. St. Rep. 304, 44 L. R. A. 840.

[35] Baker & Co. *v.* Healey, 1 Alaska, 45; Woodworth *v.* McKee, 126 Iowa, 714, 102 N. W. Rep. 777; Old Wayne Mut. Life Ass'n. *v.* Flynn, 31 Ind. App. 473, 68 N. E. Rep. 327. Unless it be of a nature not cognizable without statute authority, such as divorce. Commonwealth *v.* Blood, 97 Mass. 538.

[36] Woodworth *v.* McKee, 126 Iowa, 714, 102 N. W. Rep. 777; Voorhees *v.* Bank of U. S., 10 Pet. 449; Harvey *v.* Tyler, 2 Wall. 342; Galpin *v.* Page, 18 Id. 350; Reber *v.* Wright, 68 Penn. St. 471; Dunbar *v.* Hallowell, 34 Ill. 168; Wilcox *v.* Kassick, 2 Mich. 165. Compare City Bank *v.* Dearborn, 20 N. Y. 244. This presumption avails even against infant defendants. Bosworth *v.* Vandewalker, 53 N. Y. 597.

When the jurisdiction is once questioned the burden rests on the party asserting it. Woodworth *v.* McKee, 126 Iowa, 714, 102 N. W. Rep. 777.

[37] Galpin *v.* Page, 18 Wall. 350.

special statute, or in the exercise of probate or admiralty jurisdiction,[38] if only it be by service of process personally or *in rem*, in substantial accord with common law or equity principles as to acquiring jurisdiction by personal service and opportunity of hearing;[39] but if the statute forbids a judgment except on certain conditions, the record should show the existence of the conditions.[40]

If the court be an inferior court of special and limited jurisdiction, neither jurisdiction,[41] nor the want of it,[42] is presumed. Recitals of the juisdictional facts, if contained in the record, are (under the rule of full faith and credit),[43] usually presumptive, but never conclusive,[44] evidence of such facts. If the recitals are lacking, the fact may be sup-

[38] Harvey *v.* Tyler, 2 Wall. 322.

[39] Harvey *v.* Tyler, 2 Wall. 342; Galpin *v.* Page, 18 Wall. 350; Potter *v.* Merchants' Bank, 28 N. Y. 641.

[40] Allen *v.* Blunt, 1 Blatchf. 480; Harvey *v.* Tyler (above).

Though a court in which a proceeding was had to impose a mortgage upon an infant's property was one of general jurisdicton,. yet its powers in this matter were statutory making its jurisdiction special and limited, and no presumption could be indulged in favoring that particular jurisdiction. Therefore the petition should have set up the facts justifying the court in mortgaging the infant's property. Warren *v.* Union Bank of Rochester, 157 N. Y. 259, 51 N. E. Rep. 1036, 68 Am. St. Rep. 777, 43 L. R. A. 256.

[41] People *v.* Van Alstyne, 32 Barb. 131.

In New York and some other states the rule likewise obtains with respect to judgments proved in courts of the same state. Thus in an action to set aside a conveyance made by the defendant in fraud of his creditors, a judgment of an inferior court, (City Court of Yonkers) of the same state was offered to establish that the plaintiff was a creditor of the defendant. It was held that as the record of this judgment failed to disclose facts showing the jurisdiction of the inferior court, they would not be presumed, but must be made to appear affirmatively in support of the judgment. Beaudrias *v.* Hogan, 16 N. Y. App. Div. 38, 44 N. Y. Supp. 785.

[42] Reno *v.* Pinder, 20 N. Y. 298, and cases cited, rev'g 24 Barb. 423.

[43] Paragraph 15.

[44] Bolton *v.* Jacks, 6 Robt. 166, 200.

The pleading should follow the words of the statute or words having an equivalent meaning should be used. Strecker *v.* Railson, 16 N. D. 68, 111 N. W. Rep. 612, 8 L. R. A. N. S. 1099.

plied by extrinsic evidence,[45] unless the proceeding is a special statutory one in derogation of the common law, and exercised in a summary manner. In that case, whatever the court, these presumptions cannot be relied on.[46]

In respect to all the classes of courts and proceedings I have mentioned, if jurisdiction is once thus established, a conclusive presumption arises that it was exercised regularly and without error,[47] except in the case of a judgment by confession, respecting which the presumption is not conclusive as to legality.

The ordinary presumption that a public officer has done his duty cannot supply the absence of evidence of a vital jurisdictional fact in any judgment.[48] But where the substantial fact is shown, the presumption may supply details of time, place and manner, although these be necessary to the validity of the act.[49]

23. Service.

When the record sets forth the manner of the service, courts of another State will examine it to see if it gave

[45] Van Deusen *v.* Sweet, 51 N. Y. 378; and see Bolton *v.* Jacks (above). *Contra*, Simmons *v.* DeBarre, 4 Bosw. 548, s. c., 8 Abb. Pr. 269, affi'g 6 Id. 188; Powers *v.* People, 4 Johns. 292.

[46] Harvey *v.* Tyler (above).

The statutes of a sister state must be proved as facts. Field *v.* Cain, 9 N. Mex. 283, 50 Pac. Rep. 327.

[47] Comstock *v.* Crawford, 3 Wall. 396; Lynch *v.* Bernal, 9 Id. 315. See Dodd *v.* Groll, 19 Ohio Cir. Ct. R. 718, 8 O. C. D. 334.

Presumptions will not be indulged to show that a justice of the peace acquired jurisdiction. But where it appears that the justice had jurisdiction, the same presumptions will be indulged in favor of his proceedings as in case of a court of general jurisdiction. Hopper *v.* Lucas, 86 Ind. 43.

[48] See Improvement Co. *v.* Munson, 14 Wall. 550; and chap. VIII, paragraph 13 of this vol.

The fact that the transcript does not show that the judgment was signed by the judge will not preclude it from evidence. McFarland *v.* Fricks, 99 Ga. 104, 24 S. E. Rep. 868.

[49] Sheldon *v.* Wright, 7 Barb. 39, and see chap. VIII, paragraph 19 of this vol.

Although the transcript does not give the name of the presiding justice, the presence of a judge will be presumed where the record

jurisdiction.[50] The record is not unavailing because the only proof of service is by an informal return,[51] nor because defendant's first name is stated by initial only.[52] If an official return of service is signed by deputy, it is presumed that he was authorized.[53] A general indication of service without saying on all, implies service on all;[54] but a state-

does show that a trial was had, that rulings were made, exceptions taken, etc. Amer. Mut. Life Ins. Co. *v.* Mason, 159 Ind. 15, 64 N. E. Rep. 525.

[50] Ewer *v.* Coffin, 1 Cush. (Mass.) 23. That parties had due notice of judicial proceedings will be presumed after the lapse of twenty years, although the record does not affirmatively show that fact. Wilson *v.* Holt, 83 Ala. 528, 3 Am. St. Rep. 768, 3 So. Rep. 321.

It may be shown that service was not made as recited in the judgment roll. Johnston *v.* Mut. Reserve Life Ins. Co., 104 N. Y. App. Div. 550, 93 N. Y. Supp. 1052.

It is not necessary that the statutes prescribing the manner of service be either incorporated in or referred to in the judgment roll. Id.

A judgment roll is admissible although it appears therefrom that after the entry of judgment it was amended, without notice to the defendant, so as to show personal service upon him, the judgment having been taken by default and the State statute not requiring personal service in such cases. Cunningham *v.* Spokane Hydraulic Min. Co., 20 Wash. 450, 55 Pac. Rep. 756, 72 Am. St. Rep. 113.

[51] Such as "served" (Latterett *v.* Cook, 1 Iowa, 1); or "executed" (Welson *v.* Jackson, 10 Mo. 329; Blackburn *v.* Jackson, 22 Id. 308.)

The fact that the return of service is informal or imperfect does not render the judgment ineffective if the service was in fact made. See Drake *v.* Duvenick, 45 Cal. 455.

[52] Martin *v.* Barron, 37 Mo. 301.

In an action of ejectment the fact that the original judgment does not show service of process on the defendant is not sufficient to preclude it from evidence where such service appears elsewhere. Kinkade *v.* Gibson, 209 Ill. 246, 70 N. E. Rep. 683.

[53] State *v.* Williamson, 57 Mo. 192. Compare Bosworth *v.* Vandewalker, 53 N. Y. 597.

Where the service of the summons by the deputy was attacked "by the testimony of the defendant alone, confused and somewhat uncertain, in which she contradicted herself at least twice as to points more or less material," the evidence is not sufficient to impeach the record. Splane *v.* Splane, 29 Pa. Super. Ct. 185.

[54] Bosworth *v.* Vandewalker, 53 N. Y. 597; Secrist *v.* Green, 3 Wall. 751.

It appears that the same view obtains though the judgment in

ment of service on a part, implies non-service of the others.[55] A general statement of service implies that service was made at a proper place,[56] and in a proper manner; [57] but a statement of service at a place without the jurisdiction, implies that no service of the same defendant was made within the jurisdiction.[58]

24. Constructive Service.[59]

Neither constructive service on a non-resident [60] (whether

question is not that of a sister state. Thus, it was held that with respect to a contention that a mother of infants under fourteen had not been served pursuant to the code provision, there was a presumption that the judgment would not have been rendered except upon due proof of service in the manner prescribed by law, and the fact of proper service was "materially strengthened by the recital in the judgment that it was upon 'reading and filing due proof of the service of the summons and complaint.'" Berkowitz *v.* Brown, 3 Misc. 1, 23 N. Y. Supp. 792.

[55] Galpin *v.* Page, 18 Wall. 351; Rape *v.* Heaton, 9 Wisc. 328.

[56] State *v.* Williamson, 57 Mo. 192; Knowles *v.* Gas-light Co., 1, Wall. 61.

[57] Lackland *v.* Pritchett, 12 Mo. 484.

The finding of the court which rendered the judgment that the defendant was personally served is conclusive. Hull *v.* Webb, 78 Ill. App. 617.

Where a different mode of service of a paper is not prescribed by statute, such service must be personal. Kinkade *v.* Gibson, 209 Ill. 246, 70 N. E. Rep. 683.

[58] Galpin *v.* Page, 18 Wall. 350. For the mode of proving territorial boundaries, see United States *v.* Jackalow, 1 Black, 484, 487.

In an action on a sister state judgment, it appeared by the record that an appearance by attorneys, after service by publication, was relied upon as giving jurisdiction over the defendant. The court said: "Presumptively the attorneys who appeared for the defendants had authority to so do, and whether they had or not was a question for the jury." Kahn *v.* Lesser, 16 N. Y. Supp. 154.

Where the validity of the service has been specifically passed upon in the original jurisdiction, a judgment against a non-resident, served while temporarily within that state will be enforced in another state. Tootle *v.* McClellan, 7 Ind. Ter. 64, 103 S. W. Rep. 766, 12 L. R. A. N. S. 941.

[59] For cases on constructive service, see Earle *v.* McVeigh, 91 U. S. (1 Otto) 503.

[60] Knowles *v.* Gas-light Co., 19 Wall. 61. As to constructive service on residents, see Henderson *v.* Staniford, 105 Mass. 504; Stockwell *v.* McCraken, 109 Mass. 84; Holt *v.* Alloway, 2 Blackf.

by publication,[61] attachment of property,[62] leaving at abode,[63] or by personal service on defendant's joint obligor),[64] nor actual notice to any defendant without service,[65] nor actual service without the State[66] (though it be sufficient to give jurisdiction *in rem*),[67] is sufficient to make the judgment

108; Buford *v.* Kirkpatrick, 13 Ark. 33.

See also Rand *v.* Hanson, 154 Mass. 87, 28 N. E. Rep. 6, 26 Am. St. Rep. 210, 12 L. R. A. 574, where service upon a non-resident was by publication; Ward *v.* Boyce, 152 N. Y. 191, 46 N. E. Rep. 180, 36 L. R. A. 549.

It was held that one state would not recognize a judgment obtained in a sister state and revived by the issuance of a writ of *scire facias*, where it appeared that the defendant, at the time of the revival of the said judgment, was not a resident of that state and had not been personally served. Dunn *v.* Dilks, 31 Ind. App. 673, 68 N. E. Rep. 1035.

[61] Pennoyer *v.* Neff, 95 U. S. (5 Otto) 714; Ætna Life Ins. Co. *v.* Lyon County, 95 Fed. Rep. 325.

Service by publication on a non-resident defendant in a suit for alimony is not sufficient. Larson *v.* Larson, 82 Miss. 116, 33 So. Rep. 717.

[62] Bicknell *v.* Field, 8 Paige, 440; Rice *v.* Hickok, 39 Vt. 292; Thompson *v.* Emmert, 4 McLean, 96. *Contra*, see Arndt *v.* Arndt, 15 Ohio, 33.

[63] Compare Jardine *v.* Reichert, 10 Vroom, 165; Barney *v.* White, 46 Mo. 137.

A service obtained by a trick will not be held sufficient. Frawley *v.* Pennsylvania Casualty Co., 124 Fed. Rep. 259.

[64] D'Arcy *v.* Ketchum, 11 How. U. S. 165; Phelps *v.* Brewer, 9 Cush. (Mass.) 390; Board of Public Works *v.* Columbia College, 17 Wall. 521; Hall *v.* Lanning, 91 U. S. (1 Otto) 160.

Where a judgment was recovered against all the members of a firm in the New Jersey Court by service upon one member only, the New York Court refused to enforce this judgment against those members who had not been served. Hoffman *v.* Wight, 1 N. Y. App. Div. 514, 37 N. Y. Supp. 262. See also Lowrie *v.* Castle, 198 Mass. 82, 83 N. E. Rep. 1118; Renaud *v.* Abbott, 116 U. S. 277, 6 S. Ct. 1194, 29 L. ed. 629.

[65] Woodward *v.* Tremere, 6 Pick. 354.

[66] Ewer *v.* Coffin, 1 Cush. 23; Price *v.* Hickok, 39 Vt. 292; Bank of China, etc., *v.* Morse, 168 N. Y. 458, 61 N. E. Rep. 774, 56 L. R. A. 139, 85 Am. St. Rep. 676, affirm. 44 N. Y. App. Div. 435, 61 N. Y. Supp. 268.

[67] Cooper *v.* Reynolds, 10 Wall. 318.

When a judgment appeared to be *in rem*, and service on the defendants was by publication without any appearance by any of them, such judgment was held to be no evidence of debt in an action in a

evidence of a debt against defendant.[68] Evidence in the record, or extrinsic to it, that the defendant was, at the time of the alleged service upon him, beyond the reach of the process of the court, raises a presumption of want of jurisdiction for this purpose.[69]

If regular constructive service is shown, it not appearing whether the person so served was a resident or not, jurisdiction is presumed, if residence, domicil or citizenship could give it, and the burden is on defendant to show the contrary.[70] No substantial element of constructive service will be presumed in aid of the jurisdiction;[71] but if substantial service, by publication or otherwise, appears,[72] and the court rendering judgment declared the proof of regularity sufficient, the existence of incidental facts may be presumed in aid of its jurisdiction.[73]

sister state. Iles *v.* Elledge, 18 Kan. 296. See also Gordon *v.* Munn, 87 Kan. 624, 125 Pac. Rep. 1, Ann. Cas. 1914, A. 783.

[68] Eastman *v.* Wadleigh, 65 Me. 251, s. c., 20 Am. Rep. 695; Pennoyer *v.* Neff, 95 U. S. (5 Otto) 714, affi'g 3 Sawy. 274. But jurisdiction of the original action being shown, constructive notice of appeal will sustain a judgment on appeal. Nations *v.* Johnson, 24 How. U. S. 195.

A personal judgment rendered in a state court upon a money demand against a non-resident without personal service, although it may be valid within that jurisdiction, cannot be made the foundation of an action in another state. Du Pont *v.* Abel, 81 Fed. Rep. 534.

[69] Gray *v.* Larrimore, 2 Abb. U. S. 542; Galpin *v.* Page, 18 Wall. 350.

[70] Bissell *v.* Wheelock, 11 Cush. (Mass.) 279; Stockwell *v.* McCraken, 109 Mass. 84; Barney *v.* White, 46 Mo. 137; Jones *v.* Warner, 81 Ill. 343; Holt *v.* Alloway, 2 Blackf. (Ind.) 108; and see Munn *v.* Sturges, 22 Ark. 389. Otherwise of judgments of divorce and the like.

[71] Galpin *v.* Page, 18 Wall. 350.

Where the judgment was entered by agreement, the fact that there was no personal service of the defendant is immaterial. Brady *v.* Palmer, 19 Ohio Cir. Ct. Rep. 687, 10 O. C. D. 27.

[72] Smith *v.* Pomeroy, 2 Dill. C. Ct. 420.

The character of an agent under a state statute making service on an agent sufficient, must be thoroughly representative, if the service is to be sustained. Frawley *v.* Pennsylvania Casualty Co., 124 Fed. Rep. 259.

[73] Such as the proximity of the paper (Secrist *v.* Green, 3 Wall. 751); the use of the complaint,

25. Appearance.

Apparently regular appearance is presumptively equivalent to process and service.[74] A record which shows that the party appeared by attorney,[75] though without proof of the

on file, as an affidavit (Neff *v.* Pennoyer, 3 Sawyer, 274); the residence of the notary verifying it (Mosher *v.* Heydrick, 45 Barb. 549), and the like.

It is not necessary that a statute prescribing the manner of service be referred to or incorporated in the judgment roll. Johnston *v.* Mut. Reserve Life Ins. Co., 104 N. Y. App. Div. 550, 93 N. Y. Supp. 1052.

[74] Moore *v.* Spackman, 12 Serg. & R. 287. An admission or evidence that there was no personal service does not necessarily impugn an appearance. Eldred *v.* Bank, 17 Wall. 552; and see Whittaker *v.* Murray, 15 Ill. 293. Although the recital in a judgment-roll, in an action of foreclosure, of service of process upon, and of appearance by, a defendant, is not conclusive, and evidence is admissible on the part of a defendant in an action brought to foreclose a mortgage to show that the court never acquired jurisdiction of his person, every intendment is in favor of the validity of the judgment, if regular on its face; the burden of establishing want of jurisdiction is upon the party so questioning it, and it should be established in the most satisfactory manner to deprive the judgment of its effect. Ferguson *v.* Crawford, 86 N. Y. 609.

In the absence of evidence to the contrary the fair inference is that an appearance was a general appearance. Willock *v.* Wilson, 178 Mass. 68, 59 N. E. Rep. 757.

[75] For example, by the usual formal recital, "and now at this day come the parties aforesaid, by their attorneys," &c. (Landes *v.* Brant, 10 How. U. S. 348; and see Atkins *v.* Disintegrating Co., 18 Wall. 272); or by the entry of the attorney's name upon the record of the judgment in the mode usual (Bank of Middletown *v.* Huntington, 13 Abb. Pr. 402); or by filing a plea (Eldred *v.* Bank, 17 Wall. 551).

The fact that the law of the forum does not recognize judgments by confession of attorney, will not prevent it from enforcing a judgment so obtained in another state. Cuykendall *v.* Doe, 129 Iowa, 453, 105 N. W. Rep. 698, 113 Am. St. Rep. 472, 3 L. R. A. N. S. 449.

In a suit upon a justice's judgment rendered in another state, the record was introduced showing a copy of the original summons and the return of service thereon endorsed, the non-appearance by the defendant and an appearance by an attorney. To an objection that the attorney had no authorization to appear, the court held that the judgment could not be attacked on that ground since if the appearance was authorized the judg-

attorney's authority, is *prima facie* sufficient;[76] even though the action was commenced by publication, etc., and the summons and proof of publication do not appear on the record.[77] But evidence *aliunde* may be received for the purpose of rebutting the presumption of authority in the attorney.[78]

Where the jurisdiction depends upon appearance, defendant may prove, under proper allegation, that he was never served with process, did not know of the action, did not authorize any one to appear, and he had a good defense upon the merits.[79] Retainer by partner is not enough.[80]

ment was good, and if not, it was still valid because of the defendant's default. Tomlin *v.* Woods, 125 Iowa, 367, 101 N. W. Rep. 135.

Where the record shows that the defendant appeared by attorney he will not be allowed to dispute the attorney's authority in an action on the judgment. Hubbard *v.* Dubois, 37 Vt. 94, 86 Am. D. 690.

[76] Hill *v.* Mendenhall, 21 Wall. 454; Rogers *v.* Burns, 27 Penn. St. 535.

A record of a judgment rendered in a sister state showing a genera appealance by an attorney was held to be presumptive authority of the attorney to act and stood in lieu of the service of process. Famous Mfg. Co. *v.* Wilcox, 180 Ill. 246, 54 N. E. Rep. 211.

[77] Maxwell *v.* Stewart, 22 Wall. 77. For withdrawal of appearance and its effect, see Creighton *v.* Kerr, 20 Wall. 13, and cases cited; Eldred *v.* Bank, 17 Id. 551.

A general appearance gives jurisdiction even where there was no property in the State and the defendant was served only by publication. See Grant *v.* Birrell, 35 Misc. 768, 72 N. Y. Supp. 366; Reed *v.* Chilson, 142 N. Y. 152, 36 N. E. Rep. 884; Christal *v.* Kelly, 88 N. Y. 285.

[78] Handley *v.* Jackson, 31 Ore. 552, 50 Pac. Rep. 915.

The defendant may show that the appearance was unauthorized even where the proof directly contradicts the record. See also Vilas *v.* Plattsburgh, etc., R. R. Co., 123 N. Y. 440, 25 N. E. Rep. 941, 20 Am. St. Rep. 771, 9 L. R. A. 844; Kerr *v.* Kerr, 41 N. Y. 272; Ferguson *v.* Crawford, 70 N. Y. 252, 26 Am. Rep. 589; Gilman *v.* Gilman, 126 Mass. 26, 30 Am. Rep. 646; Wright *v.* Andrews, 130 Mass. 149; Chicago Title, etc., Co. *v.* Smith, 185 Mass. 363, 70 N. E. Rep. 426, 102 Am. St. Rep. 350.

[79] Marx *v.* Fore, 51 Mo. 69, s. c., Eager *v.* Stover, 59 Mo. 87. *Contra*, Dennison *v.* Hyde, 6 Conn. 508.

[80] Phelps *v.* Brewer, 9 Cush. 390; Boylan *v.* Whitney, 3 Ind. 140;

26. Effect of Judgment.

A judgment of a sister State, if thus authenticated, or if duly proved in another mode because the court has not a clerk and record,[81] is entitled to such faith and credit [82] as it has by law or usage in the courts of the State from whence the record is taken; [83] except that neither the recitals nor

11 Am. Rep. 432, and note; Hill *v.* Mendenhall, 21 Wall. 454.

A petition for removal to the federal court is not equivalent to a general appearance or a submission to the jurisdiction. Du Pont *v.* Abel, 81 Fed. Rep. 534.

[81] Silver Lake Bank *v.* Harding, 5 Ohio, 545; Tiler's Exr. *v.* Winslow, 15 Ohio St. 364; Stockwell *v.* Coleman, 10 Id. 33; Kuhn *v.* Millers' Adm., 1 Wright (Ohio), 127; Dragoo *v.* Graham, 9 Ind. 212.

[82] No greater. Public Works *v.* Columbia College, 17 Wall. 529.

Action lies to enforce a decree of a sister state for a fixed sum of money due and payable by way of alimony. Wells *v.* Wells, 209 Mass. 282, 95 N. E. Rep. 845, 35 L. R. A. N. S. 561 and cases cited.

But a decree for future payments which is subject to modification by the court of original jurisdiction is not enforcible in another state. Israel *v.* Israel, 148 Fed. Rep. 576, 79 C. C. A. 32, 9 L. R. A. N. S. 1168, 8 Ann. Cas. 697.

Nor is a decree for accrued installments where no sum has been determined as immediately due and the decree is subject to modification. Hunt *v.* Monroe, 32 Utah, 428, 91 Pac. Rep. 269, 11 L. R. A. N. S. 249. See also Lynde *v.* Lynde, 162 N. Y. 405, 56 N. E. Rep. 979, 76 Am. St. Rep. 332, 48 L. R. A. 679; Lydne *v.* Lynde, 181 U. S. 183, 21 S. Ct. 555, 45 L. ed. 810.

But where the decree for installment payments is not subject to modification, it will be enforced by a sister state. Mayer *v.* Mayer, 154 Mich. 386, 117 N. W. Rep. 890, 129 Am. St. Rep. 477, 19 L. R. A. N. S. 245, and cases cited.

[83] See Edwards *v.* Jones, 113 N. C. 453, 18 S. E. Rep. 500, U. S. R. S., § 905, U. S. Comp. Stat., § 1519; Mills *v.* Duryee, 7 Cranch, 484; any statutes of the State where it is set up, notwithstanding. Christmas *v.* Russell, 5 Wall. 302. The record of a foreign judgment is *prima facie* evidence of an indebtedness, and in the absence of proper plea and proof to overcome the presumption in the defendant's favor, it is sufficient to sustain an action of debt. Tourigny *v.* Houle, 88 Me. 406, 34 Atl. Rep. 158. The judgment-roll of another state court or an authenticated copy of it, is evidence of all that it properly contains, including the judgment, and is, at least, *prima facie* evidence that the judgment was properly rendered and entered so as to have effect. In re Ellis' Estate, 55 Minn. 401, 43 Am. St. Rep. 514, 56 N. W. Rep. 1056.

The courts of one state are not

the proof, contained in the record, of any jurisdictional fact, are conclusive.[84] Unless so brought within the constitutional clause, the judgment of a sister State is merely *prima facie* evidence.[85] The faith and credit thus secured extends not only to the form of the record, but to its effect as an adjudication;[86] not, however, to entitle the party to the remedies of enforcement given only by the law of the State where it was recovered.[87]

27. Justice's Judgments.

Common-law proof may be resorted to;[88] and in such case plaintiff should prove the statute under which the

charged with knowledge of the laws of another state and they must be proved as facts. Leathe *v.* Thomas, 218 Ill. 246, 75 N. E. Rep. 810, 4 Ann. Cas. 79, rehearing denied 233 Ill. 430, 84 N. E. Rep. 481.

[84] Thompson *v.* Whitman, 18 Wall. 468. *Contra*, Burtners *v.* Keran, 24 Gratt. 42. The English rule adopted in some of the States that the judgment imports absolute verity even as to jurisdictional statements, can have no extra-territorial force, even under the full faith and credit clause of the constitution. Id. *Contra*, Logansport Gaslight Co. *v.* Knowles, 2 Dill. C. Ct. 421. Some authorities concede conclusive effect to an express adjudication of a jurisdictional fact, or to proof embodied in the record, which they deny to recitals. See Watson *v.* New England Bank, 4 Metc. (Mass.) 343; Hall *v.* Williams, 6 Pick. 232; Aldrich *v.* Kenney, 4 Conn. 570.

The action of the court of original jurisdiction in overruling a motion "to quash service and dismiss the action" cannot be reviewed in an action in another jurisdiction on the judgment. Am. Mut. Life Ins. Co. *v.* Mason, 159 Ind. 15, 64 N. E. Rep. 525.

[85] Taylor *v.* Brown, 30 N. H. 78, 97; Kean *v.* Rice, 12 Serg. & R. 203; Ellsworth *v.* Barstow, 7 Watts (Penn.), 314. Compare Gleason *v.* Dodd, 4 Metc. (Mass.) 333; Roberts *v.* Hodges, 16 N. J. Eq. 299.

[86] Crapo *v.* Kelly, 16 Wall. 610.

[87] Brengle *v.* McClellan, 7 Gill & J. 434.

But the fact that the law of the jurisdiction where the judgment was rendered provides a different manner of enforcing it from that of the jurisdiction where action is brought on such judgment does not disentitle it to full faith and credit. Sistare *v.* Sistare, 218 U. S. 1, 30 S. Ct. 682, 54 L. ed. 905, 28 L. R. A. N. S. 1068, 20 Ann. Cas. 1061.

[88] McElfatrick *v.* Taft, 10 Bush (Ky.), 160; Graham *v.* Grigg, 3

court was held, and that the justice had jurisdiction of the subject and of defendant's person.[89] A mode of proving justice's judgments of a sister State is provided by the statute in New York[90] and some other Sates. If there is a record, and a clerk, or the justice is, by law, clerk,[91] they may be proved with better effect under the act of Congress.

28. Former Adjudication.

A decision of the court of the sister State, against the grounds alleged in impeachment of a judgment, is available as *res adjudicata*.[92]

Harr. (Del.) 408; Bissell *v.* Edwards 5 Day (Conn.), 363.

In some states the entry in the docket of a justice of the peace of the verdict and the costs as taxed alone constitute the judgment. Smith *v.* Petrie, 70 Minn. 433, 73 N. W. Rep. 155.

[89] Thomas *v.* Robinson, 3 Wend. 267; Cole *v.* Stone, Hill & D. Supp. 360; Betts *v.* Bagley, 12 Pick. 572.

Where parties between whom no action is pending appear before a justice of the peace for the purpose of confessing judgment, he has no jurisdiction to enter the judgment unless the provisions of the code regulating such confessions are complied with. Rowe *v.* Peckham, 30 N. Y. App. Div. 173, 51 N. Y. Supp. 889.

[90] N. Y. Code Civ. Pro., §§ 948, 951. See paragraphs 2, 15, &c.

[91] Hutchins *v.* Gerrish, 52 N. H. 205, s. c., 13 Am. Rep. 19; Carpenter *v.* Pier, 30 Vt. 81; Tomlin *v.* Wood, 125 Iowa, 367, 101 N. W. Rep. 135.

A transcript of the justice's docket setting forth the proceedings of his court generally, is admissible where his jurisdiction has been established. Kerstette *v.* Thomas, 36 Wash. 620, 79 Pac. Rep. 290.

The entries in the justice's docket properly appearing therein, are evidence of the facts so stated. Goldstein *v.* Fred Krug Brewing Co., 62 Neb. 728, 87 N. W. Rep. 958.

Where the justice's docket is required to be kept by law, it imports verity to the same extent as the record of any court commonly designated as a court of record. Downey *v.* People, 117 Ill. App. 591.

The entry of the judgment on the justice's docket must be taken as conclusive evidence of the facts therein recited. See also Boettcher *v.* Bock, 74 Ill. 332.

In an action on a judgment of a justice of the peace of another state, a plea which goes to the merits is bad. Banister *v.* Campbell, 138 Cal. 455, 71 Pac. Rep. 703, 504.

[92] Dobson *v.* Pearce, 12 N. Y.

29. Appeal Pending.

Proof that an appeal is pending does not bar the action, without proof that, by the law of the other State, such appeal stays proceedings.[93] The court may take judicial notice of the law,[94] or it may be proved.[95]

30. Limitations.

The statute of limitations of the State in whose court the action is brought, applies.[96] But the presumption of payment by the law of the State where the judgment was recovered, avails.[97]

156; McLaren *v.* Kehler, 23 La. Ann. 80, s. c., 8 Am. Rep. 591.

[93] Faber *v.* Hovey, 117 Mass. 107, s. c., 19 Am. Rep. 398; Taylor *v.* Shew, 39 Cal. 536, s. c., 2 Am. Rep. 478; Stockman Bank *v.* Weins, 12 Okla. 502, 71 Pac. Rep. 1073.

It is not necessary for the plaintiff to allege that no appeal has been taken or that the time to appeal has expired. A. Coolot Co. *v.* Kahner, 72 C. C. A. 248, 140 Fed. Rep. 836; Chaquette *v.* Ortet, 60 Cal. 594.

[94] Paine *v.* Schenectady, 11 R. I. 411, s. c., 5 Centr. L. J. 517.

[95] Holton *v.* Gleason, 26 N. H. 501.

[96] Napier *v.* Gediere, 1 Speers' Eq. (So. Car.) 215; Estes *v.* Kyle, Meigs (Tenn.), 34; State *v.* Virgin, 36 Geo. 388; McArthur *v.* Goddin, 12 Bush, 274; Longland *v.* Davidson, 3 Clark Penn. L. J. R. 377; Arkansas City First Nat. Bank *v.* Hazie, 27 R. I. 190, 61 Atl. Rep. 171, 8 Ann. Cas. 1123. See also Bauserman *v.* Charlott, 46 Kan. 480, 26 Pac. Rep. 1051; Newman *v.* Eldridge, 107 La. 315, 31 So. Rep. 688. Fields *v.* Mundly, 106 Wis. 383, 82 N. W. Rep. 343, 80 Am. St. Rep. 39.

Statutes limiting the time within which action must be brought on a judgment of a sister state do not deprive that judgment of the full faith and credit to which it is entitled under the constitution. Leathe *v.* Thomas, 218 Ill. 246, 75 N. E. Rep. 810, 4 Ann. Cas. 79.

If the complainant relies on an exception such as absence from the State to take a case out of the statute of limitations, the burden is upon him to prove such exception. Belden *v.* Blackman, 124 Mich. 667, 83 N. W. Rep. 616.

A judgment of a sister state must be considered as a "debt of record and a verity" not as a simple contract debt. Little *v.* McVey (N. J. 1900), 47 Atl. Rep. 61.

[97] Baker *v.* Stonebraker, 36 Mo. 338, 348.

Where an order of revivor was granted in the State of original jurisdiction which operated to

IV. UNITED STATES COURTS AND THEIR JUDGMENTS

31. Judgments of Those Courts Proved Elsewhere.

The act of Congress [98] permits,[99] but does not require [1] such a judgment to be authenticated as there prescribed. It may be received in any State court, when authenticated in the ordinary method practiced in the courts of the State within whose limits it was recovered.[2] By the New York

give new life to a dormant judgment, the judgment may be enforced in a sister state during the life of the order of revivor. Leman *v.* Cunningham, 12 Idaho, 135, 85 Pac. Rep. 212.

If the judgment does not, by the law of the state where rendered, becomeo perative for a stated time after such rendition, this time should be deducted in computing the period of limitations in an action on the judgment in another State. Gaumer *v.* Terrel, 65 Kan. 15, 68 Pac. Rep. 1071.

[98] Paragraph 15.

[99] Helen *v.* Shackleford, 5 J. J. Marsh. (Ky.) 390; Redman *v.* Gould, 7 Blackf. (Ind.) 361; Buford *v.* Hickman, Hemp. 232. An authentication of the record of a Circuit Court of the United States is sufficiently made to appear by a certificate of the clerk and judge of the court conforming to the requirements of § 905 of the Revised Statutes, although that section does not in terms include the records and judicial proceedings of the Federal courts. O'Hara *v.* Mobile, &c. R. Co., 40 U. S. App. 471, 76 Fed. Rep. 718.

Although the requirements of § 905 of the Revised Statutes do not in terms include the records and judicial proceedings of the courts of the United States, it has been the uniform practice to follow them in authenticating the records and judicial proceedings of these courts. O'Hara *v.* Mobile, etc., R. Co., 76 Fed. Rep. 718, 22 C. C. A. 512. See also National Acc. Soc. *v.* Spiro, 94 Fed. Rep. 750, 37 C. C. A. 388.

[1] Turnbull *v.* Payson, 95 U. S. (5 Otto) 418; McGregor *v.* Hampton, 70 Mo. App. 98; Allison *v.* Robinson, 136 Ala. 434, 34 So. Rep. 966.

[2] Jenkins *v.* Kinsley, 3 Johns. Cas. 474, s. c., Col. & C. Cas. 136; Turnbull *v.* Payson (above).

The Act of Congress as to authentication of records does not apply to the Federal Courts. Consequently a judgment of such a court is admissible even if attested only by the certificate of the clerk with the seal of the Federal Court. McGregor *v.* Hampton, 70 Mo. App. 98; Allison *v.* Robinson, 136 Ala. 434 34 So. Rep. 966.

"A judgment of the Circuit Court of the United States for the Southern District of California

statute, any record or proceeding of a court of the United States, may be proved by a copy certified by the clerk or officer in whose custody it is required by law to be.[3] In a State court, the judgment of a United States court is open to inquiry in respect to jurisdiction; but, jurisdiction appearing, is conclusive on the merits.[4]

32. The Practice in the United States Courts.

The record or proceeding of any court of the United States may be proved in any other court of the United States by the certificate of the clerk of the court where it was recovered, with the seal of the court, without the certificate of a judge.[5] That of a State court may be proved under the act of Congress,[6] or (perhaps with less effect) in any common-law mode. If the United States court is a circuit court sitting in the same State as the court whose judgment is offered, a certificate of the clerk and seal of the court is a sufficient authentication.[7]

stands in respect to its proof and also as to its essential nature, in any court of Connecticut, on the same footing as if it had been rendered by another court of this State." Barber *v.* International Co. of Mexico, 74 Conn. 652, 92 Am. St. Rep. 246, 51 Atl. Rep. 857, and cases cited.

A certified copy of the order of a federal court adjudging a person a bankrupt is a judgment and competent evidence. Rosenfeld *v.* Siegfried, 91 Mo. App. 169.

A record of the proceedings of a United States District Court held within the State of Indiana is admissible in that State, if authenticated as required with respect to the records of a State Court. Bradford *v.* Russell, 79 Ind. 64.

[3] N. Y. Code Civ. Pro., § 943. Seal was formerly required.

An order confirming a composition in bankruptcy is sufficiently proved by a copy thereof certified by the clerk of the court under his seal. Mandell *v.* Levy, 47 Misc. 147, 93 N. Y. Supp. 545.

[4] McCauley *v.* Hargroves, 48 Geo. 50, s. c., 15 Am. Rep. 660.

[5] Turnbull *v.* Payson, 95 U. S. (5 Otto) 424; National Acc. Soc. *v.* Spiro, 94 Fed. Rep. 750, 37 C. C. A. 388. See also Henderson *v.* Denious, 186 Fed. Rep. 100, 108 C. C. A. 212.

[6] Paragraph 16.

[7] Mewster *v.* Spalding, 6 McLean, 24; Turnbull *v.* Payson (above).

V. FOREIGN JUDGMENTS

33. Mode of Proof.

Proceedings of a court of a foreign State or province cannot be proved by a mere certified copy under seal.[8] They may be proved by sworn copy,[9] by an exemplification,[10] or in any mode prescribed by the law of the forum.[11] If

[8] Delafield *v.* Hand, 3 Johns. 310. Compare Packard *v.* Hill, 7 Cow. 434; Alivon *v.* Furnival, 1 C. M. & R. 277; Alves *v.* Banbury, 4 Campb. 28.

"Sections 952 and 953 of the Code of Civil Procedure (New York) relate only to the authentication of copies of records, etc., of the courts of foreign countries." Trebilcox *v.* McAlpine, 46 Hun, 469, 11 N. Y. St. 847.

See also Van Deventer *v.* Mortimer, 56 Misc. 650, 107 N. Y. Supp. 564; Rich *v.* Cohen, 61 Misc. 148, 114 N. Y. Supp. 672.

A judgment of a court in British Columbia authenticated by the certificate of the district registrar, with an impress of what appeared to be the seal of that court, and by the certificate of the United States consul general in Vancouver to the effect that the said registrar was duly appointed and commissioned, was held to be improperly authenticated and therefore inadmissible. Am. Surety Co. *v.* Sandberg, 225 Fed. Rep. 150.

[9] Lincoln *v.* Battelle, 6 Wend. 445, but not by a copy of a copy. Id.

[10] Mahurin *v.* Bickford, 6 N. H. 567; Church *v.* Hubbart, 2 Cranch, 238; Hutchins *v.* Gerrish, 52 N. H. 205, 13 Am. Rep. 19.

A foreign judgment may be proved by a copy thereof, duly authenticated by the certificate of an officer properly authorized by the law to give a copy. Gunn *v.* Peakes, 36 Minn. 177, 30 N. W. Rep. 466, 1 Am. St. Rep. 661.

[11] See Linton *v.* Baker, 1 Neb. (Unof.) 896, 96 N. W. Rep. 251. By the New York statute (Code Civ. Pro., § 952), a copy of a record, or other judicial proceeding of a court of a foreign country (or province; Lazier *v.* Westcott, 26 N. Y. 146), is admissible when authenticated: 1. By the attestation of the clerk of the court, with the seal of the court affixed, or of the officer in whose custody the record is legally kept, under the seal of his office: with, (2) a certificate of the chief judge or presiding magistrate of the court, to the effect that the person so attesting the record is the clerk of the court; or that he is the officer in whose custody the record is required by law to be kept; and that his signature to the attestation is genuine; and, (3) the certificate under the great or principal seal of the government (colonial

in a foreign language, a translation is competent,[12] if sworn to by a witness.[13] The court may take judicial notice as to whether a foreign court proceeds according to the course of the common law.[14]

34. Effect.

The admissibility of the document does not determine

or national), under whose authority the court is held, of the secretary of State, or other officer having the custody of that seal, to the effect that the court is duly constituted, specifying generally the nature of its jurisdiction; and that the signature of the chief judge or presiding magistrate, to the certificate specified in the last subdivision, is genuine.

A copy attested by the seal of the court, in which it remains, is also admissible upon due proof: 1. That it has been compared by the witness with the original, and is an exact transcript of the whole of the original; 2. That the original was, when the copy was made, in the custody of the clerk of the court, or other officer legally having charge of it; and 3. That the attestation is genuine.

[12] Hill *v.* Packard, 5 Wend. 376.

[13] Vandervoort *v.* Smith, 2 Cai. 155.

The jurisdiction of the high court of justice of the Province of Ontario, Canada, was held established by a book appearing and purporting to be the last revision of the Statutes of the Legislature of the Province of Ontario and identified by a solicitor of that province. Grant *v.* Birrell, 35 Misc. 768, 72 N. Y. Supp. 366. See also Hecla Powder Co. *v.* Sigua Iron Co., 157 N. Y. 437, 52 N. E. Rep. 650.

[14] Lazier *v.* Westcott, 26 N. Y. 146.

"But this extends no farther than that the general system of civil jurisprudence prevails, without taking notice of details." Banco De Sonora *v.* Bankers' Mut. Casualty Co. (Iowa, 1903), 95 N. W. Rep. 232.

"The court will take judicial notice of the fact that the common law is not and never was in force in France." Matter of Hall, 61 App. Div. 266, 70 N. Y. Supp. 406.

The common law of a sister state will be presumed to be the same as that of the forum in the absence of proof to the contrary. Crandall *v.* Great Northern Ry., 83 Minn. 190, 86 N. W. Rep. 10, 85 Am. St. Rep. 458.

The Nebraska courts will not take judicial notice of the statutes of a sister state but in the absence of evidence to the contrary will presume the law to be the same as in Nebraska. People's Build., etc., Ass'n *v.* Backus, 2 Neb. (Unof.) 463, 89 N. W. Rep. 315.

It seems that the courts of Louisiana will take judicial notice

what effect it has as evidence.[15] The record may be contradicted as to all jurisdictional facts.[16] If jurisdiction depends on even personal service on a non-resident of the foreign state made without its territorial limits, it is not evidence of debt against him here,[17] even though he gave a personal admission of service.[18]

of the existence of the common law in a sister state. Rush *v.* Landers, 107 La. Ann. 549, 32 So. Rep. 95, 57 L. R. A. 353.

[15] N. Y. Code Civ. Pro., § 954. This is also true of a judgment of a sister state. Whitman *v.* Hitt, 75 Ark. 461, 87 S. W. Rep. 1032. See also Field *v.* Cain, 9 N. Mex. 283, 50 Pac. Rep. 327.

[16] Hall *v.* Lanning, 91 U. S. (1 Otto) 165. Including the attorney's authority to appear. Arnott *v.* Webb, 1 Dill. C. Ct. 362.

A defendant who voluntarily appears in an action in a Canadian court and answers, though the answer in terms reserves the right to object to the jurisdiction of the court, is precluded from objecting that the court did not acquire jurisdiction of his person. Grant *v.* Birrell, 35 Misc. 768, 72 N. Y. Supp. 366.

[17] Bischoff *v.* Wethered, 9 Wall. 814.

[18] Scott *v.* Noble, 72 Penn. St. (22 P. F. Smith) 115 s. c., 13 Am. Rep. 663.

As to conclusiveness of judgments of the courts of foreign nations, see Am. Mutual Life Ins. Co. *v.* Mason, 159 Ind. 15, 64 N. E. Rep. 525.

CHAPTER XXX

ACTIONS AGAINST BAILEES, AGENTS, &c.

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I. GENERAL PRINCIPLES

1. Grounds of Action.

The pleadings and evidence involve one or more of three elements: 1. Breach of express contract. 2. Breach of implied duty. 3. Conversion.

If the action is founded on express contract to deliver, evidence of breach is *prima facie* enough (though excuse may be shown by the bailee); and evidence of actual negligence, or of conversion, is competent, so far as involved in proving the actual breach of contract.[1]

If the action is founded on breach of implied duty, the degree required of proof of negligence or other cause of loss varies with the nature of the bailment and the degree of diligence required. In this class of cases the contract, if any, must be proved in order to define the duty; and evidence of conversion is competent for the same purpose as in cases of express contract.

If the action is founded on conversion, the contract must be proved if necessary to define the duty, otherwise it is not essential; but the action is not sustained by proof of mere breach of contract or implied duty, or of negligence.[19]

[19] These principles I deem sufficiently settled under the new procedure; although not hitherto universally recognized. The modes of proving negligence and conversion respectively are stated in other chapters.

An uncertainty on the face of the complaint as to which of these is the gist of the action, is to be determined by the court with reference to the rules affecting variance.[20]

2. Contract of Bailment.

If the action is for a wrongful use contrary to express contract, proof of the contract is necessary.[21] A written contract may be proved, under a general allegation not indicating writing.[22] Evidence of the bailee's uniform usage to give a written receipt xpressing terms of bailment, may be sufficient to require foundation to be laid before admitting oral evidence of terms.[23] A mere receipt not expressing terms, is not the exclusive primary evidence of the delivery.

3. Oral Evidence to Vary Writing.

The general rule already stated[24] protects written instructions,[25] and words of contract contained in a receipt,[26]

[20] See chapter XV, paragraph 2 and chapter XVI, paragraph 1, of this vol., and the chapter on Actions for Deceit.

[21] Smith *v.* Rollins, 11 R. I. 464, 23 Am. Rep. 509.

A bailee is not an insurer unless he so contracts, and consequently a bailee's agreement to deliver the goods bailed is not an agreement insuring their delivery. Standard Brewery *v.* Bemis, etc., Malting Co., 171 Ill. 602, 49 N. E. Rep. 507.

[22] Fiedler *v.* Smith, 6 Cush. (Mass.) 336, 340.

A bailment is for hire where the bailment is a part of the bailee's trade, although not charged for directly. Sulpho-Saline Bath Co. *v.* Allen, 66 Neb. 295, 92 N. W. Rep. 354, 1 Ann. Cas. 21.

[23] Ashe *v.* De Rosset, 8 Jones (N. C.) L. 240.

[24] Chapter XVI, paragraph 8 and chapter XIX, paragraph 14 of this vol.

[25] Richardson *v.* Churchill, 5 Cush. 425; Dunlop *v.* Monroe, 7 Cranch, 242.

[26] Stapleton *v.* King, 33 Iowa, 28, s. c., 11 Am. Rep. 109, and cases cited; Wood *v.* Whiting, 21 Barb. 190.

"The contractual clauses of a bill of lading are immune from variation or attack by parol testimony, except for fraud, accident or mistake, but the mere receipt for the goods therein involved is in no sense conclusive and the carrier is permitted, if it can, to show that, notwithstanding the recital of a receipt of the goods, the goods were in truth and in fact never delivered to it." Milne *v.* Chicago, etc., Railroad Co., 155 Mo. A. 465, 135 S. W. Rep. 85.

if binding as a contract. A stipulation to return cannot be varied by oral evidence of contemporaneous agreement as to risk; [27] but a mere memorandum of length of time and rate of payment, does not exclude a separate oral agreement as to risk; [28] nor does a written power exclude evidence of a separate and not inconsistent [29] agreement as to the conditions, in respect to time, price, etc., on which it might be executed.[30] A receipt expressed to be for storage cannot be shown by parol to represent a sale.[31] A mere receipt without indicating the nature of the transaction may be explained or contradicted.[32] A warehouse receipt is usually subject to oral explanation unless plaintiff has made advances or incurred responsibility on the faith of it.[33] If the terms of the receipt are ambiguous,[34]—as for instance "received on account of A. [the plaintiff], for B."—evidence of usage is admissible to explain.[35]

[27] Brown *v.* Hitchcock, 28 Vt. 452.

[28] Jeffrey *v.* Walton, 1 Stark. R. 267.

[29] Dykers *v.* Allen, 7 Hill, 497, affi'g 3 Id. 593; Vail *v.* Rice, 5 N. Y. 155; Markham *v.* Jaudon, 41 N. Y. 235, rev'g 49 Barb. 462, s. c., 3 Abb. Pr. N. S. 286.

[30] Clarke *v.* Meigs, 10 Bosw. 337.

[31] Wadsworth *v.* Allcott, 6 N. Y. 64.

[32] Robinson *v.* Frost, 14 Barb. 536.

A deposit slip issued by a bank is within this rule. Andrews *v.* State Bank, 9 N. Dak. 325, 83 N. W. Rep. 235.

[33] Second Nat. Bank of Toledo *v.* Walbridge, 19 Ohio St. 419; Bebee *v.* Moore, 3 McLean, 387. Compare Peck *v.* Armstrong, 38 Barb. 215; Hoyt *v.* Baker, 15 Abb. Pr. N. S. 405; McCombie *v.* Spader, 1 Hun, 193.

[34] Agawam Bank *v.* Strever, 18 N. Y. 502; Harris *v.* Rathbun, 2 Abb. Ct. App. Dec. 326.

[35] Bowman *v.* Horsey, 2 M. & Rob. 85.

"Where there is an express agreement between parties, but it is silent, or at least ambiguous as to the compensation to be paid for the work contracted to be done, or where there is no express agreement at all, parol evidence is admissible to show a certain custom or usage of the business and of the locality, known to the parties, or so general and well settled as to raise the presumption that the parties in dealing with each other did so with a silent reference to the usage, and a tacit understanding that their rights and responsibilities should be determined by it."

4. Plaintiff's Title; Bailee's Estoppel.

The plaintiff's title is sufficiently proved by the contract. A bailee, or agent, cannot dispute the original title of the bailor or principal from whom he received the thing, [36] even by purchasing an adverse title.[37] But he may show that his bailor parted with his interest in the property subsequent to the bailment.[38]

5. Eviction.

Eviction by title paramount or its equivalent, suffices to terminate the relation of bailee which raises this estoppel; but notice of adverse claim does not.[39] Even where the action is on a contract,[40] the better opinion is that the bailee is excused by showing that without his fault, act or connivance, the thing was seized and taken from his possession, by virtue of regular and valid legal process,[41] out of a court

Hansbrough *v.* Neal, 94 Va. 722, 27 S. E. Rep. 593.

[36] Vosburgh *v.* Huntington, 15 Abb. Pr. 254; Bricker *v.* Stroud, 56 Mo. App. 183; Marvin *v.* Elwood, 11 Paige, 365, or whose title he has recognized by issuing a receipt, Gosling *v.* Birnie, 7 Bing. 339, "The rule, as laid down in this state, is, that the bailee cannot set up the title of the third person against his bailor, however tortious the possession of the latter, unless the owner has claimed the property and the bailee has yielded to the claim." Sedgwick *v.* Macy, 24 N. Y. App. Div. 1, 49 N. Y. Supp. 154; and see chapter XXVIII, paragraph 12 of this vol. The contrary said of a pledge in Cheesman *v.* Exall, 6 Exch. 341.

[37] Nudd *v.* Montanye, 38 Wis. 511, 20 Am. Rep. 25; Hampton *v.* Swisher, 4 N. J. L. 74. And this estoppel inures in favor of the bailor's assignee, &c. Marvin *v.* Smith, 56 Barb. 600; Dixon *v.* Hammond, 2 Barnw. & A. 310.

[38] See Marvin *v.* Ellwood, 11 Paige, 365; Bates *v.* Stanton, 1 Duer, 79, s. c., 10 N. Y. Leg. Obs. 216.

[39] Biddle *v.* Bond, 6 Best. & S. 225; and see Lund *v.* Seamen's Bank for Savings, 37 Barb. 129.

"When the bailee has actually delivered the property to the true owner, having a right to the possession, on his demand, it is a sufficient defense against the claim of the bailor." Sedgwick *v.* Macy, 24 App. Div. 1, 49 N. Y. Supp. 154.

[40] As distinguished from conversion. Edwards *v.* White Line Co., 104 Mass. 159, 6 Am. Rep. 213.

[41] Ohio & Miss. Ry. Co. *v.* Yoke, 51 Ind. 181, s. c., 19 Am.

having jurisdiction,[42] either against the bailor,[43] or a third person,[44] and that he gave immediate notice to the bailor.[45] In such case he is not bound to show the merits of the claim, or correctness of the decision on which the process was founded,[46] but only its regularity and validity. The process itself is the primary evidence, and the oral admission of the plaintiff is not a substitute for it.[47]

If the bailee *voluntarily* surrenders, or fails to give such notice, he assumes the burden of showing that he was evicted by legal title paramount to that of the bailor.[48] If he shows actual delivery on the demand of the true owner, and that the latter had a right to the immediate possession, paramount to that of the bailor, neither legal proceedings nor proof of fraud are necessary.[49]

An allegation of *conversion* is not sustained by evidence that without the bailee's act, fault or connivance, the thing was taken from his possession by virtue of regular and valid legal process; but it is sustained by evidence that while retaining possession he refused proper demand, on the pretext

Rep. 727, and cases cited, 4 Southern Law Rev. N. S. 465; Glass *v.* Hauser, 40 Misc. 661, 83 N. Y. Supp. 177.

[42] Barnard *v.* Kobbe, 54 N. Y. 516.

The burden is on the bailee to show the validity and lawfulness of the seizure. Walter A. Wood Harvester Co. *v.* Dobry, 59 Neb. 590, 81 N. W. Rep. 611.

[43] Edson *v.* Weston, 7 Cow. 278; Stamford Steamboat Co. *v.* Gibbons, 9 Wend. 327.

[44] Cook *v.* Holt, 48 N. Y. 275, 4 South. Law Rev. N. S. 465.

[45] Ohio & Miss. Ry. Co. *v.* Yoke (above); Cook *v.* Holt (above).

It seems that a reasonable effort to notify the bailor is sufficient. Glass *v.* Hausser, 40 Misc. 661, 83 N. Y. Supp. 177.

[46] *Contra*, Mierson *v.* Hope, 2 Sweeny, 561.

[47] Jenner *v.* Joliffe, 6 Johns. 9. For the mode of proof, see Chapter XXIX. Further proof of any proceedings upon it is not necessary. Hirschfeldt *v.* Fanton, Anth. N. P. 361.

[48] Welles *v.* Thornton, 45 Barb. 390.

[49] The Idaho, 93 U. S. (3 Otto) 575, 579, 11 Blatchf. 218. Cases to the contrary may be found in the books. See Bernard *v.* Kobbe, 3 Daly, 35, affi'd on other grounds in 54 N. Y. 516; Mierson *v.* Hope, 2 Sweeny, 561.

that it was bound in his hands by process against a third person.[50]

6. Burden of Proof as to Breach of Duty.

If the action is founded solely on an express contract to return, the plaintiff must prove the contract and the breach or failure to redeliver, and this is enough;[51] the burden then rests on defendant to show due diligence or a loss for which he is not liable.[52] If the action is founded on negligence or other tort, plaintiff, in addition to the duty, must prove the tort. Slight proof, however, is sufficient to sustain an inference of negligence.[53] Whether evidence of the loss or the

[50] Rogers *v.* Weir, 34 N. Y. 463.

[51] Dinsmore *v.* Abbott, 89 Me. 373, 36 Atl. Rep. 621; Merchants' Bank of Macon *v.* Rawls, 7 Ga. 191.

Where the plaintiff bailed goods to the defendant, the former does not have a right to the possession of the goods during the period of the bailment unless the contract of bailment is shown to have been broken by the defendant. Heilman *v.* McKinstry, 18 Pa. Super. Ct. 70.

[52] Edw. on B., § 62; Whart. on Neg., § 422; Massillon Engine, etc., Co. *v.* Akerman, 110 Ga. 570, 35 S. E. Rep. 635; Snell *v.* Cornwell, 93 App. Div. 136, 87 N. Y. Supp. 1; Hunter *v.* Ricke Bros., 127 Iowa 108, 102 N. W. Rep. 826; Brewster *v.* Weir, 93 Ill. App. 588; Davis *v.* Tribune Job-Printing Co., 70 Minn. 95, 72 N. W. Rep. 808. See also Emmerling *v.* First Nat. Bank, 97 Fed. Rep. 739, 38 C. C. A. 399. "The plaintiff alleges that the defendants refused to deliver to him the property stored upon demand. The burden was upon the plaintiff, in the first instance, to prove such a refusal. If this had been done, he would have made out a *prima facie* case, and it would then have been incumbent upon the defendants to explain the cause of their refusal, such as by showing the loss of the property by theft, or burglary, or its destruction by fire or otherwise. Then it would have been incumbent upon the plaintiff to show that the loss or destruction occurred by reason of the defendant's failure to exercise such degree of care of the property as the law requires of a gratuitous bailee." Dinsmore *v.* Abbott, 89 Me. 373, 374–375, 36 Atl. Rep. 621.

[53] Wintringham *v.* Hayes, 144 N. Y. 1, 38 N. E. Rep. 999; The J. Russell Mfg. Co. *v.* N. H. Steamboat Co., 50 N. Y. 121; Whart. on Neg., § 422.

A charge that, the loss of the goods by the bailee being admitted, the burden is upon the bailee to show that such loss was not caused

non-delivery of the thing throws on a bailee the burden of proving diligence depends on the degree of his duty.[54] In case of bailees for hire generally, such as common carriers, forwarders,[55] warehousemen[56] (including carriers holding possession as warehousemen),[57] collecting bankers,[58] and innkeepers, non-delivery[59] without anything to indicate a cause of loss or injury consistent with due diligence, or return of the thing if in a damaged state without explanation,[60] is sufficient to go to the jury as evidence of negligence.[61]

Evidence that the thing had disapeared from the possession of the bailee, without anything to indicate how, is

by his negligence, is erroneous. The negligence of the defendant, being part of the plaintiff's case, must be proved by him. James *v.* Orrell, 68 Ark. 284, 57 S. W. Rep. 931, 82 Am. St. Rep. 293.

[54] Story on Bailm., §§ 213, 278, 410. The circumstances that the facts were peculiarly within defendant's knowledge, and that such an injury does not usually occur without negligence, may be controlling. Collins *v.* Bennett, 46 N. Y. 490.

A gratuitous bailee for his own benefit will be held to the use of extraordinary care. Apezyuski *v.* Bulkiewicz, 140 Ill. App. 375.

A bailee who expressly so contracts, will be held to an absolute liability for the return of the goods and cannot defend by showing that he was not negligent. Nat. Cash Register Co. *v.* Caillias, 84 N. Y. Supp. 166.

[55] Especially if there is a total failure to account for the property. Bush *v.* Miller, 13 Barb. 481.

[56] Schwerin *v.* McKie, 5 Robt. 404; Arent *v.* Squire, 1 Daly, 347; Claflin *v.* Meyer, 43 Super. Ct. (J. & S.) 7, and cases cited. Otherwise, if the compensation is only for place-room, not a reward for care and diligence (see Schmidt *v.* Blood, 9 Wend. 271); as in the case of a mere wharfinger (Foote *v.* Storrs, 2 Barb. 236; and see Searle *v.* Laverick, L. R. 9 Q. B. 122). As to Safe Deposit Company, see 17 Alb. L. J. 198.

[57] Fairfax *v.* N. Y. Central R. R. Co., 67 N. Y. 11; Cass *v.* Boston, &c. R. R. Co., 14 Allen, 448. *Contra*, Jackson *v.* Sacramento, &c. R. R. Co., 23 Cal. 268.

[58] Chicopee Bank *v.* Philadelphia Bank, 8 Wall. 641.

[59] Especially if without explanation. Boies *v.* Hartford & New Haven R. R. Co., 37 Conn. 272, s. c., 9 Am. Rep. 347.

[60] Funkhouser *v.* Wagner, 62 Ill. 59; Logan *v.* Mathews, 6 Penn. St. 417, Whart. on Neg., § 422.

[61] The language of many authorities to the effect that it throws on the bailee the burden of proving due care is liable to mislead. Plain-

sufficient.[62] As a general rule, plaintiff need not, in the first instance, prove that the thing was free from latent defects when delivered to the bailee.[63]

If plaintiff's evidence goes further, and traces loss or injury to a cause consistent with due diligence on defendant's part—such as fire,[64]—or if defendant shows such a cause, plaintiff must give evidence of negligence, unless he stands upon a contract which holds defendant without that.[65] Where the duty is ordinary care, the happening of an accident of a kind which ordinary care does not suffice to prevent

tiff will be entitled to go to the jury on such evidence, if defendant does not give evidence of the cause of loss (cases above cited); but is not entitled to a ruling, or an instruction to the jury that this evidence shifts the burden of proof respecting negligence. If the complaint is founded on tort, however, plaintiff must give some evidence of the tort. Lamb *v.* Camden & Amboy, &c. R. R. Co., 49 N. Y. 271, rev'g 2 Daly, 454. In an action for damages for failure to feed and properly care for plaintiff's horses, evidence tending to show that they were returned in bad condition by defendant, who had contracted for their keeping, and that such condition was due to want of proper care and food, casts upon the defendant the burden of proving other cause, if there was any, for their condition. Hynes *v.* Hickey, 109 Mich. 188, 66 N. W. Rep. 1090.

[62] Fairfax *v.* N. Y. Central, &c. R. R. Co., 67 N. Y. 11, rev'g 40 Super. Ct. (J. & S.) 128, s. c., again 43 Super. Ct. (J. & S.) 18, affi'd in 73 N. Y. 167.

[63] 1 Whart. Ev. 326, § 362.

[64] Lamb *v.* Camden & Amboy R. R. Co., 46 N. Y. 271, rev'g 2 Daly, 454.

"Proof of the destruction of the automobile by fire having been made, it was incumbent on the plaintiff to prove want of ordinary care, or negligence, on the part of the defendant." Ford Motor Co. *v.* Osburn, 140 Ill. App. 633.

[65] Cass *v.* Boston & Lowell R. R. Co., 14 Allen, 448; Dinsmore *v.* Abbott, 89 Me. 373, 36 Atl. Rep. 621; Polack *v.* O'Brien, 114 N. Y. App. Div. 366, 100 N. Y. Supp. 385.

"It may now be said to be established that, when a bailor shows that goods are delivered to his bailee in good condition and are lost or destroyed or returned in a damaged condition, this fact creates a *prima facie* presumption of negligence; and it thereupon devolves upon the bailee to absolve himself from negligence. But the bailee may acquit himself of the charge of negligence by showing that the loss occurred from a cause which *prima facie* exonerates the bailee from negligence." Yazoo,

is no evidence of negligence, even though the apparatus was within defendant's control.[66]

The presumtion that legal duty has been discharged does not countervail evidence of injury or diminution of the thing intrusted to a bailee for hire.[67]

Fire, without evidence of its cause, is presumed not "the act of God;" [68] but is not presumed to be caused by defendant's negligence.[69] Theft and robbery, in the absence of further evidence, are not *prima facie* proof of negligence.[70] But the bailee's conduct in the hue and cry,[71] and his failure to give prompt notice, is competent.[72] The testimony of the servant in charge of the deposit, that he never delivered it to any one, is not sufficient evidence of theft.[73]

Evidence of independent acts of negligence not connected with the loss is incompetent,[74] except as tending to show the manner in which the business of the bailee was conducted at the time.[75]

etc., Ry. Co. *v.* Hughes, 94 Miss. 242, 47 So. Rep. 662, 22 L. R. A. N. S. 875.

[66] See French *v.* Buffalo, &c. R. R. Co., 2 Abb. Ct. App. Dec. 196.

[67] Arent *v.* Squire, 1 Daly, 347.

While the plaintiff in an action against a bailee must prove the negligence of the latter, still the necessary evidence thereof may be supplied by presumption, and when it appears that the subject of the bailment has been injured or destroyed while in the custody of the bailee by an accident such as in the ordinary course of things does not happen when a bailee uses due care, a presumption of negligence arises which casts upon the bailee the burden of rebutting that presumption. Swenson *v.* Snare, 145 Fed. Rep. 727.

[68] Miller *v.* Steam Nav. Co., 10 N. Y. 431.

[69] Lamb *v.* Camden & Amb. Transp. Co., 4 N. Y. 271, rev'g 2 Daly, 454; Edw. on B., § 236.

[70] Story on B., § 39, and see L. R. 9 Exch. 93, s. c., 8 Moak's Eng. 535, L. R. 9 Q. B. 468, s. c., 10 Moak's Eng. 118; Knights *v.* Piella, 111 Mich. 9, 69 N. W. Rep. 92, 66 Am. St. Rep. 375.

[71] Tompkins *v.* Saltmarsh, 14 Serg., & R. 275.

[72] First National Bank of Carlisle *v.* Graham, 79 P nn. St. 106, s. c., 21 Am. Rep. 49.

[73] Fairfax *v.* N. Y. Central, &c. R. R. Co., 67 N. Y. 11, rev'g 40 Super. Ct. (J. & S.) 128.

[74] First Nat. Bank of Lyons *v.* Ocean Nat. Bank, 60 N. Y. 279.

[75] Dearborn *v.* Union Nat. Bk.,

7. Qualified Refusal.

The statements of the defendant, made at the time of the demand, and excusing and qualifying his refusal to surrender, thus constituting a part of the refusal may be proved in his favor as part of the *res gestæ;*[76] but this does not justify the admission of statements of independent facts.[77]

8. Value and Damage.

The mode of proving value and damage are the same as in an action on *quantum meruit* for the price of goods sold, or the breach of a warranty.[78]

61 Me. 369, and see chapter on NEGLIGENCE.

[76] Gracie *v.* Robinson, 14 Ark. 438; Bennett *v.* Burch, 1 Den. 141; compare Mahone *v.* Reeves, 11 Ala. 345, 351.

[77] Walrod *v.* Ball, 9 Barb. 271.

[78] Chapter XVI, paragraphs 20–23 and 85 of this vol.

The value of an article when new is admissible as evidence of its value when demanded. Gleason *v.* Morrison, 20 Misc. 320, 45 N. Y. Supp. 684.

The measure of damages for an "unwarranted use of the property of another by a bailee is not the value that may be produced by the labor and investment of the wrongdoer combined with such use of the property, but is the value of the use itself and any damage that may be done to the property in so using it, or if the use amounts to a conversion, then the measure of damages will be the value of the property itself." State *v.* State Journal Co., 75 Nebr. 275, 106 N. W. Rep. 434, 9 L. R. A. N. S. 174, 13 Ann. Cas. 254. Where the bailee, a tailor, is given a cloak for the purpose of making alterations and so improperly makes them that the bailor cannot wear it, the measure of damages is not the value of the cloak but the difference between its value in its existing condition and the value which it would have had if the bailee had made proper alterations. May *v.* Georger, 21 Misc. 622, 47 N. Y. Supp. 1057. A bailee of money who refuses to return it according to his contract of bailment is guilty of conversion and his damages include interest for the time it is withheld. Arnold *v.* Sedalia Nat. Bank, 100 Mo. App. 474, 74 S. W. Rep. 1038. Where the bailee does not return the bailed property within a reasonable time he will be liable for the rental value thereof during the period of unreasonable detention but not for prospective profits which the plaintiff would have made on other contracts of rental of which the bailee had no notice at the time of the bailment. Baker, etc., Mfg. Co. *v.* Clayton, 40 Tex.

II. SPECIAL CLASSES OF BAILEES AND AGENTS

9. Gratuitous Bailments.

A delivery to and acceptance by a gratuitous bailee[79] cannot be presumed merely from evidence of the ordinary course of business. Plaintiff must prove a deposit of the goods with defendant, and that he did not restore them, and that the non-restoration was produced by a lack of due diligence on his part. This lack of diligence often may be inferred from the nature of the transaction,[80] but the plaintiff's case must be sufficient to raise some presumption of defendant's fault. Defendant may then show that he was not guilty of gross negligence.[81]

Civ. App. 586, 90 S. W. Rep. 519. Where plaintiff bailed goods to defendant and the latter, by selling them, put it out of the power of the plaintiff to show their value, the defendant will be liable for the value of the best quality of such goods. Goltra *v.* Penland, 42 Oreg. 18, 69 Pac. Rep. 925.

[79] Samuels *v.* McDonald, 11 Abb. Pr. N. S. 344, s. c., 42 How. Pr. 360.

The proprietor of a store owes a duty of due diligence in the protection of the property of its customers and where dressing rooms are provided for persons to leave their clothes while trying on others, the proprietor who does not exercise care in protecting the property left in the dressing rooms will be liable for its loss, provided such property is of the kind or value which a person may reasonably be supposed to carry with him. Hunter *v.* Reed, 12 Pa. Super. Ct. 112.

"The bailment does not become one for hire merely because the motive inducing the bailee to act gratuitously may be an expectation of incidental advantage from such course. Com. *v.* Carlisle Deposit Bank, 94 Pa. 409." Bissell *v.* Harris, 1 Neb. (Unof.) 535, 95 N. W. Rep. 779.

A person is not a bailee nor liable as such without his assent to become such. Belmont Coal Co. *v.* Richter, 31 W. Va. 858, 8 S. E. Rep. 609.

[80] Doorman *v.* Jenkins, 2 Adolph. & Ell. 256.

A gratuitous bailee is liable only for gross negligence. Belmont Coal Co., *v.* Richter, 31 W. Va. 858, 8 S. E. Rep. 609; Texas Cent. R. R. Co. *v.* Flanry, 45 S. W. Rep. 214; Bissell *v.* Harris, 1 Neb. (unof.) 535, 95 N. W. Rep. 779. Slight care required, De Lemos *v.* Cohen, 28 Misc. 579, 59 N. Y. Supp. 498. A gratuitous bailee for his own benefit will be held to the duty of extraordinary care. Apczynski *v.* Butkiewicz, 140 Ill. App. 375.

[81] Whart. on Neg., §§ 430, 477,

The bailee's declarations at and immediately after the loss are competent in his favor as part of the *res gestæ*.[82] A presumption of gross negligence is usually repelled by evidence that the bailee took the same care as of things of his own;[83] but recklessness in care of his own does not excuse.[84]

The fact that he was known to bailor to be a person of incapacity is revelant.[85]

10. Attorneys.

A general receipt, given by an attorney, for an evidence of debt already due, raises a presumption, not conclusive, that he received it in his capacity of attorney, for the purpose of collection;[86] and a receipt for collection imports

citing Perry *v.* Roberts, 3 Ad. & El. 118; Garside *v.* Proprietor, 4 T. R. 581, and other cases.

A gratuitous bailee who shows that the goods bailed have been stolen, throws back on the bailor the burden of showing that the bailee was negligent. Smith *v.* Elizabethport Banking Co., 69 N. J. L. 288, 55 Atl. Rep. 248.

[82] McNabb *v.* Lockhart, 18 Geo. 496, 508; Lampley *v.* Scott, 24 Miss. 528.

[83] Story on B., §§ 63, 79, and see 79 Penn. St. 106, s. c., 21 Am. Rep. 49, 53.

[84] Whart. on Neg., § 462.

[85] Story on B., § 66.

[86] Executors of Smedes *v.* Elmendorf, 3 Johns. 185.

A receipt given be a member of a law firm for moneys is evidence that the money was received as a firm transaction and not as an individual one. Wellenbrock *v.* Speckert, 21 Ky. Law Rep. 1369, 55 S. W. Rep. 200. While ordinarily a demand upon the attorney for the payment of money collected by him for his client is necessary before suit can be brought, yet if the agreement between them is such as to create a trust relation, no demand is necessary. Metz *v.* Abney, 64 S. C. 254, 42 S. E. Rep. 103. "When an attorney collects a debt due to his client, he does not convert the money received by placing it in bank to his own credit and mixing it with his own funds. The money so received is not the client's property, and the attorney's obligation regarding the same is one resting on contract, merely, to account for it and pay over such sum as upon an accounting shall be found to be due from him thereon. And even if he neglects to so account and pay after a demand made he is not liable to trover as for a conversion of such amount." Jackson *v.* Moore, 72 N. Y. App. Div. 217, 76 N. Y. Supp. 164.

an undertaking himself to collect, not merely that he received it for transmission to another for collection, for whose negligence he is not to be responsible.[87] In an action against an attorney, whether for breach of contract, or of legal duty, the burden is upon the plaintiff to prove the breach, and the damages sustained.[88] Ignorance of a recent statute[89] or decision[90] changing the law is some evidence of negligence. To prove a defect in his proceedings of record, the record is the appropriate evidence.[91] When negligence has been proved, in consequence of which judgment has gone against

[87] Bradstreet *v.* Everson, 72 Penn. St. 124, s. c., 13 Am. Rep. 665.

In a suit by a client against an attorney for negligence in investing money, the burden of proving such negligence rests upon the plaintiff except where the attorney has obtained for himself some property or property rights from the client. Schreiber *v.* Heath, 103 N. Y. App. Div. 364, 92 N. Y. Supp. 1043. Proof that the plaintiff, through the negligence of his attorney, the defendant, lost a valuable right of action against a municipality, is *prima facie* proof of actual damage, although the municipality might waive its defense which had accrued through the defendant's negligence, thus making the damage caused by such negligence only nominal. Drury *v.* Butler, 171 Mass. 171, 50 N. E. Rep. 527.

"The attorney is only liable for the actual injury which his client has sustained and not necessarily for the nominal amount of the client's demand. . . . Hence, when a claim is alleged to have been lost by the attorney's negligence, in order to recover beyond nominal damages it must be shown that it was a subsisting debt, and that the debtor was solvent." Goldzier *v.* Poole, 82 Ill. App. 469. See for facts not warranting a finding of negligence on the part of an attorney, Keith *v.* Marcus, 181 Mass. 377, 63 N. E. Rep. 924.

[88] Quinn *v.* Van Pelt, 56 N. Y. 417, rev'g 36 N. Y. Super. Ct. (4 J. & S.) 279.

[89] A. B.'s Estate, 1 Tuck. 247.

An error of judgment by an attorney due to his ignorance of the existence of a statute renders him liable to his client for loss caused by such error. Humboldt Bldg. Ass'n *v.* Ducker, 111 Ky. 759, 64 S. W. Rep. 671, 23 Ky. Law Rep. 1073.

[90] Lee *v.* Walker, L. R. 7 C. P. 121, s. c., 1 Moak's Eng. 371.

In an action by a client against his attorney, it is not error to refuse to charge the jury that the defendant is not liable unless he was grossly negligent or grossly ignorant. Wallace *v.* Frazer (Tex. 1906), 94 S. W. Rep. 324.

[91] Reilly *v.* Cavanaugh, 29 Ind. 435.

the client, it is not incumbent on the client to show that but for the negligence he would have succeeded in the action.[92] Illegality in the transaction whence the money claimed was collected is not available to the attorney.[93]

11. Brokers.

One employed to buy stock, he to make advances therefor, has, in the absence of contrary arrangement, implied authority to take title in his own name.[94] A customer is presumed, but not conclusively, to have known the usages of brokers generally.[95] Evidence of a conversion by brokers, of stock

[92] Rosc. N. P. 484; Whart. on Neg. § 752, citing Purvis *v.* Landell, 12 Cl. & Fin. 91; Godefroy *v.* Jay, 7 Bing. 413. See *contra*, Harter *v.* Morris, 18 Ohio St. 491.

[93] Fogerty *v.* Jordan, 2 Robt. 319; Merritt *v.* Millard, 2 Abb. Ct. App. Dec. 391; and see chapter on actions for MONEY RECEIVED.

[94] Horton *v.* Morgan, 19 N. Y. 170. Compare Merwin *v.* Hamilton, 6 Duer, 244. As to grounds of action, whether on contract or for conversion, see Read *v.* Lambert, 10 Abb. Pr. N. S. 428; Stewart *v.* Drake, 46 N. Y. 449.

"A broker has no authority to contract in his own name in behalf of his principal without authority from the latter, and, if he does so he has no claim upon his principal for services or for loss incurred." Robbins *v.* Maher, 14 N. D. 228, 103 N. W. Rep. 755.

A broker who undertakes to purchase stock for a customer may employ a sub-agent for negotiating the purchase, but where he does so, he is liable for the default of his sub-agent unless there is proof that the customer knew of such sub-agent and adopted him as his agent. Hoogewerff *v.* Flack, 101 Md. 371, 61 Atl. Rep. 184.

Where a broker buys a number of bonds from time to time for various customers and does not allot any particular bonds to any particular customer but always keeps on hand the exact number of bonds to which the customers are entitled, the customers' title to the bonds is superior to that of the assignee for the benefit of creditors of the broker. Hunt *v.* Marquand, 109 N. Y. App. Div. 729, 96 N. Y. Supp. 546.

Where a banker having bought the stock for a customer in his name and on his own account notifies the customer that the stock has been bought, the title then passes to the customer who is entitled thereto in specie upon the insolvency of the banker. Le Marchant *v.* Moore, 150 N. Y. 209, 44 N. E. Rep. 770.

[95] Ruger *v.* Firemen's Fund Ins. Co., 90 Fed. Rep. 310; McCurdy *v.* Alaska, etc.; Commercial Co., 102 Ill. App. 120; Botany Worsted Works *v.* Wendt, 22 Misc. 156, 48

actually purchased, is not admissible under an allegation of fraud in falsely pretending to have purchased.[96] Where the evidence shows that the broker was a pledgee as to the stock, evidence of a usage to sell without notice, contrary to a pledgee's duty, is not competent.[97] Otherwise if the relation of pledgor and pledgee is not established.[98]

12. Collecting Bankers.

The receiving of negotiable paper for collection implies an agreement on the part of the bankers with the one from whom they receive it,[99] to present, etc., and to cause the drawers, indorsers, etc., to be charged;[1] and negligence of

N. Y. Supp. 1024; Whitehouse *v.* Moore, 13 Abb. Pr. 142. See chapter XVI, paragraph 9 of this vol.

A telegram sent to a New York broker to sell stock must be considered as having been intended to have relation to the usages in the New York market for executing such orders. Boyle *v.* Henning, 121 Fed. Rep. 376.

In general "one employing another to act for him in buying or selling in a certain market will be held as intending that the business should be conducted according to the general usage and custom of that market,—and this is the rule whether or not he in fact knows the custom." Taylor *v.* Bailey, 169 Ill. 181, 48 N. E. Rep. 200.

[96] Salters *v.* Genin, 7 Abb. Pr. 193, 3 Bosw. 250.

[97] Taylor *v.* Ketchum, 5 Robt. 507, 35 How. Pr. 289; Markham *v.* Jaudon, 41 N. Y. 235.

[98] Corbett *v.* Underwood, 83 Ill. 324.

[99] Montgomery Co. Bank *v.* Albany City Bank, 7 N. Y. 459.

"A bank which receives a check for collection and enters the face value of it as a deposit credit to its owner, becomes the agent of the owner to collect it." Jefferson Co. Sav. Bank *v.* Hendrix, 147 Ala. 670, 39 So. Rep. 295, 1 L. R. A. N. S. 246.

The receiving bank is bound to return the note or account for its proceeds. See McClure *v.* Osborne, 86 Ill. App. 465.

[1] Ayrault *v.* Pacific Bank, 6 Qobt. 337, 47 N. Y. 570. But compare State Bank of Troy *v.* Bank of the Capitol, 41 Barb. 343, 17 Abb. Pr. 364, 27 How. Pr. 57.

Where the plaintiff bank, having discounted certain drafts with bills of lading attached, forwarded them to the defendant bank for collection and the latter presented them for acceptance and surrendered the bills of lading when the drafts were accepted, it was held that the defendant bank should have held the bills of lading until the drafts were paid and their failure to do so rendered them

their notary,[2] or their correspondent,[3] is competent against them.[4] This liability may be varied by evidence of express

liable. Merchants' Nat. Bank *v.* Nat. Bank of Commerce, 17 Fed. Cas. No. 9,446.

A bank receiving a sight draft for collection should present it not later than the day after its receipt, if the drawee has his office in the same town. Citizens' Nat. Bank *v.* Greensburg Third Nat. Bank, 19 Ind. App. 69, 49 N. E. Rep. 171.

For facts constituting negligence and bad faith on the part of a collecting bank, see Dern *v.* Kellogg, 54 Neb. 560, 74 N. W. Rep. 844.

[2] Ayrault *v.* Pacific Bank, 47 N. Y. 570, affi'g 6 Robt. 337.

[3] Montgomery Bank *v.* Albany City Bank (above); Herider *v.* Phœnix Loan Ass'n., 82 Mo. App. 427.

"In this state a bank receiving commercial paper for collection is, in the absence of some special agreement, liable for a loss occasioned by a default of its correspondents or other agents selected by it to make the collection." Nat. Reserve Bank *v.* Nat. Bank of Republic, 172 N. Y. 102, 64 N. E. Rep. 799.

The owner of the paper may sue the correspondent as he still has the title, the transmitting bank being merely his agent. Lord *v.* Hingham Nat. Bank, 186 Mass. 161, 71 N. E. Rep. 312.

[4] Testimony that the cashier of a bank stated "that he felt he was somewhat negligent or careless in the matter," is inadmissible in an action wherein it is sought to charge the bank with liability by reason of its alleged negligence in failing to apply funds on deposit with it in payment of a note sent it for collection, before such funds were withdrawn. Such statements are incompetent, for they are merely his conclusions as to what constitutes negligence. Metropolitan Nat. Bank *v.* Commercial State Bank, 104 Iowa, 682, 74 N. W. Rep. 26.

Where plaintiff delivers a draft bearing the indorsement of another to a bank for collection, and this bank, upon receiving the check of the drawee, notifies the plaintiff that the draft has been paid and the amount is credited in plaintiff's pass book, the bank cannot later revoke that credit on the ground that the drawee's check was not good. Kirkham *v.* Bank of America, 165 N. Y. 132, 58 N. E. Rep. 753, 80 Am. St. Rep. 714.

But where commercial paper is delivered to a bank for collection, and credit is given therefor as cash on the depositor's account, and the deposit slip and pass book contain a statement that "all cash items not actual cash are entered subject to payment," the bank is not liable to the depositor when after due diligence it is unable to collect the paper. Givan *v.* Bank of Alexandria (Tenn. 1898), 52 S. W. Rep. 923, 47 L. R. A. 270.

contract or general usage, but not by the practice of single banks adopted for their own convenience.[5]

An accidental loss or disappearance, in a bank, of a bill sent to it for collection, resulting from the bank not taking sufficient care of letters brought to it from the mail, raises a presumption of negligence.[6] To recover more than nominal damages for failure to give due notice of non-payment, there must be evidence that if due notice had been given, plaintiff might have collected the amount, or some part of it.[7] Execution against the maker unsatisfied is competent to show his insolvency.[8]

[5] Ayrault *v.* Pacific Bank (above). A bank cannot escape liability for negligence by showing that it made no charge for the service. Manhattan Life Ins. Co. *v.* Denver First Nat. Bank, 20 Colo. App. 529, 80 Pac. Rep. 467.

[6] Chicopee Bank *v.* Philadelphia Bank, 8 Wall. 641. The loss of a paper by a bank, to which it had been sent for collection, carries with it the presumption of negligence and want of care, and the proof of such loss casts upon the bank the burden of proving facts to rebut the presumption. First Nat. Bank of Birmingham *v.* First Nat. Bank of Newport, 116 Ala. 520, 22 So. Rep. 976.

"It is only necessary to show reasonable probability that with due care the collection would have resulted. The burden then rests on the defendant to show that there was no damage." Dern *v.* Kellogg, 54 Neb. 560, 74 N. W. Rep. 844.

[7] Lienan *v.* Dinsmore, 10 Abb. Pr. N. S. 209, s. c., 3 Daly, 365; Coghlan *v.* Dinsmore, 9 Bosw. 453. But compare Allen *v.* Suydam, 20 Wend. 321, rev'g 17 Id. 368; Waldrod *v.* Ball, 9 Barb. 271.

A collecting agent who has rendered himself liable on account of negligence may show in reduction of damages that if he had used due diligence, the collection could not have been made. Citizens' Nat. Bank *v.* Greensburg Third Nat. Bank, 19 Ind. App. 69, 49 N. E. Rep. 171.

The plaintiff must show not only the negligence but also that such negligence caused him injury. Bamberger *v.* Town of Tupelo, 15 Ky. Law Rep. 361.

The measure of damages is the actual loss sustained. Decatur First Nat.Bank *v.* Henry, 159 Ala. 367, 49 So. Rep. 97.

Such damages are *prima facie* the amount of the paper (Commercial Bank *v.* Red River Valley Nat. Bank, 8 N. Dak. 382, 79 N. W. Rep. 859; Decatur First Nat. Bank *v.* Henry, 159 Ala. 367, 49

[8] Eichelberger *v.* Pike, 22 La. Ann. 142.

13. Factors.

Plaintiff's letters to defendant, written with the goods consigned, are competent in his favor to show his instructions;[9] and the instructions are strictly binding, if the consignment is accepted.[10] If a voluminous correspondence is offered, the party offering it should point out the parts he relies on as relevant.[11] If the written instructions refer the factor also to a third person for verbal instructions, the latter may be competent, although they vary the former.[12] Evidence of a general consignment without specific instructions as to sale, and of advances made or liabilities incurred on the faith of the goods, raises a legal presumption that the factor has a discretion about selling, for his own protection, which the principal cannot control by subsequent instructions.[13] The letters and declarations of the defendant's

So. Rep. 97), but not necessarily. Jefferson Co. Sav. Bank *v.* Hendrix, 147 Ala. 670, 39 So. Rep. 295, 1 L. R. A. N. S. 246.

[9] Porter *v.* Ferguson, 4 Fla. 102.

[10] Scott *v.* Rogers, 4 Abb. Ct. App. Dec. 157; Lorraine *v.* Cartwright, 3 Wash. C. Ct. 151; Bell *v.* Cunningham, 3 Pet. 69, 85. Otherwise of instructions on a separate and subsequent consignment. Milbank *v.* Dennistown, 10 Bosw. 382.

Emergencies may arise which will warrant the exercise of extraordinary powers. Acts done to save perishing property. See Lippmann *v.* Brown, 43 Misc. 632, 88 N. Y. Supp. 141.

[11] Daines *v.* Allen, 14 Abb. Pr. N. S. 363.

[12] Manella *v.* Bary, 3 Cranch, 415.

[13] Feild *v.* Farrington, 10 Wall. 148.

Where the owner of goods delivers them to a factor on instructions not to sell below a fixed price and the factor does sell below that price, the measure of damages is the difference between the actual value of the goods and the price for which they were sold. But where the factor guarantees that the goods will be sold for a certain price but sells them for less than the guaranteed price, the measure of damages is the difference between the guaranteed price and the price for which they are sold. Pugh *v.* Porter Bros. Co., 118 Cal. 628, 50 Pac. Rep. 772.

A factor's lien for advances made is not extinguished by the death of the owner and he may sell the goods to reimburse himself. Willingham *v.* Rushing, 105 Ga. 72, 31 S. E. Rep. 130.

Commission merchants who have made advances on shipments to them have power to sell the goods in a proper market and reimburse themselves. Dreyfus *v.* Gumble,

agent, to him, are not alone competent to prove his diligence.[14] The factor's agreement may be interpreted by oral evidence of usage,[15] under principles already stated.[16]

Sale by a factor is presumed from lapse of time; [17] and a refusal to account raises a presumption in favor of the strongest construction of the evidence against him as to amount, value, and price.[18] The presumption that an invoice is sent, upon a consignment of merchandise, suffices to require a foundation for secondary evidence of contents.[19] To show intent to defraud, similar fraudulent acts of defendant, committed at or about the same time may be shown.[20] If conspiracy is alleged, plaintiff may recover against one, on proof of fraud, but not without.[21] The mode of proving value has already been stated.[22]

Ratification is presumed from evidence that plaintiff, after full information, made no objection within a reasonable time.[23] Intentional omission to reply raises a presumption

123 La. Ann. 344, 48 So. Rep. 958.

[14] Framingham *v.* Barnard, 2 Pick. 532.

[15] Beardsley *v.* Davis, 52 Barb. 159; Farmers, &c. Bank *v.* Sprague, 52 N. Y. 605.

A factor who exercises reasonable diligence and care and observes the usages of the business absolves himself from liability to the owner of the goods. Kelley *v.* Maguire, 99 Ill. App. 317.

[16] Chapter XVI, paragraph 9; and chapter XXVI, paragraph 14 of this vol. Compare Catlin *v.* Smith, 24 Vt. 85; Dwight *v.* Whitney, 15 Pick. 179.

[17] McArthur *v.* Wilder, 3 Barb. 66.

[18] Pope *v.* Barret, 1 Mass. 117; Field *v.* Moulson, 2 Wash. C. Ct. 155.

[19] Turner *v.* Yates, 16 How. U. S. 14, 26.

[20] Castle *v.* Bullard, 23 How. U. S. 172; and see Chapter on DECEIT.

[21] Price *v.* Keyes, 62 N. Y. 378, rev'g 1 Hun, 117, 3 Supm. Ct. (T. & C.) 720.

[22] Chapter XVI, paragraphs 20 and 21 of this vol. As to the time to which the evidence should refer see Scott *v.* Rogers, 4 Abb. Ct. App. Dec. 157; Blot *v.* Boiceau, 3 N. Y. 78, rev'g 1 Sandf. 111.

[23] Cairnes *v.* Bleecker, 12 Johns. 300; Hazard *v.* Spears, 2 Abb. Ct. App. Dec. 353.

Thus where the owner of goods sold by a factor gives the factor a note for advances made thereon by the factor, he cannot later allege as a counterclaim negligence of the factor which occurred prior to the making of the note and was

of approval of a past course, even though contrary to instructions.[24]

To establish a *lien*, defendant must show; either, 1, that he had made advances specially upon the credit of this shipment; or, 2, that he was entitled, by arrangement with the consignor, to a lien for any balance of advances generally.[25]

14. Forwarders.

An allegation that defendants acted only as carriers, is a variance.[26] The stipulation to forward, in the receipt, is a contract, subjecting it to the rule excluding oral evidence to vary.[27]

known to the maker at the time of its execution. Allen *v.* McAllister, 39 Wash. 440, 81 Pac. Rep. 927.

[24] Feild *v.* Farrington, 10 Wall. 148.

Where a factor sold his business to another and turned over to his successor the goods of the plaintiff and notified the latter thereof, the silence of the plaintiff for six months will be deemed a ratification of the factor's acts. McIntosh *v.* Merchant, 40 Wash. 477, 82 Pac. Rep. 753.

[25] Beebe *v.* Mead, 33 N. Y. 587.

"'A factor, or commission merchant, who has in possession cotton or other goods to sell at a certain limited price, and has made advances to the owner upon such cotton or goods, has a right to reimburse himself by selling the same at the fair market price, though below the limited price, if his principal refuses, upon demand or request, after a reasonable time, to repay the advances.'" S. Blaisdale Co. *v.* Lee, 127 N. C. 365, 37 S. E. Rep. 509.

"A lien in favor of a factor is implied by law, without an express agreement between the parties, upon all the goods in the hands of a consignee who is given the power to sell them for the advances which he makes for his consignor in conducting the business of his agency." Plattner Implement Co. *v.* International Harvesting Co., 66 C. C. A. 438, 133 Fed. Rep. 376. See also Whigham *v.* Fountain, 132 Ga. 277, 63 S. E. Rep. 1115.

An agreement for valuable consideration to ship specific goods to a factor in order to secure advances made by the factor impresses upon the goods an equitable lien and one who takes these goods with notice thereof must give them up to the factor. Triest *v.* Noval, 32 Misc. 386, 66 N. Y. Supp. 717.

[26] Hempstead *v.* N. Y. Central R. R. Co., 28 Barb. 485.

[27] Niles *v.* Culver, 8 Barb. 205.

It is enough for defendant to satisfy the jury, by the best evidence in his power, that he performed his duty with care and fidelity, used all reasonable care and diligence in selecting proper carriers, and that the loss has not arisen from any default of himself or his servants.[28]

15. Hirers of Chattels.

The fact that the hirer returned the thing injured in a manner or from a cause ordinarily liable to occur in its careful use—such as a horse returned to the owner lame,[29] or galled[30]—does not raise a presumption of negligence.

16. Innkeepers.[31]

The fact that defendant was an innkeeper may be proved by parol, although the law requires him to have a license.[32] It is enough to show that defendant habitually received, as guests, all who came to his house (it is not material that

[28] Am. Express Co. *v.* Second Nat. Bank, 69 Penn. St. 394, s. c., 8 Am. Rep. 268.

[29] Millon *v.* Salisbury, 13 Johns. 211; Harrington *v.* Snyder, 3 Barb. 380; Watson *v.* Bauer, 4 Abb. Pr. N. S. 273.

[30] Newton *v.* Pope, 1 Cow. 109.

[31] Cutler *v.* Bonney, 18 Am. Rep. 127, note 130.

"The right of a bailee to limit his liability by special contract is well established, but this does not go to the extent of relieving against his own fraud or negligence." Hoyt *v.* Clinton Hotel Co., 35 Pa. Super. Ct. 297.

Payment of one's bill at a hotel is not necessarily proof that the relation of innkeeper and guest has terminated. Brown Hotel Co. *v.* Burckhardt, 13 Colo. App. 59, 56 Pac. Rep. 188.

"The law is that the first requisite of the extraordinary liability imposed upon an innkeeper is that the relation of innkeeper and guest should have existed between the parties at the time the loss or injury occurred or shortly preceding such loss or injury; that after the relation ceases the guest has a reasonable time within which to remove his property from the hotel and thereafter the innkeeper is liable only as a bailee gratuitous, or otherwise, in the absence of an express contract to the contrary; that the complaint should allege the existence of the relation of innkeeper and guest at the time of the loss or within a reasonable time preceding." Clark *v.* Ball, 34 Colo. 223, 82 Pac. Rep. 529, 114 St. Am. Rep. 154, 2 L. R. A. N. S. 100.

[32] Owings *v.* Wyant, 3 Harr. & McH. 393.

they be only travelers), without agreement as to the duration of their stay, or terms of their entertainment.[33] Evi-

[33] Wintermute *v.* Clarke, 5 Sandf. 242; Taylor *v.* Monnot, 4 Duer, 116, 1 Abb. Pr. 325. See generally: Meacham *v.* Gallaway, 102 Tenn. 415, 52 S. W. Rep. 859, 46 L. R. A. 319, 73 Am. St. Rep. 886; Johnson *v.* Chadbourn Finance Co., 89 Minn. 310, 94 N. W. Rep. 874, 99 Am. St. Rep. 571. Although the house was kept on the "European plan." Krohn *v.* Sweeny, 2 Daly, 200. Express contract with plaintiff, as to time or terms, does not necessarily supersede the innkeeper's liability. Hancock *v.* Rand, 17 Hun, 279. As to boarding-house keepers, see 17 Alb. L. J. 499.

A restaurant keeper is not an insurer, as an innkeeper is, but is liable only for negligence. Block *v.* Sherry, 43 Misc. 342, 87 N. Y. Supp. 160.

The fact that a guest at a hotel stays a long time does not necessarily destroy the relation of innkeeper and guest. Metzger *v.* Schnabel, 23 Misc. 698, 52 N. Y. Supp. 105.

"It does not appear that the plaintiff bargained to remain for any particular time, although it is true that the agreed price of the room was to be $1.25 per week. But a special agreement fixing in advance the price to be paid, or the length of the stay, does not absolutely disturb the relation of innkeeper and guest, and constitute the person so acting a boarder or lodger." Id.

One who is not a traveler but a permanent lodger for seventeen months cannot hold an innkeeper to his insurance liability. Crapo *v.* Rockwell, 48 Misc. 1, 94 N. Y. Supp. 1122, 17 N. Y. Ann. Cas. 112.

The fact that a lodging house does not serve meals does not necessarily take it out of the class of inns; where the proprietor holds out that he will accommodate all travellers who are willing to pay a reasonable price, he is an innkeeper though no provision is made for furnishing food. Nelson *v.* Johnson, 104 Minn. 440, 116 N. W. Rep. 828, 17 L. R. A. N. S. 1259.

One who contracts with an innkeeper for a stay by the week at a fixed price is not a "guest" in the technical sense but a boarder and the proprietor is not an insurer of the property of such boarder. Vigeant *v.* Nelson, 140 Ill. App. 644.

Where a hotel keeps baggage of a person after that person has ceased to be a guest, such hotel is only a bailee and liable only for negligence. Hoffman *v.* Roessle, 39 Misc. 787, 81 N. Y. Supp. 291.

Where a club gives a banquet at a hotel, a guest of the club at the banquet cannot hold the hotel to its liability as an insurer, such guest not being a traveller nor a guest of the hotel, but rather a guest of the club. Amey *v.* Winchester, 68 N. H. 447, 39 L. R. A.

dence of slight entertainment is enough to show that plaintiff was a guest.[34] Authority in the servant to receive money or other property on the credit of the house, may be inferred from the capacity in which he was acting.[35] Plaintiff may prove the instructions he gave affecting the duty of the defendant or his servant.[36] The declarations of the person discovering the loss, made at the time, are competent as part of the *res gestæ*,[37] but do not prove any past fact narrated. Loss is presumptive,[38] but not conclusive evidence of

760, 39 Atl. Rep. 487, 73 Am. St. Rep. 614.

The reception of a person's baggage may be sufficient to create the relation of innkeeper and guest. Eden *v.* Drey, 75 Ill. App. 102.

Where a guest deposits money for safety with the proprietor of a hotel and it is stolen after the guest has ceased to be a guest, he cannot hold the proprietor to the liability of an insurer. De Lapp *v.* Van Closter, 136 Mo. App. 475, 118 S. W. Rep. 120.

[34] McDonald *v.* Egerton, 5 Barb. 560; Washburn *v.* Jones, 14 Id. 193.

[35] See Howser *v.* Tully, 62 Penn. St. 92, s. c., 1 Am. Rep. 390; Svenson *v.* Pacific Mail St. Co., 57 N. Y. 108; and see South & North Ala. R. R. Co. *v.* Henlein, 52 Ala. 606, s. c., 23 Am. Rep. 578; Zimmerman *v.* Murphy, 131 Ill. App. 56.

"One who becomes the guest of a hotel, by giving his baggage checks into its possession, places the goods they represent in its custody, *infra hospitium*, so far as to make the innkeeper responsible for goods which, by means of the possession of such checks, his representative or agent receives, although the baggage be never brought within the walls, yards or outbuildings of the hotel." Williams *v.* Moore, 69 Ill. App. 618.

Where the waiter at a restaurant takes the hat and coat of a guest, the restaurant becomes the bailee thereof and liable for any want of due care. Vogelsang *v.* Fredkyn, 133 Ill. App. 356.

[36] Jones *v.* Hill, 26 Geo. 194.

[37] Pope *v.* Hall, 14 La. Ann. 324. As to the competency of answers on inquiry, see page 146 of this vol., and Chapter on NEGLIGENCE.

Similarly statements to a guest by hotel employees at the time of a fire as to the danger and as to whether the fire was under control, are admissible on the question of whether the guest took proper care to save his property. Jefferson Hotel Co. *v.* Warren, 63 C. C. A. 193, 128 Fed. Rep. 565.

[38] Hulett *v.* Swift, 33 N. Y. 571, affi'g 42 Barb. 230; Rosc. N. P. 618; Story on Bailm., § 472; Murray *v.* Clarke, 2 Daly, 102. See Eden *v.* Drey, 75 Ill. App. 102.

Where the guest left open his room door, the failure of the hotel

liability.[39] At common law this presumption can only be repelled by proof that the loss is attributable to negligence or fraud of the guest, or to the act of God or the public enemy.[40] A general denial of negligence will admit evidence

servant to lock the door with his pass key is such negligence as to render the hotel liable on the ground of the "last clear chance" doctrine although plaintiff was negligent. Watson *v.* Loughran, 112 Ga. 837, 38 S. E. Rep. 82.

The fact that a guest at a hotel is drunk when some of the employees of the hotel steal his money, is no defense to the liability of the hotel keeper. Cunningham *v.* Bucky, 42 W. Va. 671, 26 S. E. Rep. 442, 35 L. R. A. 850, 57 Am. St. Rep. 878.

[39] Hulett *v.* Swift (above); Hulbert *v.* Hartman, 79 Ill. App. 289.

"All losses of property incurred by guests at a public hotel or inn by fire are *prima facie* due to the negligence of the proprietor, but he may discharge or relieve himself from liability by showing that the loss happened by an irresistible force or unavoidable accident, such as a fire originating upon premises over which he had no control, without fault or negligence on his part." Johnson *v.* Chadbourn Finance Co., 89 Minn. 310, 94 N. W. Rep. 874, 99 Am. St. Rep. 571.

[40] Hulett *v.* Swift, 33 N. Y. 571; affi'g 42 Barb. 230.

"An innkeeper owes the duty and assumes the obligation of safely keeping the property of his guests, and if the property is lost, all that is necessary to make a *prima facie* case is to show the relation of innkeeper and guest and the loss. The burden is then cast on the innkeeper to exonerate himself, and this he may do by showing that there has been no negligence on the part of himself or his servants, or that the loss was caused by the personal negligence of the guest of some one for whom the guest was responsible, or by superior force." Rockhill *v.* Congress Hotel Co., 237 Ill. 98, 86 N. E. Rep. 740, 22 L. R. A. N. S. 576.

A statute providing that where the innkeeper provides a safe, and valuable are not turned over to him to keep therein, he is not liable for their loss, does not abolish the innkeeper's liability as an insurer but simply charges the guest with negligence. Wies *v.* Hoffman House, 28 Misc. 225, 59 N. Y. Supp. 38.

A guest's absence all night from his room is not necessarily such negligence on his part as to bar his recovery for goods stolen from his room. Turner *v.* Whitaker, 9 Pa. Super. Ct. 83, 43 W. N. C. 375.

Where the guests of a hotel habitually hang their coats on hooks behind the desk, the proprietor, by maintaining the hooks, may be said to invite them so to do and is therefore under the duty of caring for them. The court said: "I do not think that a hotel

of plaintiff's negligence.[41] Reasonable regulations or usages of the particular inn, of which plaintiff had notice, may be proved, but not the usage of another inn.[42] The opinions of witnesses unacquainted with the facts of the particular case, upon the propriety or safety of carrying or keeping are inadmissible.[43]

17. Pledgees.

Evidence that the pledgee wholly failed to restore the goods, without indicating the cause of loss, is sufficient to go to the jury on the question of negligence, unless he show loss under such circumstances as will exculpate him.[44] A usage to sell, at private sale, contrary to the legal duty of pledgees, is inadmissible.[45]

18. Tows.

Tow-boats are not common carriers.[46] The law implies

keeper can absolve himself from a certain duty he owes his guests by providing for them a place to put their overcoats, hats, etc., and permit a custom to prevail for the use of that place in that way and then say in case of a loss that no obligation whatever rests on him." Bradner *v.* Mullen, 27 Misc. 479, 59 N. Y. Supp. 178.

A statute modifying the common-law liability should be strictly construed. See Jones *v.* Hotel Latham Co., 62 Misc. 620, 115 N. Y. Supp. 1084.

[41] Rosc. N. P. 618.

[42] Berkshire Woolen Co. *v.* Proctor, 7 Cush. (Mass.) 417.

Where a restaurant keeper provided hooks for coats and hats but posted placards to the effect that he would not be liable for their loss and it appeared that he also maintained a checking system for those who wished it and placed upon the bill of fare a notice that the management would not be liable for loss of goods not checked, it was held he was not liable for a stolen coat. Harris *v.* Childs' Unique Co., 84 N. Y. Supp. 260.

[43] Taylor *v.* Monnot, 4 Duer, 116, s. c., 1 Abb. Pr. 325.

[44] Edw. on B., § 236; Caldwell *v.* Nat. Mohawk Bank, 64 Barb. 333.

The burden is on the pledgee to establish the loss of the property and his freedom from negligence. Mansur-Tebbetts Implement Co. *v.* Carey, 1 Ind. Terr. 572, 45 S. W. Rep. 120; Crocker *v.* Monroe, 18 La. 553, 36 Am. Dec. 660; Onderkirk *v.* Troy Cent. Natl. Bank, 119 N. Y. 263, 23 N. E. Rep. 875.

[45] Wheeler *v.* Newbould, 16 N. Y. 392, 401, affi'g 5 Duer, 29; approved in 5 Wall. 680.

[46] Pike *v.* Nash, 3 Abb. Ct. App. Dec. 610; Arctic Fire Ins. Co. *v.*

an engagement that each party will use proper skill and diligence; that neither vessel will by neglect or misconduct, create unnecessary risk to the other, or increase any incidental risk which may be incurred.[47] Exemption from liability for injury by causes over which human agency has no control—such as the close of navigation—is implied.[48] All the surrounding circumstances which may afford any just ground of inference relative to the question in issue, may be proved;[49] and the condition and character of the vessel towed,[50] and her unseaworthiness,[51] if these are relevant to the casualty. The burden is on the owner of the injured boat to show that the injury was caused by the negligence of those in charge of the tow-boat.[52] To recover expenses consequent on being left without any tow, plaintiff must prove an effort to procure another.[53]

19. Warehousemen.

Plaintiff may show by defendant's advertisements, re-

Austin, 69 N. Y. 474, rev'g 3 Hun, 195; Brown *v.* Clegg, 63 Penn. St. 51, s. c., 3 Am. Rep. 522; Hays *v.* Millar, 77 Pa. St. 238, s. c., 18 Am. Rep. 445. *Contra*, 24 La. Ann. 165, s. c., 13 Am. Rep. 120.

[47] Smith *v.* St. Lawrence Towboat Co., L. R. 5 P. C. 308, 8 Moak's Eng. 236, and cases cited; and see Arctic Fire Ins. Co. *v.* Austin, 54 Barb. 559; Milton *v.* Hudson R. Steamboat Co., 37 N. Y. 210, 4 Lans. 76.

[48] Worth *v.* Edmonds, 52 Barb. 40. The construction of the contract is for the court, not the jury. Arctic Fire Ins. Co. *v.* Austin, 69 N. Y. 470, 477, rev'g 3 Hun, 195, 6 Supm. Ct. (T. & C.) 63.

[49] Steam Navigation Co. *v.* Dandridge, 8 Gill & J. (Md.) 248, 315.

[50] Baird *v.* Daly, 68 N. Y. 547, 550.

[51] Id. 551. For the mode of proof, see chapter XXVI, paragraph 34 of this vol.

[52] The Patrick McGuire, 168 Fed. Rep. 453; Hays *v.* Millar, 77 Penn. St. 238, 18 Am. Rep. 445; Pike *v.* Nash (above).

See for facts held to constitute negligence on the part of a tug boat, rendering her liable for injury caused a steamer, The J. S. T. Stranahan, 91 C. C. A. 493, 165 Fed. Rep. 439.

See for facts held not to constitute negligence on the part of a tug, The G. N. Hannold, 166 Fed. Rep. 637; Neall *v.* P. Dougherty Co., 168 Fed. Rep. 415.

[53] Worth *v.* Edmonds, 52 Barb. 40.

ceipts and declarations, that the place was to be fireproof.[54]

The general rules as to estoppel by the receipt in respect to the quantity and condition of the goods, are the same as in case of carriers.[55] Evidence of the degree of care which other persons engaged in a similar business in the vicinity were in the habit of bestowing on property similarly situated, is competent;[56] but it should relate to the calling generally, rather than to a particular person in it.[57] To charge warehousekeepers with a loss by negligence of their servants, diligence within the scope of the employment must be shown; the test is: Are the servants liable to the employer?[58]

Proof of the general care with which the warehouse and its contents were guarded is not sufficient to raise a legal presumption of due diligence in this particular instance.[59] Defendant need not show the precise manner in which loss

[54] Hatchett *v.* Gibson, 13 Ala. 587. In an action brought to recover the value of goods owned by the plaintiff, which were destroyed by fire while in the freight house of the defendant, a railroad corporation, which was liable for the goods as a warehouseman, the plaintiff must prove that the fire resulted from the defendant's negligence. Grieve *v.* New York Cent., &c. R. R. Co., N. Y. App. Div. 518.

[55] Hale *v.* Milwaukee Dock Co., 29 Wis. 482, 9 Am. Rep. 603.

[56] Cass *v.* Boston & Lowell R. R. Co., 14 Allen, 448.

In general, a warehouseman's duty is that of ordinary care to protect the property entrusted to him. Berger *v.* St. Louis Storage, etc., Co., 136 Mo. App. 36, 116 S. W. Rep. 444; Van Buren Storage & Van Co. *v.* Mann, 139 Ill. App. 652.

[57] See First Natl. Bank *v.* Graham, 79 Penn. St. 106, 21 Am. Rep. 49, 53.

[58] Aldrich *v.* Boston & Worcester R. R. Co., 100 Mass. 31, 1 Am. Rep. 76.

[59] Fairfax *v.* N. Y. Central, &c. R. R. Co., 67 N. Y. 11, rev'g 40 Super. Ct. (J. & S.) 128.

In an action against a warehouseman for the loss of goods delivered to him, the burden of proving negligence is on the plaintiff, but the burden of going forward is shifted to the defendant when the plaintiff proves that the goods were entrusted to the defendant in good condition and were not delivered back on demand, or were delivered in bad condition. Berger *v.* St. Louis Storage, etc., Co., 136 Mo. App. 36, 116 S. W. Rep. 444.

On the issue of a warehouseman's negligence evidence is not admissible to show that in other

occurred, any farther than to show that it was consistent with non-liability.[60]

20. Wharfingers; Place-hire.

To recover of a wharfinger, or one who does not undertake actual custody, but only to give place-room, plaintiff must show negligence on the part of defendant and his servants. Mere loss or disappearance, or injury by accident, is not even *prima facie* evidence of negligence.[61]

III. ACTIONS AGAINST COMMON CARRIERS OF GOODS

21. Defendant a Common Carrier.

If plaintiff relies on defendant's common-law duty, he must show him to have been a common carrier.[62] This may be done by testimony of a witness that defendant had habitually done business as such for all that called on him; or [63] by producing defendant's advertisements or handbills

instances of dealings between the plaintiff and defendant, the defendant had not been negligent. Baltimore Refrigerating, etc., Co. *v.* Kreiner, 109 Md. 361, 71 Atl. Rep. 1066.

[60] Lichtenhein *v.* Boston & Providence R. R. Co., 11 Cush. (Mass.) 70.

Negligence on the part of a warehouseman is not established merely by proving that the goods were returned in a damaged condition. Baltimore Refrigerating, etc., Co. *v.* Kreiner, 109 Md. 361, 71 Atl. Rep. 1066.

[61] Cases in paragraph 6, note 51.

[62] Edw. on B., § 496.

A company engaged in switching cars over its switch tracks to and from warehouses situated on its spurs and switches to other points of the yards, is, in so doing, acting as acommon carrier. Kansas City &c. Ry. Co. *v.* Rosebrook-Josey Grain Co. (Tex. 1908), 114 S. W. Rep. 436.

A telegraph company sending messenger boys for delivering packages is acting as a common carrier. But where money is sent in a package without notice to the messenger or the company that it is money, the plaintiff cannot hold the company for its loss unless it shows affirmatively that the company holds itself out as a common carrier of money. White *v.* Postal Tel. Co., 25 App. Cas. D. C. 364.

[63] Haslam *v.* Adams Express Co., 6 Bosw. (N. Y.) 235.

In an action against a railroad

issued before the transaction;[64] or any other admissions. Ownership of the vessel or vehicle is not necessarily enough, if defendant did not act as carrier in taking the goods.[65] Under an express contract, it is not necessary to prove that defendant had an interest in the vessels or vehicles employed.[66]

If defendant was also a warehouseman, forwarder, etc., plaintiff should show that he received the thing as carrier.[67]

company engaged in operating passenger trains, there was evidence that twice within two years goods had been conveyed by its trains but it did not appear that any compensation was paid therefor to the company. *Held* that this evidence did not tend to prove that the company was engaged in business as common carriers. Elkins *v.* The Boston, etc., R. R. Co., 23 N. H. 275.

[64] Farmers & M. Bk. *v.* Champlain Transportation Co., 23 Vt. 186.

[65] Fish *v.* Clark, 49 N. Y. 122, affi'g 2 Lans. 176. Compare Moss. *v.* Bettis, 4 Heisk. (Tenn.) 661, s. c., 13 Am. Rep. 1.

[66] Van Buskirk *v.* Roberts, 31 N. Y. 661.

[67] Stout *v.* Coffin, 28 Cal. 65. For the conflict of opinion as to the burden of proof and presumptions in case of carriage of animals, see Cragin *v.* N. Y. Central, &c., 51 N. Y. 61, 49 N. Y. 204; Steiger *v.* Erie Ry. Co., 5 Hun, 345; Kansas Pacific Ry. Co. *v.* Nichols, 9 Kan. 235, s. c., 12 Am. Rep. 494; Lake Shore & Michigan Southern R. R. Co. *v.* Perkins, 25 Mich. 329, s. c., 12 Am. Rep. 275; Kendall *v.* London & Southwestern Ry. Co. Co., L. R. 7 Ex. 373; and see 13 Am. Rep. 42, 53, note, and cases cited, 4 So. L. R. N. S. 564.

"One is not chargeable as a carrier, but merely as a warehouseman, until the shipper has complied with every duty upon him, which it was necessary for him to discharge before shipment." Dixon *v.* Cent. of Ga. Ry. Co., 110 Ga. 173, 35 S. E. Rep. 369.

Where a bailor of goods to a warehouseman terminates the contract of storage by paying the charges therefor and directs that the goods be carried to the bailor's house, to which direction the warehouseman thereafter holds the goods as a common carrier. Snelling *v.* Yetter, 25 N. Y. App. Div. 590, 49 N. Y. Supp. 917, 27 Civ. Proc. R. 158.

Where due notice is given to the consignee of the arrival of his goods and he does not within a reasonable time remove the goods, the liability of the carrier thereafter is only that of a warehouseman and not that of a carrier. Denver, &c. R. Co. *v.* Peterson, 30 Colo. 77, 69 Pac. Rep. 578, 97 Am. St. Rep. 76; Herf, etc., Chemical Co. *v.* Lackawanna Line, 70 Mo. App. 274.

Receiving it marked to go to an address upon his route, is presumptive evidence that he took it as carrier.[68] A receipt given by him stating that the thing was received to be forwarded does not exclude evidence of the agreement to transport under which it was given.[69]

22. Delivery to Carrier.

Plaintiff must show that the property was actually delivered to defendant by being placed in such a position that it might be taken care of by him or his agent having charge of the business, and so as to be under his immediate control.[70] Neither notice that the goods are ready, without putting them in his custody,[71] nor delivery on his premises without notice,[72] is enough. To prove delivery a witness may tes-

[68] Ladue *v.* Griffith, 25 N. Y. 364; and see Ætna Ins. Co. *v.* Wheeler, 49 N. Y. 616, 621, affi'g 5 Lans. 480.

Where a carrier receives goods subject to further instructions from the shipper and to await the latter's orders, the responsibility of a common carrier does not attach but his liability is that of a warehouseman, requiring the exercise of no more than ordinary care. St. Louis, etc., R. R. Co. *v.* Cavender, 170 Ala. 601, 54 So. Rep. 54.

[69] Blossom *v.* Griffin, 13 N. Y. 569; and see Scovill *v.* Griffith, 12 N. Y. 509.

[70] Grosvenor *v.* N. Y. Central R. R. Co., 39 N. Y. 34, 5 Abb. Pr. N. S. 345.

Goods have been delivered to a common carrier when they have have been loaded in cars furnished by the carrier and notice given to the agent of the carrier, notwithstanding the fact that no bill of lading has been issued. Pine Bluff, etc., Ry. Co. *v.* McKenzie, 75 Ark. 100, 86 S. W. Rep. 834.

For a discussion of facts insufficient to constitute a delivery to a carrier, see Abrams *v.* Platt, 23 Misc. 637, 52 N. Y. Supp. 153.

Placing the goods along the line of a railway pursuant to an agreement with an agent of the company, having authority to make it, deemed sufficient delivery. Georgia, etc., Ry. Co. *v.* Marchman, 121 Ga. 235, 48 S. E. Rep. 961.

[71] Id.

A common carrier's liability does not begin until there has been a delivery of the goods to it and an acceptance thereof by it, and there can be no acceptance until the carrier has knowledge of the readiness of the goods for transportation and the shipper's desire therefor. Tate *v.* Yazoo, etc., R. Co., 78 Miss. 842, 29 So. Rep. 392, 84 Am. St. Rep. 649.

[72] Spade *v.* Hudson River R. R.

tify that the goods were delivered to the defendant, subject of course to cross-examination as to details; but where the details have been stated he cannot be allowed to testify whether they constituted a delivery.[73] Evidence of the usual course of business is competent for the purpose of showing whether the fact constituted a delivery.[74] Evidence of admission of the fact of the loss of the goods is competent on the question of delivery.[75]

Delivery may also be shown by the bill of lading[76] or receipt given by defendants; or by an entry in defendants' books showing that they had had possession of the goods.[77] The handwriting of the agent need not be proved if the entries

Co., 16 Barb. 383; Rosc. N. P. 609.

Thus there has been no delivery when the goods have simply been placed on a platform built by the carrier at a place where there is no agent of the carrier. Anderson *v.* Mobile, etc., R. R. Co., (Miss.) 38 So. Rep. 661.

See for facts held to constitute receipt of goods by a common carrier, Richer *v.* Fargo, 77 N. Y. App. Div. 550, 78 N. Y. Supp. 1007.

[73] Bowrie *v.* Baltimore, &c. R. R. Co., 1 McArthur, 609.

[74] Vaughan *v.* Raleigh, &c. R. R. Co., 63 N. C. 11; Edw. on B., § 288; Root *v.* Great Western Railw. Co., 1 Supm. Ct. (T. & C.) 10, s. c., 65 Barb. 619, affi'd in 55 N. Y. 636; Bartee *v.* Wheeler, 49 N. H. 9, s. c., 6 Am. Rep. 434.

The delivery of goods to a carrier must be made at a customary place, during the usual business hours and to an authorized agent of the carrier. Spofford *v.* Penn. Ry. Co., 11 Pa. Super. Ct. 97.

Where a carrier adopted the custom of receiving cars, when loaded, upon its switch tracks and undertaking to deliver them to the transfer tracks at other points in the yards, there has been a delivery of such cars to the carrier if they have been loaded and sealed and the agent of the carrier notified of that fact. Kansas City, etc., Ry. Co. *v.* Rosenbrook-Josey Grain Co., 114 S. W. Rep. 436.

[75] Southern Express Co. *v.* Thornton, 41 Miss. 216, 222.

[76] Notwithstanding it includes other goods not mentioned in the complaint. Wallace *v.* Vigus, 4 Blatchf. (Ind.) 260.

Where goods have not been delivered to a carrier, the issuance of a bill of lading by an agent of the carrier does not estop the carrier from showing that the goods were not in fact received. The Willie D. Sandhoval, 92 Fed. Rep. 286. *Contra*, Missouri, etc., Ry. Co. *v.* Hutchings, 78 Kan. 758, 99 Pac. Rep. 230.

[77] Root *v.* Great Western R. Co., 1 Supm. Ct. (T. & C.) 10, s. c., 65

appear to have been made in the same handwriting for a sufficient length of time for the jury to be satisfied that the person making them was a recognized agent of the company.[78] The bill of lading or receipt may be proved by producing it with proof of signature,[79] and of agency of clerk or servant who gave it.[80] The place of delivery is material where the agent's authority depends on it;[81] otherwise a variance in it is immaterial.[82]

23. Authority of Rece ving Agent.

In case of delivery to an agent or servant, the burden is on the plaintiff to show that the person was an agent of defendants, and authorized to receive the property for them, and to contract for its transportation.[83] Very slight evidence that a person, assuming to act as defendant's agent, was his agent, suffices to go to the jury.[84] But neither hear-

Barb. 619, affi'd in 55 N. Y. 636.

[78] Id.

[79] According to rules stated in chapter XXI, paragraphs 4 to 19 of this vol. Armstrong *v.* Fargo, 8 Hun, 175.

A bill of lading in which W. R. B. is named as consignee is admissible in a suit by A. G. B. where it is shown that the consignor always addressed him in that style. Bullock *v.* Charleston, etc., Ry. Co., 82 S. C. 375, 64 S. E. Rep. 234.

[80] Id.

[81] Croknite *v.* Wells, 32 N. Y. 247. As to delivery "on board," compare Goddard *v.* Mallory, 52 Barb. 87; Brown *v.* Powell, &c. Co., L. R. 10 C. P. 562, 14 Moak's Eng. 420.

[82] Newstadt *v.* Adams, 5 Duer, 43.

[83] Thurman *v.* Wells, 18 Barb. 500; Abrams *v.* Platt, 23 Misc. 637, 52 N. Y. Supp. 153.

See, for evidence held sufficient to send the case to the jury on the issue of a delivery to an agent of the carrier, Lewis *v.* Van Horn, 24 Misc. 765, 53 N. Y. Supp. 546.

"Third parties cannot rely upon the agent's mere assumption of authority. In dealing with an avowed agent, they are put upon their guard by the very fact. Where the agent transcends the limits of his authority, and the person with whom he deals has notice of this, sufficient to put him upon inquiry, he cannot charge the principal." Lienkauf *v.* Lombard, 12 N. Y. App. Div. 302, 42 N. Y. Supp. 391.

[84] Western Transp. Co. *v.* Hawley, 1 Daly, 327; Rogers *v.* Long Island R. R. Co., 2 Lans. 269; and see Hughes *v.* N. Y. & N. H. R. R. Co., 36 Super. Ct. (J. & S.) 222. As to evidence of authority to sign bills of lading on ship, see

say,[85] nor the supposition of the witness,[86] is competent. Evidence of a single similar act on the part of the alleged agent, and of a recognition of it by the defendant, may be enough.[87] But evidence that the clerk was accustomed to receive goods at the company's office does not show authority to receive them at other places.[88] *Prima facie*, a servant of common carriers, allowed by them to take particular property for carriage, takes it as their servant; and the fact that they allowed him to retain the compensation

Ward *v.* Green, 6 Cow. 173; Dows *v.* Greene, 16 Barb. 72; The Freeman *v.* Buckingham, 18 How. 182; Walter *v.* Brewer, 11 Mass. 99; Reynolds *v.* Toppan, 15 Mass. 370; Citizens' Bank *v.* Nantucket Steamboat Co., 2 Story C. Ct. 16.

Where, in an action against a railroad company, it appeared that S, the regularly appointed agent of the company at a certain depot, lived three miles away from the depot and T, who lived in the depot, had for two years discharged the duties of agent of the depot in the name of S, the acts of T were presumed to have been done with the knowledge and acquiescence of the company, it being impossible that he should have discharged those duties, for such a length of time, without such knowledge and acquiescence on its part, and that the company was therefore, bound by the acts of T in the capacity of such agent. Katzenstein *v.* Raleigh, etc., R. Co., 84 N. C. 688.

[85] Spade *v.* Hudson River R. R. Co., 16 Barb. 383.

[86] Butler *v.* Hudson R. R. Co., 3 E. D. Smith, 571.

[87] Wilcox *v.* Chicago, &c. R. R. Co., 5 Reporter, 114; Glasco *v.* N. Y. Central R. R. Co., 36 Barb. 557.

Where the defendant company is engaged in operating passenger trains, evidence that twice within two years agents of the defendant have received goods for transportation over its lines does not make the defendant liable as a common carrier, in the absence of proof that the acts of the agent or agents were recognized by the company or that the latter received any payment for the transportation, if any was made. Elkins *v.* Boston, etc., R. Co., 23 N. H. 275.

[88] Cronkite *v.* Wells, 32 N. Y. 247.

A train master who is authorized by the defendant company to place cars along the railway lines, for the purpose of receiving freight, has implied authority to enter into an agreement to receive such freight when deposited at a certain point along defendant's line, notwithstanding that he may not be authorized to make a contract of affreightment. Georgia, etc., Ry. Co. *v.* Marchman, 121 Ga. 235, 48 S. E. Rep. 961.

does not rebut this presumption, without evidence that the credit was given to him by the owner of the goods.[89]

24. Implied Contract.

Evidence that the goods were delivered on board is sufficient to charge the carrier without showing a bill of lading or other express agreement made.[90]

25. Address; Instructions; " C. O. D."

The address may be proved by a witness without producing the writing.[91] It is *prima facie* evidence of instructions to deliver or forward accordingly.[92] Instructions or remonstrances as to care, communicated to the defendants or their proper servant, by the plaintiff or his agent,[93] are competent, as charging them with notice of their duty.[94] A mistake, even in written instructions, drawn up by defendant's agent, contrary to the previous oral agreement, may be proved by parol.[95]

The mark "C. O. D." may be explained by oral evidence of usage not inconsistent with it.[96]

[89] Farmers, &c. Bank *v.* Champlain Transp. Co., 23 Vt. 186, 203. Compare Butler *v.* Basing, 2 C. & P. 613.

[90] Robinson *v.* Chittenden, 69 N. Y. 525, 531, rev'g 7 Hun, 133; s. p., Baylis *v.* Lintott, L. R. 8 C. P. 345, 5 Moak's Eng. 319.

The issuance of a bill of lading is not necessary to the beginning of the relation of carrier. Gulf, etc., Ry. Co. *v.* Compton (Tex. Civ. A.), 38 S. W. Rep. 220.

Where there is no special contract between a common carrier and a shipper, the carrier is responsible under the common-law liability alone. Pennsylvania R. R. Co. *v.* Clark, 118 Md. 514, 85 Atl. Rep. 613.

[91] Burrell *v.* North, 2 Car. & Kirw. 680; Commonwealth *v.* Morrell, 99 Mass. 542.

[92] Edw. on B., § 580.

[93] See South, &c. Ala. R. R. Co. *v.* Henlein, 52 Ala. 606, 23 Am. Rep. 578.

[94] Black *v.* Camden, &c. R. R. Co., 45 Barb. 40, 42; and see paragraph 16.

[95] Malpas *v.* London & Sw. Ry. Co., L. R. 1 C. P. 336, Rosc. N. P. 20.

[96] Collender *v.* Dinsmore, 55 N. Y. 200.

26. Express Contract.

A contract if alleged as the foundation of the action must be proved, and negligence not alleged may also be proved;[97] but without proof of contract, negligence in gratuitous carriage is not enough.[98] Omission to allege special exemptions in the contract is not material, unless there is evidence to bring the case within an exemption.[99] The bill of lading or receipt, unless admitted in pleading, must be proved to have been executed on defendant's part, before it can be put in evidence. It is proved by evidence of the signature,[1] and of the authority of the agent if signed by agent.[2] In addition to the general principles already stated,[3] it should be observed that if duplicate bills of lading or contracts are given, the one signed by defendant and delivered to plaintiff is the primary evidence in plaintiff's favor,[4] and, if the two differ, is the controlling evidence of the contract as against the carrier, and in favor of the holder of the bill.[5] A promise of the agent of a second line, after receiving the goods and without new consideration, to forward them earlier than in usual course, is not evidence from which the jury may infer a contract to do so.[6] The power of a railroad company to make an ex-

[97] Bostwick *v.* Baltimore, &c. R. R. Co., 45 N. Y. 712, rev'g 55 Barb. 137.

[98] Flint, &c. Rw. Co. *v.* Weir, Mich. S. Ct., June, 1877, Cent. L. J. 285.

[99] Newstadt *v.* Adams, 5 Duer, 43; School District in Medfield *v.* Boston, H. & Erie R. R. Co., 102 Mass. 552, 555, 3 Am. Rep. 502. Compare Edw. on B., § 671.

[1] For the mode of proving signature, see chapter XXI, paragraphs 4 to 19 of this vol. Armstrong *v.* Fargo, 8 Hun, 145, and see The Columbo, 3 Blatchf. 521.

A bill of lading which is in possession of the carrier and produced by the latter pursuant to notice, is admissible in evidence on behalf of the plaintiff without proof of execution. Louisville, etc., R. Co. *v.* Yudelson, 135 Ga. 731, 70 S. E. Rep. 576.

[2] Paragraph 23.

[3] Paragraphs 2 and 3, and 21.

[4] Cleveland & Toledo R. R. Co. *v.* Perkins, 17 Mich. 296.

[5] The Thames, 14 Wall. 105.

[6] Railroad Company *v.* Reeves, 10 Wall. 176.

press contract to carry beyond its own terminus may be presumed.[7]

27. Authority to Make Special Contract.

Evidence that the agent was the head agent of the road at the station where the goods were received, and had full charge of receiving and fowarding there, is sufficient to sustain an inference that he was authorized to make a special contract in the ordinary course,[8] although he testify

[7] Railway Company *v.* MacCarthy, 96 U. S. (6 Otto) 258, 266; and see Simmons *v.* Law, 4 Abb. Ct. App. Dec. 241. As to carriage beyond the realm, see Nugent *v.* Smith, L. R. 1 C. P. Div. 423, s. c., 17 Moak's Eng. 330, rev'g L. R. 1 C. P. Div. 19, 25, 15 Moak's Eng. 203, 209.

"*Prima facie* a station agent can only bind the company in contracts of carriage to the end of its road. When a written contract, entered into by a station agent of a railway company for the carriage of property to a point beyond the end of the line of such company is relied on, it is necessary to adduce some evidence tending to prove that the agent had authority, express or implied, to enter into the contract before it will bind the company." Faulkner *v.* Chicago, etc., R. Co., 99 Mo. App. 421, 73 S. W. Rep. 927.

"It being out of the usual course of business for a railroad company to contract with reference to the use of other lines of railway, and there being nothing to show a course of dealing indicating an arrangement between the different lines over which appellant's car was transported, authorizing the local agent at Yankton to enter into a through contract, the presumption is that he was without power to do so, and such authority will not be inferred from the mere fact that the car was billed through, and the freight for the entire distances was collected by said agent." Coates *v.* Chicago, etc., R. Co., 8 So. Dak. 173, 65 N. W. Rep. 1067.

[8] Taff Vale Rw. Co. *v.* Giles, 22 Eng. L. & Eq. 202.

A special contract made by an agent of a carrier to ship goods on a particular train is within the scope of the agent's apparent authority and the shipper is entitled to rely thereupon. Pacific Exp. Co. *v.* Needham, 37 Tex. Civ. App. 129, 83 S. W. Rep. 22.

"It is well settled that where a station agent, clothed with the power and whose duty it is, as here, to receive and forward freight, and who makes a contract within the scope of his apparent authority, he thereby binds the company he represents, although he may have exceeded his authority, and when such company seeks to absolve itself from liability under such contract, on the ground that its agent,

that he was not.[9] A single similar act, and the ratification

though apparently authorized to make it, in fact had no such authority, it must show that the party with whom the contract was made had knowledge of the fact that the agent was acting beyond his authority." Gann *v.* Chicago G. W. Ry. Co., 72 Mo. App. 34.

A soliciting freight agent can bind the carrier by a contract made in his own name to deliver freight in the near future, such contract being a usual incident of the powers of a soliciting freight agent. Graves *v.* Miami S. S. Co., 29 Misc. 645, 61 N. Y. Supp. 115.

A railroad station agent cannot bind the company by a contract to transport goods for one shipper at a lower rate than for another, such discrimination not being within the apparent scope of his authority. Myar *v.* St. Louis S. W. Ry. Co., 71 Ark. 552, 76 S. W. Rep. 557.

"When the shipper and the carrier agree, through its agent, upon a date of delivery at destination which gives the usual time to make the trip, such contract cannot be held unusual or extraordinary, and is within the general authority of the agent." Rudell *v.* Ogdensburg Transit Co., 117 Mich. 568, 76 N. W. Rep. 380, 44 L. R. A. 415. "A railway station agent authorized to receive and forward freight has implied authority to contract to furnish a certain number of cattle cars at his station on a specified day, the shipper being ignorant of any limitation upon his powers." Balt. & O. S. W. Ry. Co., Tison, 116 Ill. App. 48.

"It was within the apparent power of the agent of the defendant to contract with the plaintiff for the delivery of the car to the connecting line at Waterloo within a specified time, and, in the absence of knowledge of the limitation of his power to bind the company by his agreement, the plaintiff had the right to rely upon it as binding upon the defendant." Stoner *v.* Chicago G. W. Ry. Co., 109 Iowa, 551, 80 N. W. Rep. 569.

A special contract of carriage entered into between the shipper and the carrier is a matter of defense and does not have to be pleaded or proved by the shipper in a suit against the carrier. Empire State Cattle Co. *v.* Atchison, etc., R. Co., 129 Fed. Rep. 480.

A master of trains, who had authority to make a contract to place cars along the line of the railway at places other than stations, has power to bind the company by an agreement to receive freight at these places, and the failure of the company to keep such agreement renders it liable. Ga., etc., Ry. Co. *v.* Marchman, 121 Ga. 235, 48 S. E. Rep. 961.

[9] Deming *v.* Grand Trunk Ry. Co., 48 N. H. 455, s. c., 2 Am. Rep. 267. See Lowenstein *v.* Lombard, 164 N. Y. 324, 58 N. E. Rep. 44.

of it by the defendants, may be enough to justify inferring authority.[10]

28. Description of Goods.

A variance in description which does not mislead is not usually material.[11] The invoice is not alone competent to prove contents of packages.[12] Its competency usually depends on the witness.[13]

29. Amount.

If plaintiff produces no bill of lading, he must in some other way show the amount delivered to the carrier.[14] The returns of a private measurer are not competent against one who did not assent to his measuring,[15] except as auxiliary to the testimony of a witness.[16]

[10] Wilcox *v.* Chicago, &c. R. R. Co., 5 Reporter, 114.

The practice of an agent of a baggage express company in turning over to the railroad company passenger's checks before the baggage reached its destination, where of long standing and known to the express company, is binding on the company and renders it liable where the trunk, subsequent to such surrender of the checks by the express company to the railway company, is rifled of its contents. Springer *v.* Westcott, 166 N. Y. 117, 59 N. E. Rep. 693.

Although a station agent may not have power to bind the company by a contract to make the freight payable at a place other than that required by the rules of the company, yet the acquiescence of the general freight agent in such agreement amounts to a ratification of the unauthorized contract by the company and renders it binding upon the company. Porter *v.* Raleigh, etc., R. Co., 132 N. C. 71, 43 S. E. Rep. 547.

[11] See Zeigler *v.* Wells, 28 Cal. 263, 265; Cash *v.* Wabash R. Co., 81 Mo. App. 109.

[12] Watson *v.* Yates, 10 Mart. (La.) 688.

Such an invoice may, under certain circumstances, be admissible as part of the *res gestæ*. Milne *v.* Chicago, etc., R. Co., 155 Mo. App. 465, 135 S. W. Rep. 85.

[13] Chapter XVI, paragraphs 36 to 39 of this vol. New York, etc., Transp. Line *v.* Baer, 118 Md. 73, 84 Atl. Rep. 251.

[14] Manning *v.* Hoover, Abb. Adm. 188.

[15] Bissell *v.* Campbell, 54 N. Y. 353.

[16] Chapter XVI, paragraphs 36 to 39 of this vol.

30. Condition.

It is not an absolute rule that plaintiff must give direct evidence that the injured goods were in good condition when shipped;[17] but it is enough to show the existence on the vessel of a probable cause of the injury shown.[18] Goods shipped in cases are presumed to have been properly packed and in fit state for transportation.[19] Evidence that, at the time of delivery, the goods were in good condition, in those respects in which they were open to inspection, is proved *prima facie*,[20] but not conclusively, by words in the bill of lading signed by defendants, such as "in good order," or "well conditioned,"[21] and this presumption is not reduced by the words "weight, contents and value unknown."[22] This evidence suffices to throw the burden of proof upon the carrier, to show that the goods were not in good order when received by him.[23] If defendants were a connecting line, evidence of delivery to the first company in good order raises a presumption that the goods came to defendant's hands in good order.[24] Although goods are perishable, or liable to deteriorate, rapidly from internal causes, yet if they are damaged in the hands of a common carrier the burden of proof is on it to show that it was free from negligence, or that, notwithstanding its negligence, the damage occurred without its fault.[25]

Evidence of *bad condition* when the drayman employed

[17] Paragraph 6, note 1.

[18] Deming *v.* Grand Trunk Ry. Co., 48 N. H. 455, s. c., 2 Am. Rep. 267.

[19] English *v.* Ocean Steam Nav. Co., 2 Blatchf. 425.

[20] Hastings *v.* Pepper, 11 Pick. 41; Nelson *v.* Woodruff, 1 Black, 156, 160.

[21] Tarbox *v.* Eastern Steamboat Co., 50 Me. 339.

[22] English *v.* Ocean Steam Nav. Co., 2 Blatchf. 425; and see The Columbo, 3 Id. 521; The California, 2 Sawy. 12.

[23] Price *v.* Powell, 3 N. Y. 322; Illinois R. R. Co. *v.* Cowles, 32 Ill. 116, 121.

[24] Smith *v.* N. Y. Central R. R. Co., 43 Barb. 225; Edw. on B., § 671; Laughlin *v.* Chicago, &c. R. R. Co., 28 Wis. 204.

[25] Central Railroad Co. *v.* Hasselkus, 91 Ga. 382, 44 Am. St. Rep. 37, 17 S. E. Rep. 838.

by the carrier delivered the goods to plaintiff, is competent against the carrier from whom the drayman received them.[26] If defendants were the earlier of several connecting lines, and injury in their possession is shown, it may be presumed in absence of anything to indicate the contrary, that no further injury occurred while the goods were in the hands of the succeeding carrier.[27] Evidence as to bad condition is not necessarily confined to the period when the goods were in the carrier's possession as carrier, but may include a later time within limits affording just inferences as to the existence, nature and cause of injury in relation to that period.[28] The declaration and admissions of the carrier's agent are competent within limits already stated.[29] The letter of plaintiff's agent, to him, written on receiving the goods, and stating their condition, is not evidence in favor of plaintiff against the bailee from whom the agent received them.[30]

Plaintiff having given a receipt for the goods as delivered to him in good condition, may explain it by testimony that they were not, and that he wished to qualify the receipt, but was not allowed to do so.[31]

31. Instructions; Route; Terminus.

A bill of lading or receipt does not exclude oral evidence of instructions not inconsistent with it.[32]

If the receipt or bill expressly allows forwarding by any carrier, evidence of oral instructions to forward a particular

[26] Barclay *v.* Clyde, 2 E. D. Smith, 95.

[27] The Norman, 1 Newb. Adm., 525.

[28] Curtis *v.* Chicago, &c. R. R. Co., 18 Wis. 312; Holden *v.* N. Y. Central R. R. Co., 54 N. Y. 662.

[29] Page 144 of this vol. Burnside *v.* Grand Trunk R. R. Co., 47 N. H. 554.

[30] Owen *v.* Jones, 14 Ark. 502. Compare Beaver *v.* Taylor, 1 Wall. 637.

Admissions made by the consignee upon delivery to him of the goods shipped are admissible against the plaintiff. Louisville, etc., R. Co. *v.* Yudelson, 135 Ga. 731, 70 S. E. Rep. 576.

[31] Tierney *v.* N. Y. C. & H. R. R. Co., 10 Hun, 569.

[32] Edw. on B., § 584.

way is not competent against the carrier.[33] If only the termini of a voyage are mentioned, there is a presumption that a direct voyage was intended; but this may be rebutted by evidence of usage, or parol understanding;[34] but if it be shown that there were two usual and customary routes, the carrier has his option, and cannot be charged by oral evidence of an agreement to take one exclusively.[35] Plaintiff may show an express oral agreement,[36] or an implied agreement arising from the usage of business and his instructions,[37] as to what was to be done with the goods after reaching the terminus specified in the bill of lading, even though it require further transportation.[38]

32. Stowage.

A clean bill of lading imports that the goods are to be carried under deck; and parol evidence of a prior or contemporaneous agreement of the shipper and carrier, that they might be carried on deck is not competent;[39] but evidence of a usage of the particular trade so to carry is competent.[40] Evidence of an agreement for particularly careful stowage under deck may be competent.[41]

The actual stowage may be shown by the declarations of the master, under limits already stated.[42]

The question whether goods were properly stowed is a

[33] Hinckley *v.* N. Y. Central R. R. Co., 56 N. Y. 429.

[34] Lowry *v.* Russell, 8 Pick. 360. Compare Niles *v.* Culver, 8 Barb. 205; White *v.* Van Kirk, 25 Id. 16.

[35] White *v.* Ashton, 51 N. Y. 280.

[36] Baltimore, &c. Steamboat Co. *v.* Brown, 54 Penn. St. 77.

[37] Hooper *v.* Chicago & Nev. R. R. Co., 27 Wis. 81, 9 Am. Rep. 439.

[38] Baltimore, &c. Steamboat Co. *v.* Brown (above). Compare Wolfe *v.* Myers, 3 Sandf. 7.

[39] The Delaware, 14 Wall. 579, 692, and cases cited; Edw. on B. § 588. If it stipulates that a part may be so carried, oral evidence of consent that others be so carried is incompetent. Sayward *v.* Stevens, 3 Gray, 97, 102. The owner's knowledge is not a waiver. The Petona, Ware, 2d ed. 541.

[40] Baxter *v.* Leland, 1 Blatchf. 526. But see chapter XVI, paragraph 9 of this vol.

[41] The Star of Hope, 2 Sawy. 15.

[42] Chapter VII, paragraph 50 of this vol. Price *v.* Powell, 3 N. Y. 322. Compare Mallory *v.* Perkins, 9 Bosw. 572.

proper subject for expert testimony; and a seafaring man accustomed to stowing and carrying such goods is competent to give an opinion;[43] but the question whether the injury could have occurred to the goods had they been stowed as alleged may not be.[44-45]

33. Time; Delay.

A bill of lading making no mention of time, cannot be varied by evidence of an incidental oral stipulation as to time.[46] But evidence of usage is competent.[47]

Since the time of the arrival is peculiarly within the carriers' knowledge, very slight evidence on plaintiff's part suffices to throw on them the burden of proof as to time.[48] If injury is shown to have been caused by delay, plaintiff need not show the delay to have been unreasonable; but the burden is on the carrier to excuse it.[49] The cause of delay

[43] Price *v.* Powell, 3 N. Y. 322.

[44-45] New Eng. Glass Co. *v.* Lowell, 7 Cush. (Mass.) 319.

[46] Higgins *v.* U. S. Mail Steamship Co., 3 Blatchf. 282.

A travelling freight agent of a common carrier has power to bind the company by his contract to ship goods at a certain time although, as between the company and the agent, the agent had no authority to make such contracts except upon the condition that enough goods were shipped to justify a special train. Baker *v.* Chicago G. W. Ry. Co., 91 Minn. 118, 97 N. W. Rep. 650.

[47] Id. Cochran *v.* Retberg, 3 Esp. 121.

[48] Place *v.* Union Express Co., 2 Hilt. 19.

An agreement to deliver by a certain time does not make the carrier a guarantor in this respect so as to render it liable for an act of God. Sauter *v.* Atchison, etc., Ry. Co. (Kan.), 97 Pac. Rep. 434.

[49] Harris *v.* Northern Ind. R. R. Co., 20 N. Y. 232, 236.

Special damages for failure to deliver on time certain cans for use in a factory, resulting in the closing down of the factory, cannot be recovered unless the carrier had notice of facts which would apprise an ordinarily prudent person that such delay would cause the loss in question. Ill. Cent. R. Co. *v.* Hopkinsville Canning Co., 132 Ky. 578, 116 S. W. Rep. 758.

"When delay in delivery of freight has been shown, and the defendant has presented evidence tending to excuse that delay, it then becomes a question for the jury whether the facts as given in evidence on behalf of the defendant show such reasonable diligence

may be shown by evidence of declarations forming part of the *res gestæ*.[50] If the carriers excuse delay by reason of accumulation of freight, evidence that other goods subsequently shipped arrived sooner is competent as tending to prove that plaintiff's goods were not sent in regular order.[51]

34. Burden of Proof as to Loss, and Cause of Loss.[52]

The usual course of proof is for plaintiff to produce the bill of lading, showing the delivery of the property to defendants and their contract to carry, and to prove non-delivery or arrival in a damaged state, and the damages sustained. This evidence, if there be nothing to indicate that the loss was from a cause consistent with the carriers' exemption from liability,[53] makes a *prima facie* case,[54]

as should excuse the delay." Pennsylvania R. R. Co. *v.* Clark 118 Md. 514, 85 Atl. Rep. 613.

[50] Sisson *v.* Cleveland, &c. R. R. Co., 14 Mich. 489, 496.

[51] Acheson *v.* N. Y. Central & H. R. R. R. Co., 61 N. Y. 652.

[52] The rule here stated is applied by the majority of the best considered cases, although there are numerous authorities to the contrary. It is applicable alike in cases of loss by expressly excepted perils, and of injury by latent causes existing in the goods before the issue of the bill of lading. When there is no contract, and the question is solely on the carrier's common-law liability, Wharton says the carrier has the burden of disproving negligence. Whart. on. Neg. § 593; and see Agnew *v.* Steamer, 27 Cal. 425, 431. *Contra*, 5 Am. L. Rev. 205, 225. For the reasons in favor of requiring the carrier to prove the cause of loss, see Rixford *v.* Smith, 52 N. H. 355, s. c., 13 Am. Rep. 42. For the contrary see the dissenting opinion by Bigelow, C. J., in Cass *v.* Boston & Lowell R. R. Co., 14 Allen, 448.

[53] Paragraph 6.

[54] Transportation Co. *v.* Downer, 11 Wall. 133, and cases cited; Burnell *v.* N. Y., &c. R. Co., 45 N. Y. 185; Magnin *v.* Dinsmore, 56 N. Y. 168; Steers *v.* Liverpool, &c. Steamship Co., 57 N. Y. 6; Fairfax *v.* New York, &c. R. Co., 67 N. Y. 11; Claflin *v.* Meyer, 75 N. Y. 260; Fenn *v.* Timpson, 4 E. D. Smith, 276; Shaw *v.* Gardner, 12 Gray, 488 (so held of live stock). Louisville, &c. R. R. Co. *v.* Hedger, 9 Bush (Ky.), 645, s. c., 15 Am. Rep. 740. Injury to property in transit being shown, the burden is cast upon the carrier to exculpate himself from blame. Grieve *v.* Illinois, &c. Ry. Co., 104 Iowa, 659, 74 N. W. Rep. 192. But a shipper who has undertaken to care for his own stock while in

sufficient to go to the jury in the absence of other evidence. The presumption is that the injury was occasioned by defendants' act or default.[55] The principle upon which this rule is founded embraces as well the case of a partial as of a total failure to deliver the subject of a bailment.[56]

If defendants rely on an exemption by reason of the nature of the cause of loss, they must show that it was one of the excepted perils;[57] but need not disprove negligence unless the circumstances are of such a character as to raise a presumption of negligence.[58]

transit has the burden of showing that injury thereto did not result from his own negligence, and, if occasioned by failure to do what he has undertaken, then, that such failure resulted from omission on the part of the carrier to do some duty devolving upon it. (Id.)

[55] Nelson *v.* Woodruff, 1 Black, 156, 160.

Therefore the burden is upon the defendant to prove freedom from such default or negligence, unless, as stated above, the facts show that the proximate cause of the loss was an unprecedented event or the act of God, in which case the burden rests upon the plaintiff to prove that notwithstanding such event or act the loss could have been averted by the exercise of reasonable care. Natl. Rice Milling Co. *v.* New Orleans, etc., R. Co., 132 La. 615. The parties may agree that negligence shall not be presumed against the carrier, in which case the burden is on the plaintiff to prove negligence. Merchants', etc., Transp. Co., *v.* Eichberg, 109 Md. 211, 71 Atl. Rep. 993, 130 Am. St. Rep. 524.

[56] Canfield *v.* Baltimore, &c. R. Co., 93 N. Y. 532, 538.

[57] Id.; Steamer Niagara *v.* Cordes, 21 How. (U. S.) 7, 29; Taylor *v.* Liverpool & Gt. Western Steam Co., L. R. 9 Q. B. 546, s. c., 10 Moak's Eng. 172.

[58] Where the carrier seeks to escape liability by reason of a common-law exception or one embodied in a special contract, the authorities are sharply conflicting upon the question as to whether the burden of proof is upon the plaintiff to show negligence on the part of the carrier, or upon the latter to prove freedom therefrom. According to some authorities the burden is on the carrier to show that the loss not only falls within the exception but also that it occurred without his negligence. Atlantic Coast Line R. Co. *v.* Rice, 169 Ala. 265, 52 So. Rep. 918, 29 L. R. A. N. S. 1214, Ann. Cas. 1912 B. 389; Western, etc., R. Co. *v.* Summerour, 139 Ga. 545, 77 S. E. Rep. 802; Michigan Cent. R. Co. *v.* Osmus, 129 Ill. A. 79; Louisville, etc., R. Co. *v.* Brown, 90 S. W. Rep. 567, 28 Ky. L. 772; Mc-

Defendants having thus shown that the loss was due to an excepted peril, the burden is thrown on plaintiff to show defendants' negligence.[59] If plaintiff's case shows a cause of loss presumptively consistent with the carriers' exemption, he must go further and show negligence.[60] If it shows loss from a cause that would not have happened but for the want of care on defendants' part, this is enough to go to the jury.[61] Proof that defendants carried the thing in a

Grath *v.* Northern Pacific R. Co., 121 Minn. 258, 141 N. W. Rep. 164, L. R. A. 1910 D. 644; Lyon *v.* Atlantic Coast Line R. Co., 165 N. C. 143, 81 S. E. Rep. 1; Ferguson *v.* Southern R. Co., 91 S. C. 61, 74 S. E. Rep. 129; Pennsylvania R. Co. *v.* Naive, 112 Penn. 239, 79 S. W. Rep. 124, 64 L. R. A. 443. While numerous other authorities hold that after the carrier has shown that the loss falls within the exception, the burden is upon the plaintiff to prove such negligence on the part of the carrier as will render him liable notwithstanding the exception. Santa Fé, etc., R. Co. *v.* Grant Bros. Contr. Co., 13 Ariz. 186, 108 Pac. Rep. 467; St. Louis, etc., R. Co. *v.* Bone, 57 Ark. 26, 11 S. W. Rep. 985; Ins. Co. Co. of North America *v.* Lake Erie, etc., R. Co., 152 Ind. 333, 53 N. E. Rep. 382; Gilbert Bros. *v.* Chicago, etc., R. Co., 156 Iowa, 440, 136 N. W. Rep. 911; Morse *v.* Canadian, Pac. R. Co., 97 Me. 77, 53 Atl. Rep. 874; Canfield *v.* Baltimore etc., R. Co., 93 N. Y. 132, 41 Am. Rep. 268; but see Blum *v.* Monehan, 36 Misc. 179, 73 N. Y. Supp. 162; Armstrong *v.* Illinois Cent. R. Co., 26 Ore. 352, 109 Pac. Rep. 216, 29 L. R. A. N. S. 671; Cau *v.* Texas, etc., R. Co., 194 U. S. 427, 24 S. Ct. 663, 48 L. ed. 103; Western Transportation Co. *v.* Downer, 11 Wall. 129, 20 L. ed. 160, and cases cited.

[59] Downer *v.* Steam Nav. Co. (above); Railroad Co. *v.* Reeves, 10 Wall. 176; Patterson *v.* Clyde, 67 Penn. St. 500; Farnham *v.* R. R., 55 Id. 53; Natl. Rice Milling Co. *v.* New Orleans, etc., R. Co., 132 La. 615, 61 So. Rep. 708, Ann. Cas. 1914, D. 1099.

[60] Paragraph 6.

[61] Russell Mfg. Co. *v.* N. H. Steamboat Co., 50 N. Y. 121, distinguishing Lamb *v.* Camden & Amboy R. R. Co., 46 Id. 121. Evidence that the casualty or the inability to rescue the goods resulted from a defect in the vehicle is sufficient, without further proof of negligence, to sustain a verdict against the carrier. Empire Transp. Co. *v.* Wamsutta Oil Co., 63 Penn. St. 14, 8 Am. Rep. 515. If defendant would reduce the damage by the fact that the injury chiefly caused by his negligence was partly owing to an excepted peril, he must show to what extent. Speyer *v.* The Roberts, 2 Sawy. 1.

manner contrary to reasonable instructions on the package, throws on them the burden of proving that the injury was not attributable to this.[62]

35. Contract of Connecting Lines.

Where it is sought to extend the liability of the carrier beyond its own line, the burden is upon the party seeking to establish such liability to show an express contract by which the carrier became liable as common carrier beyond its own route.[63] The recent Acts of Congress[64] have changed this rule in so far as interstate shipments are concerned. The carrier's acceptance of goods marked for a point beyond his own route, does not alone imply a contract involving liability as carrier beyond his route.[65] But such a liability may be established by express contract,[66] or by showing

[62] Hastings *v.* Pepper, 11 Pick. 41.

[63] Taylor *v.* Maine Central R. Co., 87 Me. 299, 32 Atl. Rep. 905.

[64] See note 7 to paragraph 47 infra.

[65] This is now recognized as the *American* rule. R. R. Co. *v.* Pratt, 22 Wall. 129, and cases cited; Root *v.* Great W. R. R. Co., 45 N. Y. 524; Gray *v.* Jackson, 51 N. H. 9, 12 Am. Rep. 1. The *English* rule, adopted in a few of the States, is the contrary. Muschamp *v.* Lancaster, &c., R. R. Co., 8 Mees. & W. 421; Nashua Lock Co. *v.* Worcester & Nashua R. R. Co., 48 N. H. 339, 2 Am. Rep. 242, and cases cited; Angle, *v.* Mississippi, &c., R. R. Co., 9 Iowa, 487, 493, 2 Am. Law Rev. 426; Gray *v.* Jackson, 51 N. H. 9, s. c., 12 Am. Rep. 1, and cases cited. But the presumption may be rebutted. Cincinnati, &c. R. R. Co. *v.* Pontius, 19 Ohio St. 221, 2 Am. Rep. 391.

Under the American rule, a carrier who receives goods marked to a place beyond its own line, in the absence of a special contract, is only bound to carry the goods over its own route and safely deliver them to the next connecting carrier, whereupon its liability with respect thereto terminates. Pittsburgh, etc., R. Co. *v.* Bryant, 36 Ind. App. 340, 75 N. E. Rep. 829.

[66] *Contra*, as to railroad companies in Connecticut, 22 Conn. 502, 33 Id. 166.

Where the initial carrier makes a special contract to transport and deliver goods at a certain date at a point beyond its own line, it thereby makes itself liable for the failure of the connecting carrier to deliver the goods at the date agreed upon. Northern Pac. Ry. Co. *v.* American Trad. Co., 195 U. S. 439, 25 Sup. Ct. 84, 49 L. ed. 269.

Where a carrier by a "through freight bill of lading" agrees to

circumstances indicating such an understanding,[67]—for instance, that the company held itself out as a carrier for the entire distance,[68] or received freight for the entire distance,[69] or even agreed on an entire sum to be paid at the other end; [70] or that the connecting lines divided through freights in an agreed manner.[71]

36. Non-delivery.

If plaintiff alleges non-delivery, the burden is on him to prove it.[72] Slight evidence is sufficient to go to the jury in the absence of evidence of delivery.[73] Evidence of the declaration or admission of the agent of the carrier (if competent),[74] to the effect that the goods were lost, or that he did not know of their delivery, and believed he must have known if they had been delivered, is *prima facie* enough.[75] Non-delivery (or delivery in bad condition) by the last of

transport and deliver goods beyond its own lines, it is liable for damage to the goods occurring on connecting lines. Elgin, etc., R. Co. *v.* Bates Mach. Co., 200 Ill. 636, 66 N. E. Rep. 326, 93 Am. St. Rep. 218.

Under a contract to carry beyond its own line the initial carrier of goods has the right to select which of several connecting carriers will be used, unless there is an agreement to the contrary. Steidl *v.* Minneapolis, etc., R. Co., 94 Minn. 233, 102 N. W. Rep. 701.

[67] R. R. Co. *v.* Pratt (above).

[68] Id.; Mann *v.* Birchard, 40 Vt. 326, 337.

[69] R. R. Co. *v.* Pratt (above); St. John *v.* Express Co., 1 Woods, 612; and see Nashua Lock Co. *v.* Worcester & Nashua R. R. Co., 48 N. H. 339, s. c., 2 Am. Rep. 242.

[70] R. R. Co. *v.* Pratt, (above).

[71] Barter *v.* Wheeler, 49 N. H. 9, 6 Am. Rep. 434; Nashua Lock Co. *v.* Worcester & Nashua R. R. Co., 48 N. H. 339, 2 Am. Rep. 242, and cases cited.

[72] Woodbury *v.* Frink, 14 Ill. 279; The Falcon, 3 Blatchf. 64. If the contract allows delivery to either of two persons, the evidence must relate to each. The Falcon (above).

Similarly where the plaintiff agrees to look after his property during transportation, the burden is on him to show that his failure so to do was not the cause of the loss. Needy *v.* Western Md. Ry. Co., 22 Pa. Super. Ct. 489.

[73] Griffith *v.* Lee, 1 Carr. & R. 110; The Falcon (above); Rosc. N. P. 610; Place *v.* Union Express Co., 2 Hilt. 19.

[74] Paragraph 44.

[75] Edw. on B., § 669.

the lines connecting with defendants', by which the goods ought to have been carried after they left defendants' hands, is *prima facie* evidence of non-delivery (or delivery in bad condition, as the case may be) by defendants.[76]

37. Negligence.

A negligent breach of contract may be proved, though negligence be not alleged.[77]

Non-delivery, or delivery, in bad condition, of goods received in good condition, is *prima facie* evidence of negligence.[78] So is unusual delay in failing to deliver according to the general course of business.[79] Negligence may be presumed from a loss and failure to give any account.[80]

A demand and refusal to deliver, unexplained, is enough

[76] Laughlin *v.* Chicago, &c. Ry. Co., 28 Wis. 204, s. c., 9 Am. Rep. 493.

[77] Bostwick *v.* Baltimore & Ohio R. R. Co., 45 N. Y. 712, rev'g 55 Barb. 137; and see School District in Medfield *v.* Boston, H. & Erie R. R. Co., 102 Mass. 552, s. c., 3 Am. Rep. 502.

If the carrier's negligence brings the goods into contact with the destructive force of the Act of God, it is liable. Wald *v.* Pittsburgh, etc., R. R. Co., 162 Ill. 545, 44 N. E. Rep. 888, 53 Am. St. Rep. 332, 35 L. R. A. 356; Alabama Great Southern Ry. Co. *v.* Quarles, 145 Ala. 436, 40 So. Rep. 120, 117 Am. St. Rep. 54, 5 L. R. A. N. S. 867, 8 Ann. Cas. 308.

[78] Story on B., § 529; Edw. on B., § 671; Westcott *v.* Fargo, 6 Lans. 319, 326. So, also, of baggage, 45 N. Y. 184. But it is error to charge that this throws the burden of proof on defendant to show due care. Cochran *v.* Dinsmore, 49 N. Y. 249.

But a carrier is not liable for injury to goods due to the shipper's negligence in packing or to the ordinary wear and tear in transportation. Carpenter *v.* Baltimore, etc., Ry. Co., 22 Del. 15, 64 Atl. Rep. 252.

[79] Mann *v.* Birchard, 40 Vt. 326, 337.

Where a local usage requires the carrier to give notice of the arrival of the goods, failure to do so is negligence. Herf, etc., Chemical Co. *v.* Lackawana Line, 70 Mo. App. 274.

Delay in delivery due to the failure of the consignee to furnish evidence that the person demanding delivery as the consignee's agent is authorized to receive, is not negligence. Moore *v.* Baltimore, etc., R. R. Co., 103 Va. 189, 48 S. E. Rep. 887.

[80] Am. Express Co. *v.* Sands, 55 Penn. St. 140.

to go to the jury as evidence of fraud or *gross* negligence.[81] But accident unexplained is not sufficient evidence of gross negligence.[82] Where the plaintiff is required, by the terms of the receipt, to prove negligence, he must also show that it caused or at least contributed to the injury.[83]

38. Cause of Injury.

If a cause, the knowledge of which involves special experience or skill, is assigned,—such as unseaworthiness,[84] bad stowage,[85] or chemical action,[86] and the like,—the opinions of witnesses are competent; but, on inferences from facts of common observation and experience, they are not.[87] Weather may be proved by testimony of witnesses,[88] or by the official record of weather;[89] and whether its severity was sufficient to freeze the goods, by the opinions of witnesses cognizant of the mode in which they were protected.[90]

39. Theft or Robbery.

The burden of proof, as to whether theft or robbery was committed by the carrier's servants or by a stranger, is on the carrier.[91] It is enough for plaintiff in any case to show

[81] Newstadt *v.* Adams, 5 Duer, 43, and cases cited; Steers *v.* Liverpool, &c. St. Co., 57 N. Y. 1.

[82] French *v.* Buffalo, N. Y. & Erie R. R. Co., 2 Abb. Ct. App. Dec. 196; Bankard *v.* Baltimore, &c. R. R. Co., 34 Md. 197, 202.

[83] Cochran *v.* Dinsmore, 49 N. Y. 249; Washburn-Crosby Co. *v.* Johnston, 60 C. C. A. 187, 125 Fed. Rep. 273.

Where a carrier is not shown to have lost goods through negligence, its liability may be limited to the amount named in the contract of shipment. Shapiro *v.* Weir, 128 N. Y. App. Div. 245, 112 N. Y. Supp. 705.

[84] Baird *v.* Daly, 68 N. Y. 547.

[85] Paragraph 32.

[86] Turner *v.* The Black Warrior, 1 McAll. 181.

[87] Hayme *v.* Naylor, 18 Tex. 498, 509; and see chapter XVI, paragraph 23 of this vol.

[88] Curtis *v.* Chicago, &c. R. R. Co., 18 Wis. 312.

[89] Chap. XXVI, paragraph 38 of this vol.

[90] Curtis *v.* Chicago, &c. R. R. Co. (above).

[91] Knell *v.* U. S. & Brazil Steamship Co., 33 Super. Ct. (1 J. & S.) 423; and see 28 Wis. 204, 9 Am. Rep. 493.

that it is more probable the carrier's servant committed it, than that a stranger did; he need not fix the probability on any particular person.[92] Declarations of the proper officer of defendants' to the police, when causing investigation, are competent against the defendants.[93]

40. Conversion.

An allegation of conversion does not admit of evidence of mere loss, non-delivery,[94] or delayed delivery.[95]

41. Plaintiff's Title.

If another than plaintiff is not named as consignee, plaintiff's evidence that the carrier's contract, express or implied, was made with himself, is sufficient proof of his title.[96] If plaintiff is the *consignor* in a bill of lading or receipt naming another as consignee, he must give extrinsic evidence of his ownership, to rebut the presumption that the consignee is owner,[97] unless he shows a special contract with himself, not necessarily dependent on title to the goods.[98] If he is *consignee*, the bill or receipt naming him, or the fact of con-

[92] Vaughton *v.* London & N. W. Ry. Co. L. R., 9 Ex. 93, s. c., 8 Moak's Eng. 535.

[93] Kirkstall Brewery Co. *v.* Furness Ry. Co., L. R. 9 Q. B. 468, 10 Moak's Eng. 118.

[94] Tolano *v.* National Steam Navigation Co., 5 Robt. 318, s. c., 4 Abb. Pr. N. S. 316, 35 How. Pr. 496.

[95] Briggs *v.* N. Y. Central R. R. Co., 28 Barb. 515.

[96] Paragraphs 4 and 5. The consignee in a bill of lading is presumptively the owner and, unless the contrary appears, may sue the carrier as the owner. Sonia Cotton Oil Co. *v.* The Red River, 106 La. Ann. 42, 30 So. Rep. 303, 87 Am. St. Rep. 293. Further proof of title, if required, may be made as stated in the chapter on CONVERSION.

[97] Sweet *v.* Barney, 23 N. Y. 335, affi'g 24 Barb. 533; Krulder *v.* Ellison, 47 N. Y. 36.

The consignor of goods may sue the carrier for breach of duty whether he be the owner of the goods or not. Ross *v.* Chicago, &c. R. Co., 119 Mo. App. 290, 95 S. W. Rep. 977.

[98] Southern Express Co. *v.* Craft, 49 Miss. 480, s. c., 19 Am. Rep. 4; Dunlop *v.* Lambert, 6 Cl. & F. 600, s. P., Blanchard *v.* Page, 8 Gray, 281. Compare Thompson Fargo, 49 N. Y. 188, rev'g 58 Barb. 575.

signment, is alone presumptive [99] but not conclusive [1] evidence of his ownership. If plaintiff is *not named*, evidence of an assignment to him from the consignee,[2] or his possession of the bill of lading by indorsement from the consignee,[3] or even possession of an unindorsed bill of lading, with extrinsic evidence that plaintiff is a *bona fide* holder for value, by a transfer with intent to pass title,[4] is enough.

Oral evidence to show the real party in interest, is admissible within limits already stated.[5]

42. Oral Evidence to Explain or Vary Bill or Receipt.

A bill of lading, or other voucher giving the terms of transportation, cannot, in the absence of fraud or concurrent mistake, be varied by parol.[6] The principle does

[99] Sweet *v.* Barney (above); Ogden *v.* Coddington, 2 E. D. Smith, 317; Taplin *v.* Packard, 8 Barb. 220. Compare Ela *v.* Am. Merchants' Union Express Co., 29 Wis. 611, s. c., 9 Am. Rep. 619.

The consignee named in a bill of lading is presumptively the owner of the goods shipped and may maintain an action against the carrier for breach of a clause in a bill of lading providing for the privilege of stopping at intermediate points. Tebbs *v.* Cleveland, etc., Ry. Co., 20 Ind. App. 192, 50 N. E. Rep. 486.

[1] Price *v.* Powell, 3 N. Y. 322; Shepherd *v.* Harrison, L. R. 5 H. L. 116.

[2] Chandler *v.* Belden, 18 Johns. 157 (proved as stated in chapter I).

[3] The Thames, 14 Wall. 106, and cases cited.

[4] Merchants' Bk. *v.* Union Co., 8 Hun, 249.

[5] Chapter XVI, paragraph 10; chapter XIX, paragraph 5; and chapter XXVII, paragraph 12 of this vol. Ide *v.* Sadler, 18 Barb. 32. Compare Chapin *v.* Siger, 4 McLean, 378.

[6] Paragraphs 3 and 25–33; Long *v.* N. Y. Central R. R. Co., 50 N. Y. 76; The Presque Isle, 140 Fed. Rep. 202; Gibbons *v.* Robinson, 63 Mich. 146, 29 N. W. Rep. 533. For a freer statement of the principle, see Baltimore, etc., Steamboat Co. *v.* Brown, 54 Penn. St. 77. A bill of lading has a twofold character; first, that of a receipt; and, second, that of a contract. The receipt as between the shipper and carrier is explainable, but parol evidence is not admissible to vary the terms of that portion of it constituting the contract. Van Etten *v.* Newton, 134 N. Y. 143, 146, 31 N. E. Rep. 334; Davis *v.* Central Vermont R. Co., 66 Vt. 290, 44 Am. St. Rep. 852, 29 Atl. Rep. 313; Milne *v.* Chicago, etc., R.

not exclude an antecedent parol agreement of a different character, and imposing a different but not inconsistent obligation.[7] Bills of lading silent as to the time of the delivery of freight raise a presumption that delivery is to be made in a reasonable time, and parol evidence is not admissible to vary their legal import by showing that a definite and specified time for delivery was agreed upon by parol either expressly or by implication.[8]

43. Usage.

Evidence of usage is admissible to explain either the lan-

Co., 155 Mo. App. 465, 135 S. W. Rep. 85; N. Y., etc., Trans. Line *v.* Baer, 118 Md. 73, 84 Atl. Rep. 251. The purpose of the bill of lading being to evidence the contract of carriage, the shipper is presumed to have assented to its terms. McElveen *v.* Southern Ry. Co., 109 Ga. 249, 34 S. E. Rep. 281, 77 Am. St. Rep. 371. As a contract to carry and deliver the goods upon the terms and conditions specified in the instrument, it cannot be explained by parol testimony so as to alter its legal effect, in the absence of fraud or mistake, but as a receipt or acknowledgment of quantity, character or condition of the articles, it may be explained, or contradicted like any other receipt. Morganton Mfg. Co. *v.* Ohio River, etc. Ry. Co., 121 N. C. 514, 28 S. E. Rep. 474; Planter's Fertilizers Mfg. Co. *v.* Elder, 101 Fed. Rep. 1001, 42 C. C. A. 130. The recital in a shipment receipt as to the weight of the goods shipped may be contradicted by parol evidence even if such receipt be considered a bill of lading. Higley *v.* Burlington, etc. Ry. Co., 99 Iowa, 503, 68 N. W. Rep. 289. Thus, if it stipulates for the most direct route, it cannot be varied by evidence of a previous or contemporaneous oral agreement allowing deviation. Stapleton *v.* King, 33 Iowa, 28, s. c., 11 Am. Rep. 109. If the vessel is mentioned, it is presumed to have been selected by the owner with regard to voyage and date of sailing. Goddard *v.* Mallory, 52 Barb. 87. If the carriers rely on the fact that the owner selected the vehicle with knowledge of defects in it, which caused the injuries, they must show affirmatively that he had notice of such defects. Harris *v.* Northern Indiana R. R. Co., 20 N. Y. 232, 236.

[7] Blossom *v.* Griffin, 13 N. Y. 569. For a summary of the law, as to the effect of bill of lading, see 14 Wall. 600.

[8] Central Railroad *v.* Haeselkus, 91 Ga. 382, 44 Am. St. Rep. 37, 17 S. E. Rep. 838.

guage of the parties,[9] or the course of business in view of which they contracted so as to show what acts constitute a performance; but not to vary or contradict the written contract, or vary the obligation created by it.

44. Declarations of Agents.

The principle determining the competency of agents' declarations has already been stated.[10]

45. Defenses; Generally.

Except as against a *bona fide* transferee of the bill of lading for value,[11] the carrier may contradict it, as to the de-

[9] See chapter XVI, paragraph 9, chapter XXVI, paragraph 14, and chapter XXVII, paragraph 28 of this vol. The Delaware, 14 Wall. 579; The Schooner Reeside, 2 Sumn. 567; Bourne *v.* Gatliffe, 11 Cl. & F. 45, 71.

Where the law from considerations of public policy injects a certain provision into an agreement between parties, local custom is inadmissible to vary the provision imposed by law. Tallassee Falls Mfg. Co. *v.* West Ry. of Ala., 128 Ala. 167, 29 So. Rep. 203.

But usage cannot be given in evidence to relieve a party from his express stipulation or to vary a contract certain in its terms. Stockton Lumber Co. *v.* California Nav., etc., Co., 10 Cal. App. 197, 101 Pac. Rep. 541.

[10] Chap. VII, paragraph 50 of this vol. Burnside *v.* Grand Trunk R. R. Co., 47 N. H. 554; Price *v.* Powell, 3 N. Y. 322, 325; Fogg *v.* Child, 13 Barb. 246; Virginia & Tenn. R. R. Co. *v.* Sayers, 26 Gratt. 328, 351; Packet Co. *v.* Clough, 20 Wall. 528, 540; Great Western Ry. Co. *v.* Willis, L. J. 34 C. P. 195, s. c., 18 C. B. N. S. 748.

[11] Dickerson *v.* Seelye, 12 Barb. 99. The carrier cannot defend, when sued by a *bona fide* holder of a bill of lading on the ground that the goods named in the bill of lading were never delivered to the carrier and that the agent of the carrier could not bind it by issuing the bill for goods not received. Armour *v.* Mich. Cent. Ry. Co., 65 N. Y. 111, 22 Am. Rep. 603; Henderson *v.* Louisville, etc., R. R. Co., 116 La. Ann. 1047, 41 So. Rep. 252, 114 Am. St. Rep. 582. Against such a holder fraud, etc. must be shown. Backus *v.* Marengo, 6 McLean, 487. Compare Byrne *v.* Weeks, 7 Bosw. 372, 4 Abb. Ct. App. Dec. appendix.

livery to him of the goods,[12] or as to their description,[13] quantity,[14] or condition.[15]

The *perils* for which the carrier is answerable,[16] depend on the express contract, if any, and on settled rules of law; and evidence, if not competent to show a usage, not to be liable for a peril thus imposed.[17]

[12] The Schooner Freeman *v.* Buckingham, 18 How. U. S. 192; The Lady Franklin, 8 Wall. 328; Sutton *v.* Kettell, Sprague's Decisions, 307; Brown *v.* Powell Duffryn Steam Coal Company, L. R. 10 C. P. 562, s. c., 14 Moak's Eng. 420. A bill of lading is both a receipt and a contract and as to the parts thereof which recite the goods received, it is subject to variation by parol. Planters' Fertilizer Mfg. Co. *v.* Elder, 42 C. C. A. 130, 101 Fed. Rep. 1001. He may show that the thing—for instance, money—was such as by uniform usage was never received by him as a common carrier, but only by his servants on their own account (Knox *v.* Rives, 14 Ala. 249, 257), and that in this instance plaintiff made a private arrangement with the servant or gave credit to him alone (Farmers', &c. Bk. *v.* Champlain Transp. Co., 23 Vt. 186).

[13] See Hale *v.* Milwaukee Dock Co., 29 Wis. 482, 9 Am. Rep. 603.

[14] Wolfe *v.* Myers, 3 Sandf. 7; Graves *v.* Harwood, 9 Barb. 477, 481. But the proof of mistake must be clear. Goodrich *v.* Norris, Abb. Adm. 196. The method of ascertaining quantity, which was resorted to, may be shown to be such as to be frequently inaccurate. Manning *v.* Hoover, Abb. Adm. 188.

[15] Hastings *v.* Pepper, 11 Pick. 41; Nelson *v.* Woodruff, 1 Black, 156, 160; Tarbox *v.* Eastern Steamship Co., 50 Me. 339; Price *v.* Powell, 3 N. Y. 322; Ellis *v.* Willard, 9 Id. 529.

Thus a statement in a bill of lading that goods were received in good condition is subject to contradiction by parol. Foley *v.* Lehigh Valley R. Co., 96 N. Y. Supp. 182.

[16] The carrier is not liable for losses caused either by: 1.The act of God. 2. The public enemy. 3. The inherent defect, quality, or vice of the thing carried. 4. Its seizure, in his hands, under legal process. 5. An act or omission of the owner. Clear proof, leaving no reasonable doubt that the loss was from an excepted peril, has been said to be necessary. The Mohler, 21 Wall. 230; and see The Newark, 1 Blatchf. 203. But compare chapter XXVI, paragraph 31, of this vol.

[17] The Schooner Reeside, 2 Sumn. 567; Garrison *v.* Memphis Ins. Co., 19 How. U. S. 312, 316; Boon *v.* Steamboat Belfast, 40 Ala. 184. So held, even as to a part of the route passing through a foreign country. Simmons *v.* Law, 4 Abb.

46. Contract for Restricted Liability.

The doctrine of the courts of the United States and those of some of the States is, that a common carrier for hire cannot stipulate for exemption from liability for negligence of himself or servants.[18] The doctrine of the New York courts,

Ct. App. Dec. 241, affi'g 8 Bosw. 213.

[18] Santa Fe, etc., R. Co. *v.* Grant Bros. Constr. Co., 228 U. S. 177, 184, 33 S. Ct. 474, 57 L. ed. 787; The Kensington, 183 U. S. 263, 268, 22 S. Ct. 102, 46 L. ed. 190; Knott *v.* Botany Worsted Mills, 179 U. S. 69, 71, 21 S. Ct. 30, 45 L. ed. 90, as to limited liability under the Acts of Congress see next paragraph.

The same rule is applied in:

Ala.—Louisville, etc., R. Co. *v.* Oden, 80 Ala. 38.

Ark.—Kansas City, etc., Co. *v.* Oakley, 115 Ark. 20, 170 S. W. Rep. 565.

Cal.—Hooper *v.* Wells, 27 Cal. 11, 85 Am. D. 211. But see under statute, Donlon *v.* Southern Pac. Co., 151 Cal. 763, 91 Pac. Rep. 603, 11 L. R. A. N. S. 811, 12 Ann. Cas. 1118.

Colo.—Union Pac. R. Co. *v.* Rainey, 19 Colo. 225, 34 Pac. Rep. 986.

Conn.—Camp *v.* Hartford, etc., Steamboat Co., 43 Conn. 333.

Del.—Truax *v.* Philadelphia, etc., R. Co., 8 Del. 233.

Ga.—Southern Express Co. *v.* Hannaw, 134 Ga. 445, 67 S. E. Rep. 944, 137 Am. St. Rep. 227.

Hawaii.—Ephraim *v.* Forest Queen, 7 Hawaii, 170.

Ida.—McIntosh *v.* Oregon R., etc., Co., 17 Ida. 100, 105 Pac. Rep. 66.

Ill.—Checkley *v.* Illinois Cent. R. Co., 257 Ill. 491, 100 N. E. Rep. 942, 44 L. R. A. N. S. 1127, Ann. Cas. 1914 A. 1202.

Ind.—Cleveland, etc., R. Co. *v.* Hollowell, 172 Ind. 466, 88 N. E. Rep. 680.

Kan.—Metz *v.* Chicago, etc., R. Co., 90 Kan. 460, 135 Pac. Rep. 667.

Ky.—Louisville, etc., R. Co. *v.* Plummer, 35 S. W. Rep. 1113, 18 Ky. L. 228.

La.—National Rice Milling Co. *v.* New Orleans, etc., R. Co., 132 La. 615, 61 So. Rep. 708, Ann. Cas. 1914 D. 1099. But see Higgins *v.* New Orleans, etc., R. Co., 28 La. Ann. 133.

Me.—Willis *v.* Grand Trunk R. Co., 62 Me. 488.

Md.—Merchants', etc., Transportation Co. *v.* Eichbery, 109 Md. 211, 71 Atl. Rep. 993, 130 Am. St. Rep. 524.

Mass.—Cox *v.* Central Vermont R. Co., 170 Mass. 129, 49 N. E. Rep. 97.

Minn.—Porteous *v.* Adams Express Co., 112 Minn. 31, 127 N. W. Rep. 429.

Miss.—Johnson *v.* Alabama, etc., R. Co., 69 Miss. 191, 11 So. Rep. 104, 30 Am. St. Rep. 534.

Mo.—McFadden *v.* Missouri

Pac. R. Co., 92 Mo. 343, 4 S. W. Rep. 689, 1 Am. St. Rep. 721; Libby *v.* St. Louis, etc., R. Co., 137 Mo. A. 276, 117 S. W. Rep. 659.

Mont.—Nelson *v.* Great Northern R. Co., 28 Mont. 297, 72 Pac. Rep. 642.

Nebr.—Miller *v.* Chicago, etc., R. Co., 85 Nebr. 458, 123 N. W. Rep. 449.

N. H.—Peerless Mfg. Co. *v.* New York, etc., R. Co., 73 N. H. 328, 61 Atl. Rep. 511.

N. J.—American Silk Dying, etc., Co. *v.* Fuller's Express Co., 82 N. J. L. 654, 82 Atl. Rep. 894.

N. C.—Lyon *v.* Atlantic Coast Line R. Co., 165 N. C. 143, 81 S. E. Rep. 1.

Oh.—Pittsburg, etc., R. Co. *v.* Sheppard, 56 Oh. St. 68, 46 N. E. Rep. 61, 60 Am. St. Rep. 732.

Okl.—St. Louis, etc., R. Co. *v.* Zickafoose, 39 Okl. 302, 135 Pac. Rep. 406.

Ore.—Wells *v.* Great Northern R. Co., 59 Ore. 165, 114 Pac. 92, 116 Pac. Rep. 1070, 34 L. R. A. N. S. 818, 825.

Penn.—Eckert *v.* Pennsylvania R. Co., 211 Pa. 267, 60 Atl. Rep. 781, 107 Am. St. Rep. 571.

R. I.—Hubbard *v.* Harnden Express Co., 10 R. I. 244.

S. C.—Black *v.* Atlantic Coast Line R. Co., 82 S. C. 478, 64 S. E. Rep. 418.

Tenn.—Illinois Cent. R. Co. *v.* Southern Seating, etc., Co., 104 Tenn. 568, 58 S. W. Rep. 303, 78 Am. St. Rep. 933, 50 L. R. A. 729.

Tex.—Missouri Pac. R. Co. *v.* Harris, 67 Tex. 166, 2 S. W. Rep. 574.

Utah.—Houtz *v.* Union Pac. R. Co., 33 Utah, 175, 93 Pac. Rep. 439, 17 L. R. A. N. S. 628.

Va.—Virginia, etc., R. Co. *v.* Sayers, 26 Gratt. (67 Va.) 328.

Wash.—Jolliffe *v.* Northern Pac. R. Co., 52 Wash. 433, 100 Pac. Rep. 977.

W. Va.—Williamsport Hardwood Lumber Co. *v.* Baltimore, etc., R. Co., 71 W. Va. 741, 77 S. E. Rep. 333.

Wis.—Ullman *v.* Chicago, etc., R. Co., 112 Wis. 150, 88 N. W. Rep. 41, 88 Am. St. Rep. 949.

Wyo.—Oregon Short Line R. Co. *v.* Blyth, 19 Wyo. 410, 118 Pac. Rep. 649, 119 Pac. Rep. 875, Ann. Cas. 1913 E. 288.

The federal and a number of the state courts have held that a common carrier in consideration of a reduced rate may limit his liability to an amount fixed as the value of the goods shipped even in case of loss or damage by the negligence of the carrier or its servants. Pierce Co. *v.* Wells, 236 U. S. 278, 35 S. Ct. 351, 59 L. ed. 576; Adams Express Co. *v.* Croninger, 226 U. S. 491, 33 S. Ct. 148, 57 L. ed. 314, 44 L. R. A. N. S. 257; Hart *v.* Pennsylvania R. Co., 112 U. S. 331, 5 S. Ct. 151, 28 L. ed. 717. See also Calderon *v.* Atlas S. S. Co., 170 U. S. 272, 18 S. Ct. 588, 42 L. ed. 1033; U. S. Lace Curtain Mills *v.* Oceanic Steam Nav. Co., 145 Fed. Rep. 701; Morse *v.* Canadian Pac. R. Co., 97 Me. 77, 53 Atl. Rep. 874.

On the other hand some of the states by statute have expressly forbidden common carriers from limiting their liability by special

and those of some other States, is that he may, by express words, but not by a general phrase which does not express negligence.[19] If the contract was made in one State, to be performed in another, the parties may be presumed to have made part of their agreement that law, which is most favorable to its validity and performance.[20]

contract, among which states are the following:

Iowa.—Winn *v.* American Express Co., 149 Iowa, 259, 128 N. W. Rep. 663.

Ky.—Lewis *v.* Louisville, etc., R. Co., 135 Ky. 361, 122 S. W. Rep. 184, 25 L. R. A. N. S. 938, 21 Ann. Cas. 527.

Neb.—Wabash R. Co. *v.* Sharpe, 76 Neb. 424, 107 N. W. Rep. 758, 124 Am. St. Rep. 838.

N. M.—Atchison, etc., R. Co. *v.* Rodgers, 16 N. M. 120, 113 Pac. Rep. 805.

Tex.—Southern Kansas R. Co. *v.* Hughey (Civ. App.), 182 S. W. Rep. 361.

Va.—Southern Express Co. *v.* Keeler, 109 Va. 459, 64 S. E. Rep. 38.

[19] Magnin *v.* Dinsmore, 56 N. Y. 168; Tewes *v.* North German Lloyd S. S. Co., 186 N. Y. 151, 78 N. E. Rep. 864, 8 L. R. A. N. S. 199, 9 Ann. Cas. 1020; Rathbone *v.* N. Y. Cent., etc., R. Co., 140 N. Y. 48, 35 N. E. Rep. 418; Heuman *v.* Powers Co., 175 App. Div. 627, 162 N. Y. Supp. 590; Boyle *v.* Bush Terminal R. Co., 210 N. Y. 389, 104 N. E. Rep. 933; Gardiner *v.* New York Central, etc., R. Co., 201 N. Y. 387, 94 N. E. Rep. 876, 34 L. R. A. N. S. 826, Ann. Cas. 1912 B. 281.

Distinction must be made between an attempt to cut down a carriers' liability by a clause limiting liability to a certain maximum and a *bona fide* attempt to value the goods shipped. In the latter case, the shipper is estopped by the agreed valuation from showing a higher value. Ga., etc., R. Co. *v.* Johnson, 121 Ga. 231, 48 S. E. Rep. 870.

An agreement as to the value of articles shipped must be a *bona fide* attempt to determine their actual value and not merely a device for cutting down the carrier's legal liability, in order to estop the plaintiff from showing that the goods were of a greater value than that agreed on. Gardner *v.* Southern Ry. Co., 127 N. C. 293, 37 S. E. Rep. 328.

Where the difference between the actual value of the goods shipped and the value stipulated in the bill of lading, is so great as to render the agreement of valuation unreasonable, the agreement is invalid. St. Louis, etc., R. Co. *v.* McIntyre, 36 Tex. Civ. App. 399, 82 S. W. Rep. 346.

[20] Talbott *v.* Merchants' Despatch Transp. Co., 41 Iowa, 247, 20 Am. Rep. 589.

Where a contract was made in Illinois for the shipment of goods

47. Limited Liability Under Acts of Congress.

As construed by the Supreme Court of the United States,[21] the recent Acts of Congress [22] have superseded all State

to New York, the validity of a provision in the contract exempting the carrier from liability for loss by fire is controlled by the law of Illinois, although the goods were destroyed in New York. Valk *v.* Erie R. Co., 130 N. Y. App. Div. 446, 114 N. Y. Supp. 964.

[21] Missouri, etc., R. Co. *v.* Harriman, 227 U. S. 657, 33 S. Ct. 397, 57 L. ed. 690; Chicago etc., R. Co. *v.* Latta, 226 U. S. 519, 33 S. Ct. 155, 57 L. ed. 32.

[22] The so-called Carmack Amendment of the Act of June 29, 1906 (34 U. S. St. at L. 595, c. 3091, sec. 7) reads as follows: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to another state shall issue a receipt or bill of lading thereafor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which said property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law. That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury, as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

Construing the Carmack Amendment, the United States Supreme Court has said: ". . . the liability imposed by the statute is the liability imposed by the common law upon a common carrier and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence." Missouri, etc., R. Co. *v.* Harriman, 227 U. S. 657, 672, 33 S. Ct. 397, 57 L. ed. 690.

This question was the subject of further legislation by Congress in 1915 and 1916. By the Act known as the Cummins Act (38 U. S. Stat. at L. pp. 1196, 1197, c. 175) it was provided: "That any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or

Territory or the District of Columbia, to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad or transportation company from the liability hereby imposed; and such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or, in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission, and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: Provided, however, That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: Provided further, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law." Sec. 2. "That this

legislation on the subject of limited liability with reference to interstate shipments.

48. Evidence of Shipper's Assent; The New York Rule.[23]

In the absence of fraud, concealment or improper practice, the legal presumption is that stipulations limiting their

Act shall take effect and be in force from ninety days after its passage."

The Cummins Act was considered in Southern R. Co. *v.* Bynum, 194 Ala. 190, 69 So. Rep. 820.

By the Act of August 9, 1916 (39 U. S. Stat. at L. p. 441, c. 301) an amendment was made to the Cummins Act, substituting in place of the first proviso thereof, the following provision: "Provided, however, that the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenge trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this Act to regulate commerce, as amended; and any tariff schedule which may be filed with the mission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed on; and the commission is hereby empowered to make such order in cases where rates dependent on and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term 'ordinary live stock' shall include all cattle, swine, sheep, goats, horses, and mules except such as are chiefly valuable for breeding, racing, show purposes, or other special uses."

[23] The question as to which of these conflicting rules shall apply does not depend on the law of the place of contract, but on the law of the forum. Hoadley *v.* Northern Transp. Co., 115 Mass. 304, 15 Am. Rep. 106.

common-law liability, contained in a receipt given by the carriers, were known at the time of their receiving the goods, and assented to by the party receiving it.[24] The law conclusively presumes, in the absence of fraud or imposition, that he read or was informed of its contents.[25] Showing the receipt to have been in plaintiff's possession raises a presumption of due delivery and assent.[26] Delivery

[24] Belger *v.* Dinsmore, 51 N. Y. 166; S. P., in case of passenger and baggage, Steers *v.* Liverpool, &c. St. Co., 57 Id. 1; Mulligan *v.* Illinois Central Ry. Co., 36 Iowa, 181, 14 Am. Rep. 514, Rosc. N. P. 594. The rule is the same as to bills of lading. Cau *v.* Texas, etc., Ry. Co., 194 U. S. 427, 24 Sup. Ct. 663, 48 L. ed. 1053; Boyle *v.* Bush Terminal R. Co., 151 N. Y. App. Div. 551, 136 N. Y. Supp. 355, holding that acceptance of bill of lading binds the shipper whether he read it or not. Hoffman *v.* Metropolitan Express Co., 111 N. Y. App. Div. 407, 97 N. Y. Supp. 838; St. Louis, etc., R. Co. *v.* Ladd, 33 Okl. 160, 174 Pac. Rep. 461, executing contract hurriedly. Otherwise of a mere check or token, as distinguished from a contract. Blossom *v.* Dodd, 43 N. Y. 264. To avoid the effect of a limited liability clause, on the ground that the bill of lading was given to agents who had no authority to contract for exemption, it must appear that the carriers had notice that the shippers were agents when contracting. York Co. *v.* Central R. R. Co., 3 Wall. 107. As to connecting lines, see Irwin *v.* N. Y. Central R. R. Co., 59 N. Y. 653, affi'g 1 Sump. Ct. (T. & C.) 473.

[25] Grace *v.* Adams, 100 Mass. 505, 1 Am. Rep. 131.

"But we think that the law must now be regarded as settled in this Commonwealth in conformity with the weight of authority elsewhere, that one who receives from a common carrier a bill of lading which purports on its face to set forth the terms of carriage, and accepts and acts upon it, without objection, will be ordinarily presumed as in other cases of contract, in the absence of fraud or other sufficient excuse, to have assented to its terms, so far as the provisions therein contained are lawful and not opposed to public policy." Cox *v.* Central Vermont R. Co., 170 Mass. 129, 49 N. E. 97.

[26] Booman *v.* Am. Express Co., 21 Wis. 158. When no rate is fixed either verbally or in writing and no allusion is made in the bill of lading to a reduced rate, the shipper is not presumed to have known that a reduced one was charged merely because the printed receipt contained a clause limiting the carrier's liability, and hence the shipper cannot be presumed to have assented to this

several days after receipt of goods is not conclusive evidence of assent,[27] but may be made so by proving the uniform course of dealing.[28]

49. — the Illinois Rule.

The Illinois rule, on the contrary, is that there is no legal presumption that such restrictions, although contained in a formal bill of lading, were assented to by the shipper, even if his usage of accepting similar bills is shown. The evidence must justify the finding of knowledge and assent.[29] The

limitation of the carrier's liability in consideration of the reduced rate. Phœnix Powder Mfg. Co. *v.* Wabash R. Co., 196 Mo. 663, 94 S. W. Rep. 235. Under the Massachusetts interpretation of the rule the presumption of assent may be rebutted by showing that the bill or receipt was not accepted by plaintiff. For instance, it may be shown that the usual course of business between the parties was not to make out a receipt, and that, in the transaction in question, the goods were delivered for plaintiff to defendant by a casual favor of a stranger, who was not authorized to make a contract (Buckland *v.* Adams, 97 Mass. 124, s. p., 100 Id. 505; compare Soumet *v.* Nat'l Express Co., 66 Barb. 284); or that the usual course of dealing was not to make a receipt, and that the receipt in question could not be read intelligibly, by reason of the stamp on it (Perry *v.* Thompson, 98 Mass. 249, s. p., 100 Id. 505); or that a verbal contract without limit was made, and that the receipt was afterwards given to a clerk who had no authority to make a contract (Fillebrown *v.* Grand Trunk Rw., 55 Me. 462, s. p., 100 Mass. 505). But it has been recently held that he should show that, as soon as he had time to ascertain its contents, he returned it to the carrier with notice of its non-acceptance. Louisville, etc. R. R. Co. *v.* Brownlee, 14 Bush, 590, s. c., 8 Rep. 144. A special contract limiting a carrier's common law liability is a matter of affirmative defense. Bonfiglio *v.* Lake Shore, etc., Ry. Co., 125 Mich. 476, 84 N. W. Rep. 722.

[27] Bostwick *v.* Balt. & O. R. R. Co., 45 N. Y. 712; Strohn *v.* Detroit & M. R. Co., 21 Wis. 554. Whether a parol agreement for transportation is merged by the carrier's subsequent delivery of the receipt, without assent by the shipper, compare Germania Fire Ins. Co. *v.* Memphis, &c. R. R. Co., 7 Hun, 233; Hill *v.* Syracuse, &c. R. R., 8 Hun, 296.

[28] Shelton *v.* Merchants' Despatch Co., 59 N. Y. 258, rev'g 36 Super. Ct. (J. & S.) 527.

[29] 8 Cent. L. J. 291; Erie & Western Tr. Co. *v.* Dater, Jan. 1879; Coats *v.* Chicago, etc., Ry. Co.,

burden is on the carrier to satisfy the jury of such a contract,[30] and for this purpose all the circumstances attending the giving the receipt are competent.[31]

50. Fraud as to Value.

The carrier may show a concealment of the value, and

239 Ill. 154, 87 N. E. Rep. 929.

[30] Adams Express Co. *v.* Stettaners, 61 Ill. 184, s. c., 14 Am. Rep. 57; King *v.* Woodbridge, 34 Vt. 465; Coats *v.* Chicago, etc., Ry; Co., 239 Ill. 154, 87 N. E. Rep. 929. B. & O. S. W. Ry. Co. *v.* Fox, 113 Ill. App. 180; Cleveland R. R. Co. *v.* McNutt, 138 Ill. App. 66; Atchison, etc., Ry. Co. *v.* Bilinsky, 107 Ill. App. 504; see also Carpenter *v.* Baltimore, etc., Ry. Co., 22 Del. 15, 64 Atl. Rep. 252. A carrier seeking to avoid liability under a contract limiting its liability contained in a bill of lading which constitutes both a receipt and a contract has the burden of showing that the restrictions of its common-law liability were assented to by the consignor. Chicago, &c. Ry. Co. *v.* Simon, 160 Ill. 648, 43 N. E. Rep. 596. If the acceptance of goods for transportation by a common carrier be special, the burden of proof in case of loss is upon him to show not only that the cause of the loss was within the terms of the exception, but also that there was on his part no negligence or want of due care. Shea *v.* Minneapolis, &c. Ry. Co., 63 Minn. 228, 65 N. W. Rep. 458. A defense on the ground that a common carrier is exempted from its common-law liability under a contract of affreightment must specially allege the contract of release, and the burden is upon the carrier to maintain such defense. Clyde Steamship Co. *v.* Burrows, 36 Fla. 121, 18 So. Rep. 349.

All contracts of limitation, being in derogation of common law, are strictly construed and never enforced unless shown to be reasonable. Any doubt or ambiguity therein is to be resolved in favor of the shipper; and the burden of proof rests upon the carrier of showing that all the stipulations and exemptions are reasonable. Hinkle *v.* Southern Ry. Co., 126 N. C. 932, 36 S. E. Rep. 348, 78 Am. St. Rep. 685; Compania La Flecha *v.* Brauer, 168 U. S. 104. 118, 18 S. Ct. 12, 42 L. ed. 398; Gardner *v.* Southern Ry. Co., 127 N. C. 293, 37 S. E. Rep. 328.

[31] Boscowitwz *v.* Adams Express Co., 5 Cent. L. J. 58, and cases cited.

A provision in the receipt given by an express company that in no event should its liability exceed a certain sum, is not mere valuation of the property, but is a limitation of the common law liability and void by the Illinois statute. Cutter *v.* Wells, 237 Ill. 247, 86 N. E. Rep. 695.

its exceeding the $50 limit.[32] There is no presumption that the carrier has knowledge of the contents without evidence of circumstances tending to show it.[33] A direction marked on the package, C. O. D., a sum considerably in excess of the $50 limit, is notice to the carrier that the value exceeded that limit.[34] The shipper's admission that the packages were disguised with the intent that no one should suspect they contained anything vauable, is evidence of fraud.[35] Fraudulent concealment being shown, plaintiff must show gross negligence, such as would be reprehensible had the value been less than the limit.[36]

51. Carriers' Delivery; Notice to Consignees.

The peculiar terms of the bill of lading are important on the question, what constitutes delivery.[37] Where a bill of lading requires delivery at a specified station (the carriers' terminus), but without saying what is to be done, parol evidence is admissible to show that plaintiff gave directions as to delivering the goods to the succeeding carrier, and that he had been accustomed to give, and the defendant to

[32] Magnin *v.* Dinsmore, 42 N. Y. Super. Ct. (J. & S.) 512; Boscowitz *v.* Adams Express Co., 5 Cent. L. J. 58; Little *v.* Boston & Me. R. R. Co., 4 Law & Eq. R. 136; Le Beau *v.* Gen. Steam Nav. Co., L. R. 8 C. P. 96, s. c.., 4 Moaks' Eng. 350; Oppenheimer *v.* U. S. Express Co., 69 Ill. 62, s. c., 18 Am. Rep. 596.

[33] The Nitro-Glycerine Case, 15 Wall. 536.

[34] Van Winkle *v.* Adams Express Co., 3 Robt. 59.

[35] Warner *v.* Western Transp. Co., 5 Robt. 490. So is silence. Magnin *v.* Dinsmore (above). *Contra*, Little *v.* Boston & Me. R. R. Co. (above).

[36] See Redf. on Ry. 273, § 133 (10, 11).

[37] Compare Collins *v.* Burns, 63 N. Y. 1, affi'g 36 Super. Ct. (J. & S.) 518; The Santee, 7 Blatchf. 186, affi'g 2 Ben. 518; Gleadell *v.* Thompson, 56 N. Y. 194, affi'g 35 Super. Ct. (J. & S.) 232.

A carrier's liability continues until the consignee has had a reasonable time to remove the goods. The facts being admitted, the question of reasonable time is for the court. Normile *v.* North. Pac. Ry., 36 Wash. 21, 77 Pac. Rep. 1087, 67 L. R. A. 271. See also Tallassee Falls Mfg. Co. *v.* West Ry. of Ala., 128 Ala. 167, 29 So. Rep. 203.

comply with, similar instructions.[38] When defendants are one of the earlier of several connecting lines, entries in their books showing that the goods reached their terminus where, in the usual course of business, they would have been forwarded, are not, alone, enough to show delivery.[39] The receipt given by the next one to which they delivered the goods, is not evidence that the delivery was in good condition,[40] but may be competent as auxiliary to the testimony of a witness connected with it, who examined the goods.

Local usage and custom, if reasonable, and known to the customer, or so generally known as to be presumably known to him,[41] may be proved, to show what amounts to a delivery which terminates the carriers' duty,[42] provided they do not contradict the instrument.[43]

[38] Hooper *v.* Chicago & Northwestern R. R. Co., 27 Wis. 81, s. c., 9 Am. Rep. 439. Compare Hinckley *v.* N. Y. Central, etc. R. R. Co., 56 N. Y. 429. These facts being proved, the defendant's liability as carrier must be deemed to continue until such delivery to the succeeding carrier. Id.

The consignee of goods is presumptively the owner and where the carrier upon the consignee's order, delivers the goods at a place other than the destination named in the bill of lading, he is discharged. Southern Exp. Co. *v.* Williams, 99 Ga. 482, 27 S. E. Rep. 743.

[39] Root *v.* Great Western Ry. Co., 55 N. Y. 636, affi'g 65 Barb. 619, s. c., 1 Supm. Ct. (T. & C.) 10. What circumstances amount to evidence of completed delivery by one company to connecting company, see Pratt *v.* Railway Co., 95 U. S. (5 Otto) 43.

[40] Hunt *v.* Michigan S. & N. Indiana R. R. Co., 37 N. Y. 162, s. c., 35 How. Pr. 287.

[41] McMasters *v.* Pennsylvania R. R. Co., 69 Penn. St. 374, s. c., 8 Am. Rep. 264.

[42] Edw. on B., § 288; Angle *v.* Miss., etc. R. R. Co., 9 Iowa, 487, 494. The carrier may show a local usage that the unloading apparatus shall be furnished by the consignee, and that it was so furnished, and the injury was caused by a latent defect in such apparatus. Loveland *v.* Burke, 120 Mass. 139, s. c., 21 Am. Rep. 507.

Where a carrier has no line running to the destination, its duty is to forward to the nearest point and give notice of its arrival there to the consignee. Rogers *v.* Fargo, 47 Misc. 155, 93 N. Y. Supp. 550.

[43] Hinckley *v.* N. Y. C. & H. R. R. Co., 56 N. Y. 429.

Usage is of course admissible only as an instrument of interpretation and cannot relieve a party from his express stipulations.

Misdelivery may be excused by evidence of misdirection, or by evidence that the receiver was authorized to receive, though his authority was unknown to defendant at the time.[44] The fact that after wrongful delivery, the receiver obtained title, is competent, and reduces the damages to a nominal sum.[45]

Evidence that defendants' usual course of business was to send *notice*, is not sufficient evidence of notice.[46] Evidence

Stockton Lumber Co. *v.* California Nav., etc., Co., 10 Cal. App. 197, 101 Pac. Rep. 541.

[44] Angle *v.* Mississippi, &c. R. R. Co., 9 Iowa, 487, 501.

A carrier has the right to refuse delivery of goods until convincing proof is given by the person demanding delivery on behalf of the consignee that he is the consignee's agent, and the delay of the carrier in delivering caused by the failure to produce such proof is not negligence. Moore *v.* Baltimore, etc., Ry. Co., 103 Va. 189, 48 S. E. Rep. 887.

Delivery of goods by a carrier at the wrong place (Cleveland, etc., Ry. Co. *v.* Potts, 33 Ind. App. 564, 71 N. E. Rep. 685) or to the wrong person (Merchants, etc., Trans. Co. *v.* Moore & Co., 124 Ga. 482, 52 S. E. Rep. 802), constitutes a conversion even though the carrier acted in good faith.

Where goods were shipped by L. Singer of Boston to himself as consignee on a straight bill of lading consigning them to L. Singer, Springfield, Illinois, and there is an L. Singer in Springfield, Illinois, the carrier is not liable for delivering the goods to L. Singer of Springfield, Illinois, instead of to the one the consignor meant. The consignor should have used an "order" bill of lading. Singer *v.* Merchants' Despatch Transp. Co., 191 Mass. 449, 77 N. E. Rep. 882, 114 Am. St. Rep. 635.

An unauthorized delivery of goods by a carrier to a wharf company to be held subject to the order of the owner, is nevertheless a conversion of the goods by the carrier. Missouri, etc., Ry. Co. *v.* Seley, 31 Tex. Civ. App. 158, 72 S. W. Rep. 89.

[45] Hiort *v.* London & N. W. Ry. Co., 40 Law Times N. S. 674.

[46] Stephenson *v.* U. S. Express Co., 21 Wis. 405.

The carrier owes a duty of giving notice to the consignee that goods have arrived, but this notice may be sent by mail. G. S. Roth Clothing Co. *v.* Maine S. S. Co., 44 Misc. 237, 88 N. Y. Supp. 987. But see Berry *v.* West Va., etc., R. R. Co., 44 W. Va. 538, 30 S. E. Rep. 143, 67 Am. St. Rep. 781.

Where the carrier failed to give notice to the consignee, as required, it may show that plaintiff was absent and could not have acted on the notice had one been given. Brounton *v.* Southern Pac. Co., 2 Cal. App. 173, 83 Pac. Rep. 265.

of a usual course of business of both parties dispensing with notice, is competent.[47]

The defendants may prove that the uniform usage and course of their business, was to leave goods at their usual stopping places in the towns to which the goods are directed, without notice to the consignee; and if such usage be shown of so long continuance, uniformity and notoriety, as to justify a jury to find that it was known to the plaintiff, compliance with it is a sufficient delivery.[48]

52. "Act of God": Inevitable Accident.

The carrier is exonerated, if it appear that the loss was caused directly and exclusively by such a direct and violent, and sudden, and irresistible act of nature as he could not by any reasonable amount of ability, foresee would happen; or (if he could foresee that it would happen), could not, by any reasonable amount of care and skill, resist so as to prevent its effect.[49] On the question of the necessity and

[47] Wood *v.* Milwaukee & St. Paul Ry. Co., 27 Wis. 541, s. c., 9 Am. Rep. 465.

[48] Gibson *v.* Brown, 17 Wend. 305; McMasters *v.* Penn. R. R. Co., 69 Penn. St. 374, s. c., 8 Am. Rep. 264.

But if it is a local custom at the place of destination of goods to give notice of their arrival, failure to give such notice puts the carrier in default. Herf, etc., Chemical Co. *v.* Lackawanna Line, 100 Mo. App. 164, 73 S. W. Rep. 346.

Where goods arrived on the 4th of July and it was a custom at the point of arrival to suspend all business on that day, the carrier's failure to give notice of the arrival of the goods is not negligence. Pennsylvania R. Co. *v.* Naive, 112 Tenn. 239, 79 S. W. Rep. 124, 64 L. R. A. 443.

[49] See Nugent *v.* Smith (above), 4 So. Law Rev. N. S. 451, and cases cited. And see Bell *v.* Reed, 4 Binn. 127.

Where the negligence of the carrier brings the goods into contact with the destructive force of the "act of God," the carrier has no defense. Wald *v.* Pittsburg, etc., R. Co., 162 Ill. 545, 44 N. E. Rep. 888, 35 L. R. A. 356, 53 Am. St. Rep. 332.

When a carrier agrees to deliver goods by a certain time, it does not guarantee to deliver the goods by that time, or by any time so as to make it liable for non-delivery due to an act of God. Sauter *v.* Atchison, etc., Ry. Co., 78 Kan. 331, 97 Pac. Rep. 434.

Where goods are destroyed by a cyclone while in the carrier's hands, but would not have been so de-

good faith of a sale of perishing cargo, at an intermediate port, evidence of the advice of competent and disinterested men, taken and acted on by the master, is competent.[50] On the necessity of a jettison, a seaman of experience, who witnessed the storm, may testify to his opinion.[51]

IV. ACTIONS AGAINST COMMON CARRIERS[52] OF PASSENGERS AND BAGGAGE

53. Plaintiff a Passenger.

If the action is on contract to carry for hire, proof of negligence, without contract, is a variance,[53] and will prevent a recovery for loss of baggage, at least,[54] unless cured by amendment. It being shown that defendant was a common carrier of passengers, the fact that plaintiff was on his vehicle or vessel in course of transportation, is *prima facie* evidence that he was there as a passenger, having paid, or liable to pay fare;[55] and this suffices to throw on the carrier

stroyed had the carrier not been negligent in shipping the goods, the carrier cannot plead the act of God as a defense, it not being itself free from fault. Alabama Great South. Ry. *v.* Quarles, 145 Ala. 436, 40 So. Rep. 120, 5 L. R. A. N. S. 867, 117 Am. St. Rep. 54, 8 Ann. Cas. 308.

[50] Butler *v.* Murray, 30 N. Y. 88.

[51] Price *v.* Hartshorn, 44 N. Y. 94, affi'g 44 Barb. 645.

[52] As to private carriers, see 12 Wall. 378.

[53] Nolton *v.* Western R. Co., 15 N. Y. 446.

[54] Flint, etc. R. R. Co. *v.* Weir, 37 Mich. 111.

[55] Buffit *v.* Troy, &c. R. R. Co., 36 Barb. 420, 423; even though he was in a freight car. Dunn *v.* Grand Trunk Ry. Co., 58 Me. 187, s. c., 4 Am. Rep. 267; Gillingham *v.* Ohio River R. R. Co., 35 W. Va. 588, 14 S. E. Rep. 243, 29 Am. St. Rep. 827, 14 L. R. A. 798. But compare Eaton *v.* Delaware, &c. R. R. Co., 57 N. Y. 382. Proof of payment of fare is not essential to establish the relation of passenger and carrier between the plaintiff and the defendant street railroad company, where the plaintiff entered the car in the usual way, conducted herself as a passenger, and was conveyed as such from where she boarded the car to where she was injured in attempting to alight. West Chicago Street R. Co. *v.* Manning, 170 Ill. 417, 48 N. E. Rep. 958; Cleveland, etc. R. Co. *v.* Scott, 111 Ill. App. 234.

A carrier is liable for carrying a passenger beyond his destination where he was not given notice that the destination had been reached

the burden of disproving the contract or undertaking to carry.[56] A witness may, in the first instance, testify directly to the fact that plaintiff was a passenger, subject, of course, to cross-examination as to details; but the details having been stated, the witness cannot give an opinion as to whether he was a passenger or trespasser. Evidence of any circumstances tending to show the existence of the contract or undertaking, is competent; such as the payment of fare,[57] the possession of ticket, or of baggage check; [58] with evidence of the custom of defendants as to giving such checks; or production of the passenger list.[59] Where an authenticated list, made by defendants pursuant to law, exists, it is not the exclusive evidence, and defendants must produce it if they require it.[60]

The fact that plaintiff was carried on an apparently gratuitous pass or permission, may be explained by evidence of the contract [61] or usage [62] under which it was given.

nor reasonable opportunity to alight from the train. Southern Ry. Co. *v.* Hobbs, 118 Ga. 227, 45 S. E. Rep. 23, 63 L. R. A. 68.

[56] Dunn *v.* Grand Trunk Ry. Co. (above).

Where a passenger, wishing to extend his journey, does not get off the train at the place named in his ticket, he is still a passenger and entitled to protection as such, even though he has not paid his additional fare or notified the conductor of his purpose to extend his journey. Anderson *v.* Mo. Pac. Ry. Co., 196 Mo. 442, 93 S. W. Rep. 394, 113 Am. St. Rep. 748.

[57] Muscogee R. R. Co. *v.* Redd, 54 Georgia, 33.

One who was given the wrong ticket by the mistake of the carrier's agent, is nevertheless a passenger, though he refuses to pay another fare. Little Rock Ry., etc., Co. *v.* Goerner, 80 Ark. 158, 95 S. W. Rep. 1007, 7 L. R. A. N. S. 97, 10 Ann. Cas. 273.

[58] Davis *v.* Cayuga & Susq. R. R. Co., 10 How. Pr. 330.

[59] Merrill *v.* Grinnell, 30 N. Y. 594. Parol evidence of what is said between a passenger on a railroad and the ticket-seller of the company at the time of the purchase by the passenger of his ticket is admissible as going to make up the contract of carriage and forming part of it. New York, etc. R. R. Co. *v.* Winter, 143 U. S. 60.

[60] Id.

[61] Grand Trunk Ry. *v.* Stevens, 5 Reporter, 161.

[62] The New World *v.* King, 16 How. U. S. 469.

A small child riding with its mother, who paid only one fare,

54. Express Contract; Ticket.

Possession of an unmutilated railroad passage-ticket, is presumptive evidence that the holder has paid the regular price for it, and is entitled to be transported according to its terms, and that it has not been used.[63] It is presumed to have been purchased at some time on the day on which it bears date, but not at any particular hour of the day.[64] A ticket agent is not presumed to have power to bind the company by an oral promise that the ticket should be good at a later date.[65] To sustain such a promise, made after the sale of the ticket, a consideration must be shown.[66] Plaintiff's omission to procure a ticket before entering the cars may be explained by evidence that he applied in vain for one; and the testimony of the ticket agant is competent for this purpose.[67]

If there were several connecting lines, plaintiff, seeking to charge another than the one whose default caused the breach, must show either a contract by the company he seeks to charge, or that it had some community of interest in, or control over, the carriage of passengers by the one in default.[68] Proof that the defendant checked his baggage to the terminus of the connecting line, without evidence that he paid them his fare for passage by that line, is not alone enough to charge them for a loss on that line.[69] Al-

is a passenger. Ball *v.* Mobile, etc. 146 Ala. 309, 39 So. Rep. 584, 119 Am. St. Rep. 32.

[63] Pier *v.* Finch, 24 Barb. 514. Compare paragraph 61. Where the ticket and check indicate another route than defendants', evidence that defendants frequently carried baggage bearing such checks is not sufficient to charge them. Fairfax *v.* N. Y. Central, &c. Co., 40 Super. Ct. (J. & S.) 128.

[64] Id.

[65] Boice *v.* Hudson River R. R. Co., 61 Barb. 611; especially a way agent on a through route. McClure *v.* Phila., &c. R. R. Co., 34 Md. 532, s. c., 6 Am. Rep. 345.

[66] Boice *v.* Hudson River R. R. Co. (above).

[67] St. Louis, &c. R. R. Co. *v.* Dalby, 19 Ill. 353, 363.

[68] Green *v.* N. Y. Central R. R. Co., 12 Abb. Pr. N. S. 473, see paragraphs 21, 26, 35. Compare Wilde *v.* Northern R. R. Co., 53 N. Y. 156; Milnor *v.* N. Y. & New Haven R. R. Co., 53 N. Y. 363.

[69] Id. Kessler *v.* N. Y. Central R. R. Co., 7 Lans. 62.

though several tickets were given for the separate parts of the route, an entire contract to carry over the whole route may be proved by parol.[70] In the absence of all evidence on the subject, except such as may be inferred from the delivery of coupon tickets to the passenger, the presumption is that the carrier who sells the ticket and coupons has purchased of the connecting roads such coupons or the right to issue them, and that they were delivered in part performance of the contract of the carrier selling the ticket.[71]

55. Authority of Agency.

The fact that the ticket, and the baggage check obtained of the same agency, were issued by a person having authority, may be proved by evidence that the ticket was presented by the passenger, to the conductor, on the cars of the company sought to be charged, and recognized by him as valid.[72]

56. Baggage.

On the question what is within the rule as to baggage, evidence of the circumstances and position in life of the passenger, of the whole contemplated journey, and of intended sojourns on the way, is competent.[73] Plaintiff is not precluded from recovering, because he may not be able to furnish very detailed evidence of every item of contents.[74]

[70] Van Buskirk *v.* Roberts, 31 N. Y. 661.

[71] Kessler *v.* N. Y. C. R. R. Co., 7 Lans. 62.

[72] Chicago & Rock Island R. R. Co. *v.* Fahey, 52 Ill. 81, s. c.,4 Am. Rep. 587. Compare Mills *v.* Shult, 2 E. D. Smith, 139; Quimby *v.* Vanderbilt, 17 N. Y. 306.

[73] See Merrill *v.* Grinnell, 30 N. Y. 594; Abb. N. Y. Dig. new ed. tit. Carrier.

"Baggage" includes jewelry for personal use and money reasonably necessary for travelling expenses carried in a trunk. Battle *v.* Columbia, etc., R. R. Co., 70 S. C. 329, 49 S. E. Rep. 849.

The term "baggage" includes only such articles as may fairly be said to be a part of one's personal apparel, having in view one's social station. Hubbard *v.* Mobile, etc., R. Co., 112 Mo. App. 459, 87 S. W. Rep. 52.

[74] Butler *v.* Busing, 2 C. & P. 613, 614.

Testimony of a witness, who saw the trunk packed weeks before, may be enough to go to the jury.[75] The law only requires the best evidence in his power.

Evidence that it was defendants' custom to check baggage on the passenger's showing his ticket, together with the production and identification of the check, is *prima facie* evidence of a delivery of the baggage.[76] Notice to the baggage master, that the trunks contained other than the passenger's baggage, may be inferred by the jury from circumstances, such as indication that the passenger was a traveling salesman, that the trunks were not ordinary traveling trunks, etc., and that an extra charge was made.[77]

Upon a through ticket and check, an intermediate or ultimate company may be held liable, if there is evidence that the baggage came to their hands and was lost by them.[78]

The courts may take judicial notice of the system of checking baggage by railroad companies, and of the general practice, in case of through passengers having tickets for an entire route over roads owned and operated by separate but connecting lines, for the first company to check the baggage to its final destination, and to deliver it at the end of its route to the next succeeding carrier, and so on until it reaches the possession of the last carrier.[79]

57. — Loss or Non-delivery.[80]

Evidence that plaintiff's baggage was lost on the journey on defendants' route, is sufficient to throw the burden of proof on the defendants, and dispenses with proof of a de-

[75] Sugg *v.* Memphis & St. L. Packet Co., 40 Mo. 442, 444.

[76] Edw. on B., § 574. As to the appropriate evidence in case of baggage not checked, see Gleason *v.* Goodrich Transp. Co., 32 Wis. 35, s. c., 14 Am. Rep. 716; Berghum *v.* Great Eastern Ry. Co., 38 L. T. R. N. S. 160, 17 Alb. L. J. 298. Welch *v.* Pullman Pal. Car Co., 16 Abb. Pro. N. S. 352.

[77] Sloman *v.* Great Western Ry. Co., 67 N. Y. 208, rev'g 6 Hun, 546.

[78] Chicago & Rock Island R. R. Co. *v.* Fahey, 52 Ill. 81, s. c., 4 Am. Rep. 587. Compare paragraphs 35 and 36.

[79] Isaacson *v.* New York, &c. R. R. Co., 94 N. Y. 278.

[80] See paragraphs 6 and 36.

mand and refusal.[81] A check for baggage is *prima facie* evidence that the baggage it represents has been delivered to the issuing company by the person to whom the check is issued.[82] If there is evidence of negligence on defendants' part, accounting for the loss, mere evidence of the course of business, according to which the baggage should have been duly delivered to the next connecting line, is not enough to exonerate defendants.[83]

58. Negligence.

The mode of proving negligence is stated in the chapter on actions for negligence.[84]

59. Authority of Servant.

The fact that one assuming to act as a servant of the company was such, may be inferred from evidence of his position, conduct, or dress, etc., as such.[85] If he is shown to

[81] Garvey *v.* Camden & Amboy R. R. Co., 1 Hilt. 280, s. c., 4 Abb. Pr. 171.

Where baggage was delivered to a carrier, its loss creates a presumption of the carrier's negligence. The Priscilla, 106 Fed. Rep. 739.

A complaint based on the carrier's refusal to deliver baggage to a passenger on demand is not defective for failing to allege that the baggage check was presented at the time of demand. Cleveland, etc., R. Co. *v.* Tyler, 9 Ind. App. 689, 35 N. E. Rep. 523.

A common carrier of passengers undertakes absolutely to protect them and their baggage against the misconduct of its own servants engaged in executing the contract. DeFelice *v.* Compagnie Francaise De Navigation, etc., 83 N. Y. App. Div. 73, 82 N. Y. Supp. 552.

The production of a check and the non-delivery of the baggage represented thereby makes a *prima facie* case. Zeigler *v.* Mobile, etc., R. Co., 87 Miss. 367, 39 So. Rep. 811.

Proof of delivery of baggage to a carrier and its return rifled of its contents makes a *prima facie* case. The New England, 110 Fed. Rep. 415.

[82] Chicago, &c. R. Co. *v.* Steear, 53 Neb. 95, 73 N. W. Rep. 466; Graham, etc., Transp. Co. *v.* Young, 117 Ill. App. 257.

[83] Baltimore, &c. Co. *v.* Smith, 23 Md. 402.

[84] Chapter XXXI of this vol. See also paragraphs 6 and 34–39 of this chapter.

[85] Page 136, note 53.

have been in charge of a car, his authority to remove trespassers may be inferred by the jury, although the rules are silent.[86] If an assault and expulsion by defendants' servants is proved, the burden of justifying it is on defendants.[87] Abusive language, not part of the *res gestæ*, is not competent.[88]

60. Damages.

In addition to the damages for personal injury,[89] plaintiff may recover for lost time by neglect to transport, even without specific evidence of the value of his time.[90] Evidence of exposure by the delay, and consequent illness, is competent.[91] Opinions of witnesses are not generally competent evidence of the value of his time.[92] If he seeks to recover for the defeating of a particular errand he must produce some evidence that if he had arrived at the appointed time he might have done his errand and would have promptly returned, and that he could not, with due effort, accomplish his errand by reason of his delay in arriving.[93]

If there was no express stipulation to carry on time,[94] evidence that defendant did all that was reasonably practicable, is competent in excuse for delay.[95]

[86] Bayley *v.* Manchester, Sheffield &c. Ry. Co., L. R. 7 C. P. 415, s. c 3 Moak's Eng. 308.

[87] St. John *v.* Eastern R. R. Co., 1 Allen, 544. Where a conductor, assaulted by a passenger, uses force to repel such assault, the burden is on the railroad company to show that the conductor used no more force than appeared to him, as a reasonable man, necessary to repel the assault. St. Louis Southwestern Ry. Co. *v.* Berger, 64 Ark. 613, 44 S. W. Rep. 809.

[88] Hamilton *v.* N. Y. Central R. R. Co., 51 N. Y. 100.

[89] See chapter on Negligence.

[90] Ward *v.* Vanderbilt, 4 Abb. Ct. App. Dec. 521.

[91] Williams *v.* Vanderbilt, 28 N. Y. 217, affi'g 29 Barb. 491.

[92] Hastings *v.* Uncle Samm, 10 Cal. 341; Lincoln *v.* Saratoga, &c. R. R. Co., 23 Wend. 425. Compare chapter XIX, paragraph 22 of this vol.

[93] Benson *v.* New Jersey R. R. & Transp. Co., 9 Bosw. 412.

[94] Rosc. N. P. 615.

[95] Gordon *v.* Manchester, &c. R. R. Co., 52 N. H. 596, s. c., 13 Am. Rep. 97.

61. Defenses; Restrictions of Liability; Extrinsic Evidence to Vary Ticket.

In determining whether a printed condition on a ticket, etc., limiting a carrier's liability, was sufficient notice to the plaintiff, the question is whether the condition was so exhibited as to make its non-notice negligent.[96] Ordinary tickets, which do not purport to be contracts, are not within the rule excluding parol evidence to vary a writing.[97] Such evidence is, therefore, admissible to show the nature of the agreement entered into between the carrier and the passenger, at the time of issuing them.[98] The reasonable regulations of the company, consistent with the terms expressed on the ticket, may be proved in its favor; and the company is not bound to prove notice of these regulations to the holder of the ticket.[99] Evidence of a usage of the subordinates, in violations of such a regulation, is not competent against the company, unless notice of it to the governing

[96] Whart. on Neg., § 587, 2d ed., citing Elmore *v.* Sands, 54 N. Y. 512; Evansville, &c. R. R. Co. *v.* Androscoggin Mills, 22 Wall. 594. Compare Rawson *v.* Pennsylvania R. R. Co., 48 N. Y. 212, affi'g 2 Abb. Pr. N. S. 220; Wilson *v.* Chesapeake, etc. R. R. Co., 21 Gratt. 654, 672; Dietrich *v.* Pennsylvania, &c. R. R. Co., 71 Penn. St. 432, s. c., 10 Am. Rep. 711; Henderson *v.* Stevenson, L. R. 2 Sc. App. 470, s. c., 13 Moak's Eng. 141; and Stewart *v.* N. W. Ry. Co., 3 H. & C. 135. Whether the receipt of a ticket for deposit of luggage is *prima facie* evidence of assent to the special conditions printed on it, see Harris *v.* Great Western Ry. Co., 1 Queen's Bench Div. 515, s. c., 17 Moak's Eng. 156; Parker *v.* Southeastern Ry. Co., 1 C. P. Div. 618, s. c., 18 Moak's Eng. 238. Special limited receipt delivered some time after transaction, and in answer to demand, not deemed contract without evidence of assent. Wilner *v.* Morrell, 40 Super. Ct. (J. & S.) 222.

[97] Quimby *v.* Vanderbilt, 17 N. Y. 306.

[98] Id.; Van Buskirk *v.* Roberts, 31 Id. 661.

[99] Dietrich *v.* Pennsylvania R. R. Co., 71 Penn. St. 432, s. c., 10 Am. Rep. 711; Johnson *v.* Concord, etc. R. R. Co., 46 N. H. 213, 220.

A limitation on a first cabin steamship ticket of liability to an amount not exceeding $50 is unreasonable and will not be upheld by the courts. The New England, 110 Fed. Rep. 415.

officers is shown.[1] If the terms were sufficiently displayed or actually communicated, the ticket is the evidence of the contract.[2]

62. Contributory Negligence.

If it appear that plaintiff was riding in a place of hazard in the car or train, the burden is upon him to disprove negligence.[3] This may be done by evidence that he could get no safer place, but not by evidence that those in charge suffered him to remain in a place he knew to be dangerous.[4] If defendants object, that plaintiff brought the injury on himself by leaping from the vehicle, he may prove that others did so, and also their declarations in the act.[5]

[1] Id.

[2] Barker *v.* Coffin, 31 Barb. 556; Boice *v.* Hudson River R. R. Co., 61 Id. 611.

[3] Ward *v.* Central Park, &c. R. R. Co., 11 Abb. Pr. N. S. 411, s. c., 42 How. Pr. 289. There is no presumption that an engineer has authority to allow riding on the engine, contrary to rule. Robertson *v.* N. Y. & Erie R. R. Co., 22 Barb. 91.

[4] Ward *v.* Central R. R. (above).

[5] Mobile R. R. *v.* Ashcroft, 48 Ala. 15, 31.

CHAPTER XXXI

ACTIONS FOR NEGLIGENCE

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I. GENERAL RULES

1. Burden of Proof.

The burden of proof, that the injury resulted from negligence on the part of defendant, is upon the plaintiff.[6]

[6] Wood *v.* Wilmington City R. R. Co., 21 Del. 369, 64 Atl. Rep. 246; Harris *v.* Tremont Lumber Co., 115 La. 973, 40 So. Rep. 374; Lutelowish *v.* Lathrop, 104 Ill. App. 82; North Chicago St. Ry. Co. *v.* O'Donnell, 115 Ill. App. 110; Pryor *v.* Murnane, 82 Conn. 48, 72 Atl. Rep. 57; Goldskin *v.* People's Ry. Co., 21 Del. 306, 60 Atl. Rep. 975; Colburn *v.* Wilmington, 20 Del. 443, 56 Atl. Rep. 605; Steele's Adm. *v.* Hillman Land, etc., Co. (Ky.), 114 S. W. Rep. 311; Western Wheel Works *v.* Stocknick, 102 Ill. App. 420; Nitro-Glycerine Case, 15 Wall. 524; Holbrook *v.* Utica & Schenectady R. R. Co., 12 N. Y. 236, affi'g 16 Barb. 113; The Marpesia, L. R. 4 P. C. C. 212, s. c., 3 Moak's Eng. 92; The Benmore, L. R. 4 Ad. & Ec. 132; Curran *v.* Warren Chem. & Manuf. Co., 36 N. Y. 153, s. c., 3 Abb. Pr. N. S. 240, 34 How. Pr. 250; Caldwell *v.* N. J. Steamboat Co., 47 N. Y. 282, affi'g 56 Barb. 425. So if the negligence is in delivering a dangerous thing without giving notice, plaintiff must prove defendant's neglect to give notice. Williams *v.* East India Co., 3 East, 192, 198, 199, Steph. Ev. 98. Negligence must be clearly inferrible from the evidence. Its existence cannot be a mere matter of conjecture. City of Omaha *v.* Bowman, 52 Neb. 294, 72 N. W. Rep. 316. As between master and servant, the proof of the occurrence of an accident raises no presumption of negligence. If the circumstances surrounding the transaction speak the negligence of the master, and that can be deduced therefrom as a natural and reasonable inference, the duty of explanation is cast upon the master. The proof to warrant such inference must be brought forward by him who charges the negligence, and upon whom is the burden of proof. The inference of negligence cannot be established by conjecture or speculation or drawn from a presumption, but must be founded upon some established fact. Pierce *v.* Davis's Admr., 53 U. S. App. 291.

Thus merely showing that a freight elevator "while being oper-

2. The Pleading.

Under an allegation of negligence, a contract may be proved, together with actionable negligence, to plaintiff's injury in the acts constituting a breach;[7] but a mere breach of contract, without evidence or inference of negligence, is a variance.[8] Where a particular act of negligence is alleged as the cause of the damage, no evidence of other acts causing it can be given.[9] Thus, in an

ated with care, fell, is not sufficient to overcome the presumption that the master has performed his duty and to cast upon him the burden of explaining the cause of the accident." Starer *v.* Stern, 100 N. Y. App. Div. 393, 91 N. Y. Supp. 821.

[7] See Putnam *v.* Kingsbury, 16 Pick. 371.

Where the complaint sets out a cause of action *ex contractu*, but the allegations could support an action either *ex contractu* or *ex delicto*, the latter being barred, it will be treated as *ex contractu*. St. Louis, etc., R. Co. *v.* Sweet, 63 Ark. 563, 40 S. W. Rep. 463.

[8] See Dean *v.* McLean, 48 Vt. 412, s. c., 21 Am. Rep. 130.

"Every complaint must proceed upon some single, definite theory. This theory can be gathered only from the general scope and tenor of the pleading. . . . The pleading cannot proceed upon more than one theory, and if it does, the court may construe it as proceeding upon the theory most apparent and most clearly authorized by the facts stated and require the case to be tried upon that theory." Miller *v.* Miller, 17 Ind. App. 605, 47 N. E. Rep. 338.

[9] Snyder *v.* Wheeling Electrical Co., 43 W. Va. 661, 28 S. E. Rep. 733; Grindle *v.* Minneapolis & St. P. R. Co., 42 Iowa, 376; Garner *v.* Hannibal & St. J. R. Co., 34 Mo. 235; Schneider *v.* Missouri P. R. Co., 75 Mo. 295; Mack *v.* St. Louis, K. C. and N. R. Co., 77 Mo. 232; Black, Proof and Pleadings in Accident Cases, § 139; Clark *v.* Chicago, M. & P. St. P. R. Co., 28 Minn. 69; Keating *v.* Brown, 30 Minn. 9; Lucas *v.* Wattles, 49 Mich. 380; Ware *v.* Gay, 11 Pick. (Mass.) 106; Smith *v.* Old Colony & N. R. Co., 10 R. I. 22; House *v.* Meyer, 100 Cal. 592; Sullivan *v.* Missouri P. R. Co., 97 Mo. 113; Pope *v.* Kansas City Cable R. Co., 99 Mo. 400; Ohio & M. R. Co. *v.* McCartney, 121 Ind. 385; Western R. Co. *v.* Lazarus, 88 Ala. 453; Clark *v.* Chicago, B. & Q. R. Co., 15 Fed. Rep. 588; Davis *v.* Guarnieri, 45 Oh. St. 471; Cincinnati, &c., Ry. Co. *v.* McLain, 148 Ind. 188, 44 N. E. Rep. 306; Jenkins *v.* McCarthy, 45 S. C. 278, 22 S. E. Rep. 883; Humpton *v.* Unterkircher, 97 Iowa, 509, 517, 66 N. W. Rep. 776; Murray *v.* Chesapeake, etc., Ry.

action by a servant to recover damages for personal injuries caused by defective machinery, the plaintiff is not entitled to recover on proof that the injury was caused by defects in the machinery other than those alleged in the complaint.[10] But under a general allegation of negligence, the circumstances constituting it may be proved,[11] even

Co. (Ky.) 115 S. W. Rep. 821; Forsell *v.* Pittsburgh, etc., Copper Co., 38 Mont. 403, 100 Pac. Rep. 218; St. Louis, etc., R. Co. *v.* Elrod, 78 Kan. 868, 98 Pac. Rep. 215; Tucker *v.* Central of Georgia R. Co., 122 Ga. 387, 30 S. E. Rep. 128; Chicago City Ry. Co. *v.* Gates, 135 Ill. App. 180.

While negligence may be pleaded in general terms, yet where the particular acts of negligence complained of are specified, the pleader is confined in his proof to such negligence only. Lexington R. Co. *v.* Britton, 130 Ky. 676, 114 S. W. Rep. 295.

The plaintiff cannot invoke the doctrine of *res ipsa loquitur* in order to make out *a prima facie* case, but must prove the particular acts of negligence averred. Lone Star Brewing Co. *v.* Willie, 114 S. W. Rep. 186, 52 Tex. Civ. App. 550.

When a general allegation of negligence is followed by special averments of particular acts, plaintiff will be deemed to rely upon the special averments, "unless it also appears from the context of the pleadings that the pleader intended the general averments and the particular allegations to refer to different and distinct acts of negligence." Lantry-Sharpe Contracting Co. *v.* McCracken, 117 S. W. Rep. 453, 53 Tex. Civ. App. 627.

[10] Conrad *v.* Gray, 109 Ala. 130, 19 So. Rep. 398.

Under an allegation that the defendant company "negligently permitted the brakes on said engine to be defective" the court erred in ruling that "the plaintiff might introduce evidence tending to show the condition of the engine at the time it was placed in position, that it was too small, that the brakes would not hold, and any defects in the brakes caused by lapse of time or the failure of defendant company to keep them in repair." Forsell *v.* Pittsburgh, etc., Copper Co., 38 Mont. 403, 100 Pac. Rep. 218.

[11] Oldfield *v.* N. Y. & Harlem R. R. Co., 14 N. Y. 310; Ware *v.* Gay, 11 Pick. 106; Wright *v.* Hardy, 22 Wis. 348; and see Indianapolis, etc. R. R. Co. *v.* Horst, 93 U. S. (3 Otto) 291, 297; Louisville, etc., R. Co. *v.* Lowe, 158 Ala. 391, 48 So. Rep. 99.

"In an action for personal injuries it is sufficient to charge in a general way that the injuries or death for which the recovery is sought was caused by the negligence of defendant. Plaintiff is not required to state the circumstances or details under which the injury

though other circumstances particularly specified in the complaint are unproved.[12]

was accomplished, in order to show that it was occasioned by negligence, or to state facts showing that he was not guilty of negligence, thus anticipating the defense. An allegation of the extent of the injury, or the manner in which it was caused, has always been considered sufficient. . . . If, however, the negligence is specified, the pleader will be confined to the negligence relied on." Murray *v.* Chesapeake, etc., R. Co. 139 Ky. 379, 115 S. W. Rep. 821.

"When a complaint contains allegations of specific acts of negligence and also general allegations of negligence, the general allegations should be regarded as explained and controlled by the specific acts of negligence averred, in the absence of some clear indication in the complaint that the general allegations were intended to cover other acts of negligence than those alleged." Sutton *v.* Southern Ry. Co., 82 S. C. 345, 64 S. E. Rep. 401; Thompson *v.* Keyes-Marshall Bros. Livery Co., 214 Mo. 487, 11 S. W. Rep. 1122.

"The pleader must state facts from which the law will raise the duty, and show an omission of the duty, and a resulting injury." The question as to whether the defendant "owed a duty" to the plaintiff upon the facts stated, is one of law. Western Wheel Works *v.* Stachnick, 102 Ill. App. 420.

[12] Edgerton *v.* N. Y. & Harlem R. R. Co., 39 N. Y. 227, affi'g 35 Barb. 193, 389. In other words, where a pleader relies upon certain specific acts or omissions as negligence he is limited to such specific acts or omissions. If he pleads negligence generally, he may introduce evidence of any act or omission which tends to support his pleadings. Omaha, &c. R. Co. *v.* Wright, 49 Neb. 456, 459, 68 N. W. Rep. 608. At common law an agent's negligence could not be proved under an allegation of the principal's negligence. Dunlop *v.* Moore, 7 Cranch, 242, 269, affi'g 1 Cranch C. Ct. 536.

When the complaint specifies several distinct acts of negligence, any one of which will entitle the plaintiff to recover he is not bound to prove all of such acts. Ogesley *v.* Missouri Pac. R. Co., 150 Mo. 137, 37 S. W. Rep. 829, 51 S. W. Rep. 758; Standard Oil Co. *v.* Bowker, 141 Ind. 12, 40 N. E. Rep. 128; Davis *v.* Missouri, etc., R. Co., 19 Tex. Civ. App. 199, 43 S. W. Rep. 44; Gould Steel Co. *v.* Richards, 30 Ind. App. 348, 66 N. E. Rep. 68; Chicago, etc., R. Co. *v.* Barnes, 164 Ind. 143, 73 N. E. Rep. 91.

But enough to amount to a cause of action. New York, etc., R. Co. *v.* Robbins, 38 Ind. App. 172, 76 N. E. Rep. 804; Louisville, etc., Tract. Co. *v.* Worrell (Ind.), 86 N. E. Rep. 78; Gannon *v.* Laclede Gas Light Co., 145 Mo. 502, 46 S. W. Rep. 1133; Savannah, etc., R. Co. *v.*

3. Elements of Direct Proof.

The characteristic elements of evidence in direct proof of actual negligence are, 1. The relation of the parties, if any, such as to raise a duty on defendant's part towards plaintiff; 2. The casualty; 3. What ought to have been done; 4. What actually was done.

4. Degrees of Negligence.[13]

Whether negligence was gross or not is not matter of opinion for a witness, but a conclusion to be drawn by the court or jury. It is to be established by evidence manifesting the nature and degree of care which defendant owed, and that which he actually took. But where plaintiff needs to prove gross negligence, it is best to express his offer of proof accordingly.[14] Gross negligence may be proved under a general averment of negligence.[15]

Evans, 121 Ga. 391, 49 S. E. Rep. 308, 47 S. W. Rep. 907, 43 L. R. A. 505.

Superfluous allegations as to fraudulent representations in a petition stating a good cause of action for negligence may be disregarded. Russell *v.* Holder, 116 Iowa, 188, 89 N. W. Rep. 195.

An allegation that before the injury plaintiff was a "sound, healthy and active woman," being only a descriptive averment of her complaint, need not be proved as a part of her cause of action. Green *v.* Houston Electric Co., 40 Tex. Civ. App. 260, 89 S. W. Rep. 442.

An allegation that an injury occurred "within one-fourth of a mile from a public road crossing" need not be proved strictly as alleged. Alabama Western Ry. *v.* McPherson, 146 Ala. 427, 40 So. Rep. 934.

"A complainant who seeks to base an action on any of the provisions of the Employers' Liability Act, must, by positive and direct averment of facts, show that the action falls within the particular provision upon which he relies." Chicago, etc., R. Co. *v.* Barnes, 164 Ind. 143, 73 N. E. Rep. 91.

[13] As to the controversy on the question of degrees, see 5 Am. Law Rev. 38.

[14] See Grinnell *v.* Western Union Tel. Co., 113 Mass. 299, s. c., 18 Am. Rep. 485. See also Pittsburg, &c. R. Co. *v.* Kinnare, 203 Il. 388, 67 N. E. Rep. 826.

[15] Nolton *v.* Western R. R. Co., 15 N. Y. 444. It is not necessary, in order to sustain an action against a physician or surgeon to recover damages for unskillfulness or negligence, to prove gross culpability on the part of defendant;

5. Privity.

If the wrong is founded on breach of contract, plaintiff must be a party, or privy to the contract.[16] But the fact that a contract with a third person is proved by plaintiff, does not necessarily require him to show privity.[17] It is enough if the defendant's contract with the third person was made for the purpose of accommodating the plaintiff.[18]

6. The Casualty as Evidence of Negligence.

The mere happening of a casualty is not sufficient evidence of negligence to go to the jury. But the nature of the accident and the presumptions it raises, may suffice.[19] Evidence that

proof of any failure to exercise proper care or of any neglect in discharging the duty assumed is sufficient. Link *v.* Sheldon, 136 N. Y. 1, 32 N. E. Rep. 696; Robinson *v.* Helena Light, etc., Co., 38 Mont. 222, 99 Pac. Rep. 837.

"Where the allegation is of wilful or wanton wrong, proof of simple negligence will not justify a recovery."

[16] Clancy *v.* Byrne, 56 N. Y. 129, rev'g 65 Barb. 344.

[17] Baird *v.* Daly, 57 N. Y. 236, rev'g 4 Lans. 426.

[18] See Coughtry *v.* Globe Woolen Co., 56 N. Y. 124, rev'g 1 Supm. Ct. (T. & C.) 452; Baird *v.* Daly, 57 N. Y. 236, rev'g 4 Lans. 426.

[19] Whart. on Neg., § 421; citing Scott *v.* London, St. Kath. Docks, 3 H. & C. 596; Byrne *v.* Boadle, 2 Id. 722; Mullen *v.* St. John, 57 N. Y. 567, and other cases; and see Terry *v.* N. Y. Central R. R. Co., 22 Barb. 574. Where a thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. Snyder *v.* Wheeling Electrical Co., 43 W. Va. 661, 28 S. E. Rep. 733. The fact of the falling of an elevator is evidence tending to show want of care in its management, or that the elevator was out of order or faultily constructed. Hartford Deposit Co. *v.* Sollitt, 172 Ill. 222, 50 N. E. Rep. 178. Escape of electricity from a street railway to the injury of a horse, being driven on a public street, is presumptive proof of negligence in the operation of the railway. Trenton Passenger Ry. Co. *v.* Cooper, 60 N. J. Law, 219, 37 Atl. Rep. 730; Wood *v.* Wilmington City R. Co., 5 Del. 369, 64 Atl. Rep. 246. A bicyclist has the burden as to disproving his negligence when he rides up behind another, who is walking where he has a right to

the act was such as, if done with proper care, ordinarily does not produce damage, will generally sustain an inference that it was negligently done, if there is no evidence to indicate the manner of it.[20] Otherwise the presumption is that in the

walk, and, without giving any warning, strikes him with his vehicle. Myers *v.* Hinds, 110 Mich. 300, 68 N. W. Rep. 156. If a person erects a building, bridge, or other structure upon a city street or an ordinary highway, he is under a legal obligation to take reasonable care that nothing shall fall into the street and injure persons lawfully there. This being so, it is further assumed that buildings, bridges and other structures properly constructed do not ordinarily fall upon the wayfarer; so also, if anything falls from them upon a person lawfully passiing along the street or highway, the accident is *prima facie* evidence of negligence, or in other words the presumption of negligence arises. Hogan *v.* Manhattan Ry. Co., 149 N. Y. 23, 25, 43 N. E. Rep. 403.

[20] Sedg. on Dam. 592; Southwestern Tel. & Tel. Co. *v.* Bruce, 89 Ark. 581, 117 S. W. Rep. 564. If it is shown that the injury complained of resulted from an accident which in itself is indicative of negligence the plaintiff is relieved from the burden of further proving the negligence of the defendant. Albion Lumber Co. *v.* De Nobra's Admx., 44 U. S. App. 347, 72 Fed. Rep. 739. The burden which is thus thrown upon the defendant is not that of satisfactorily accounting for the accident, but merely that of showing that he used due care Stearns *v.* Ontario Spinning Company, 184 Pa. St. 519, 39 Atl. Rep. 292.

The doctrine of *res ipsa loquitor* "does not permit a recovery without some proof of negligence, but it regulates the degree of proof required under certain circumstances. If proof of the occurrence shows that the accident was such as could not have happened without negligence according to the ordinary experience of mankind, the doctrine is applied even if the precise omission or act of negligence is not specified, and even when it does not appear whether the accident was owing to some act done or to some act not done. It is applied when the inference of negligence is required by the nature of the occurrence. Thus the apparent cause of the accident may be want of care in constructing or maintaining or operating a machine, and if the occurrence indicates that the accident could not have happened without negligence in one or more of these respects, it speaks for itself and establishes a *prima facie* case for the jury to consider, even if it does not appear specifically whether or in what respect the machinery was negligently constructed, maintained or operated." Robinson *v.* Consolidated Gas Co., 194 N. Y. 37, 86 N. E. Rep. 805, 28 L. R. A. N. S. 586

performance of a lawful act, at least ordinary care was used.[21] It is enough for plaintiff to raise a fair presumption of negligence. Probability is sufficient to go to the jury.[22] If defendant had charge or control of the instrument of disaster, and if it was highly dangerous, or if he owed a special duty of care of one in the position of plaintiff, the disaster is evidence of negligence, sufficient to go to the jury, unless the circumstances indicate some cause consistent with

The doctrine of *res ipsa loquitor* is not applicable "'unless the thing causing the accident is under the control of the defendant or his servants, and the accident is of the kind which does not ordinarily occur if due care has been exercised.'" Paris, &c. R. Co. *v.* Robinson (Tex. 1908), 114 S. W. Rep. 658; Heuson *v.* Lehigh Valley R. Co., 194 N. Y. 205, 87 N. E. Rep. 85, 19 L. R. A. N. S. 790; Sinkovitz *v.* Peters Land Co., 5 Ga. App. 788, 64 S. E. Rep. 93.

"The process by which it is to be determined whether the physical facts and circumstances accompanying an injury are such that the act may be said itself to speak the negligence of the defendant is to be worked out by the jury and not by the court." Sinkovitz *v.* Peters Land Co., (above). But the jury is not bound to draw the inference. Sinkovitz *v.* Peters Land Co., (above).

Although the general rule seems to be that the doctrine of *res ipsa loquitor* does not apply as between master and servant, the Washington courts have held that "where the facts of the case are such as to eliminate blame on the part of the servant or his fellow servants, but show *prima facie* neglect on the part of some one, we think the master should be put to his proofs to show that the blame is not his, just the same as he would be were the injury to a stranger." LaBee *v.* Sulton Logging Co., 51 Wash. 81, 97 Pac. Rep. 1104.

"It has been held that the rule of *res ipas loquitur* does not apply to the collapse of a derrick or the falling of part of a derrick by which an employee is injured." Starer *v.* Stern, 100 N. Y. App. Div. 393, 91 N. Y. Supp. 821.

[21] Lansing *v.* Stone, 37 Barb. 15, s. c., 14 Abb. Pr. 199.

"Negligence cannot be presumed, . . . the mere fact of an accident is not sufficient to impose a liability for negligence." Renders *v.* Grand Trunk R. Co., 144 Mich. 387, 108 N. W. Rep. 368.

[22] Shearm. & Red. on Neg., § 13. *Contra*, Sheldon *v.* Hudson R. R. R. Co., 29 Barb. 226.

Where, however, the cause and happening of the accident are occult and unintelligible, the casulty is not evidence of negligence on the part of the master. Pyne *v.* Cazenovia Canning Co., 220 N. Y. 126, 115 N. E. Rep. 438.

due care on defendant's part.[23] This rule is most frequently applied in the case of injuries received by passengers. In such cases the happening of the accident is *prima facie* evidence of negligence on the part of the carrier, and (the passenger being himself in the exercise of due care), the burden then rests upon the carrier to show that its whole duty was performed, and that the injury was unavoidable by common foresight.[24] Thus the derailment of a train is

[23] In illustration of this principle, compare, as to: *Being found dead* on defendant's premises, (Lehman *v.* City of Brooklyn, 29 Barb. 234; Curran *v.* Warren Mfg. Co., 36 N. Y. 153, s. c., 3 Abb. Pr. N. S. 240, 34 How. Pr. 250); or on the crossing of their road, (Lyndsay *v.* Conn., &c. R. R. Co., 27 Vt. 643; Johnson *v.* Hudson River R. R. Co., 20 N. Y. 65, 6 Duer, 633; Waldron *v.* Rensselaer & Saratoga R. R. Co., 8 Barb. 390). *Blasting.* Ulrich *v.* McCabe, 1 Hilt. 251; Tremain *v.* Cohoes Co., 2 N. Y. 163. *Explosion.* McMahon *v.* Davidson, 12 Minn. 357, 371; Losee *v.* Buchanan, 51 N. Y. 476, rev'g 61 Barb. 86; Marshall *v.* Welwood, 9 Vroom. N. J. 339, s. c., 20 Am. Rep. 394; Illinois Cent. R. R. Co. *v.* Phillips, 49 Ill. 234, 239. *Falling bodies.* Muller *v.* St. John, 57 N. Y. 567; Welfare *v.* London & Brighton Ry. Co., L. R. 4 Q. B. 693; Kearney *v.* London, Brighton, &c. Ry. Co., L. R. 5 Q. B. 411; L. R. 6 Q. B. 759; Clare *v.* Nat. City Bank, 1 Sweeny, 539; Weitner *v.* Delaware & Hudson Canal Co., 4 Robt. 234; Kendall *v.* City of Boston, 118 Mass. 234, s. c., 19 Am. Rep. 446; Byrne *v.* Boadle, 2 H. & C. 722; Scott *v.* London, St. Kath. Docks Co., 3 Id. 596; Jager *v.* Adams, 123 Mass. 26. *Fire.* The mere fact that a fire occurred in a coal mine is not in itself proof of negligence. Hughes *v.* Oregon Impr. Co., 20 Wash. 294, 55 Pac. Rep. 119; Lansing *v.* Stone, 37 Barb. 15. Except as to locomotives and "possibly other agencies of like power and utility," the "mere proof of the damage or destruction of the property by fire does not of itself authorize an inference of negligence." Robinson *v.* Cowan, 158 Ala. 603, 47 So. Rep. 1018. *Gas escaping.* Shearm. & Red. on Neg., § 340; Lannen *v.* Albany Gas L. Co., 44 N. Y. 459, 46 Barb. 264; Parry v. Smith, 41 L. T. R. N. S. 93; Hogan *v.* Manhattan Ry. Co., 149 N. Y. 23, 43 N. E. Rep. 403.

Where a carrier has elected to receive an intoxicated person, "it should be held to owe to him the duty to resort to such extraordinary means as might be necessary, in the exercise of the highest degree of care, to secure his safety." Paris, etc. R. R. Co. *v.* Robinson, 53 Tex. Civ. A. 12, 114 S. W.Rep. 658.

[24] Inland, &c. Coasting Co. *v.* Tolson, 139 U. S. 551; Gleeson *v.*

of itself sufficient to raise the presumption of negligence on the part of the railway company which is running it.[25]

Virginia Midland R. Co., 140 U. S. 435; Stokes *v.* Saltonstall, 13 Pet. 181; Railroad Co. *v.* Pollard, 22 Wall. 341; Lincoln Street Ry. Co. *v.* McClellan, 54 Neb. 672, 74 N. W. Rep. 1074.

"A presumption of negligence arises against the carrier on proof that a passenger on its train was injured as the result of some agency or instrumentality of the carrier, some act of omission or commission of the servants of the carrier, or some defect in the instrumentalities of transportation." Sutton *v.* Southern R. Co., 82 S. C. 345, 64 S. E. Rep. 401.

Where plaintiff claims the benefit of the doctrine of *res ipsa loquitur*, the burden of rebutting the negligence is upon the defendant. Wood *v.* Wilmington City R. R. Co., 21 Del. 369, 64 Atl. Rep. 246.

"Where a passenger is injured without his fault, through a defect in the appliance of the car in which he is riding, and which is under the management and control of the carrier, the presumption of negligence arises against the carrier, and remains until overthrown by other facts." Louisville, &c. Traction Co. *v.* Worrell (Ind. 1908), 86 N. E. Rep. 78.

"If a common carrier is liable . . . for injury to a passenger while remaining passive, such carrier is equally liable to the passenger injured in an attempt to escape a reasonably apprehended danger." Louisville, &c. Traction Co. *v.* Worrell, id.

[25] Albion Lumber Co. *v.* De Nobra's Admx., 44 U. S. App. 347, 72 Fed. Rep. 739; Atchison, &c. R. Co. *v.* Elder, 57 Kans. 312, 316–317, 46 Pac. Rep. 310. But see Renders *v.* Grand Trunk R. Co., 144 Mich. 387, 108 N. W. Rep. 368.

Where an accident was due to the sudden turning of an unmanageable team of horses in front of the car upon which plaintiff was riding, it was held that in order to charge the motorman with negligence, it should appear that he "had notice at least long enough to enable him to form an intelligent opinion as to how the accident and injury might be avoided and apply the means." North Chicago St. R. R. Co. *v.* O'Donnell, 115 Ill. App. 110.

"Where a fire is caused by inflammable material on the right of way, or by fire spreading from the right of way, the general rule applies that the burden of proving negligence rests upon the plaintiff. But where the plaintiff has shown that his property was set on fire by sparks from the engine, and the right to recover is based upon the negligence of the railroad company in using engines with defective apparatus or equipments, or in negligently and unskillfully managing the engines, the presumption of negligence at once arises, and the burden is upon the railroad company to overcome that pre-

7. Other Negligences.

Evidence of other specific instances of negligence, on the part of defendant or the servant whose misconduct is alleged, independent of the negligence in question, is not competent,[26] because raising a collateral issue. For the same reason, if the disaster is attributed to a defect in structure, evidence of other disaster, attributed to the same cause

sumption in order to escape liability." Kimball *v.* Borden, 95 Va. 203, 210, 28 S. E. Rep. 207. See also Patteson *v.* Chesapeake & Ohio R. Co., 94 Va. 16; Elliott on Railroads, § 1242. While a passenger is asleep he cannot, in the nature of things, look after the safety of his effects; and therefore the sleeping-car company is bound to maintain such watch and guard during the hours of the night as may be reasonably necessary to secure the safety of the passenger's property. If a loss occurs, the burden of proof is on the company of showing that it exercised this degree of diligence, and that the loss was not occasioned because of a failure on the part of its employees to do so. This rule of evidence rests upon the general and well recognized principle that where it is peculiarly within the power of one of the parties to a case to produce evidence, he is under an obligation to do so. Kates *v.* Pullman's Palace Car Co., 95 Ga. 810, 814, 23 S. E. Rep. 186. When the killing of stock by a railroad train has been established, the burden of proof is then cast on the company to show that it was not done through negligence. Long *v.* Southern Ry. Co., 50 S. C. 49, 27 S. E. Rep. 531.

It is not negligence on the part of a street car conductor to start the car before a passenger has obtained a seat unless the passenger is crippled or under some other disability. Lexington R. Co. *v.* Britton, 130 Ky. 676, 114 S. W. Rep. 295; Padgett *v.* Atchison, &c. R. Co., 7 Kan. App. 736, 52 Pac. Rep. 578. It was not negligence *per se* for a farmer to fail to make fire guards around his wheat-field one and a half miles from a railroad, nor around his stacks two and a half miles from a railroad, especially the next day after they were completed.

[26] First Nat. Bank of Lyons *v.* Ocean Nat. Bank, 60 N. Y. 278, 295; Warner *v.* N. Y. Central R. R. Co., 44 N. Y. 465, rev'g 45 Barb. 299; Robinson *v.* Fitchburgh, &c. R. R. Co., 7 Gray (Mass.), 92, 95. Passenger thrown from horse car by driver's suddenly stopping. Maguire *v.* Middlesex R. R. Co., 115 Mass. 239; Miss. C. R. R. Co. *v.* Miller, 40 Miss. 45, 47. But it may be admissible in rebuttal of defendants' evidence of general care (Detroit, &c. R. R. Co. *v.* Van Steinburgh, 17 Mich. 99, 111), or to repel an inference of accident (1 Whart. Ev. 47, § 38).

is not generally competent;[27] and when admissible, it is because they tend to show that the cause was a dangerous thing,[28] that defendant had notice of its existence,[29] or proving a frequency of occurrence which repeals all inference of accident.[30] Evidence of disaster at another time, or an-

[27] Sherman *v.* Kortright, 52 Barb. 207; Jacques *v.* Bridgeport, &c. R. R. Co., 41 Conn. 61; and see Bailey *v.* Trumbull, 31 Conn. 581.

[28] As, for instance, that it commonly frightened other horses than plaintiff's. House *v.* Metcalf, 27 Conn. 631, 636; Hill *v.* Portland, &c. R. R. Co., 55 Me. 438, 443; Darling *v.* Westmoreland, 52 N. H. 401. The competency of such evidence has been much contested. Compare Collins *v.* Dorchester, 6 Cush. 396. It would certainly be competent to prove by an expert that at a time either before or after the disaster, when the defect which is alleged to have caused it was in no worse state than at the time of the disaster, he examined and experimented with it, and found it capable of producing the like disaster; hence there seems no reason for excluding ordinary experience when offered within the same limits and for the same purpose. Such evidence is sometimes admissible merely to show what called the attention of witness to the defect. Tomlinson *v.* Town of Derby, 43 Conn. 562.

[29] Mobile, &c. R. R. Co. *v.* Ashcraft, 48 Ala. N. S. 15, 1 Whart. Ev. 50, § 41.

[30] "There is no better evidence of negligence than the frequency of the accidents." Mobile, &c. R. R. Co. *v.* Ashcraft, 49 Ala. N. S. 305. There are two classes of cases in which such evidence is admissible: In the first, as to the condition of a place, or to the working of an appliance to show that either was dangerous; in the second, to show notice to the person who had control of the place or appliance. Cohn *v.* New York, &c. R. Co., 6 App. Div. (N. Y.) 196, 197. Thus, it is competent to show that horses or persons frequently caught their feet at a crossing, or continually slipped on a sidewalk, to show that the crossing or sidewalk was in a dangerous condition. Id. Evidence of the condition of a walk some time before an accident caused by a defect therein is admissible to show its actual condition at the time of the accident, and that it has been in a defective and dangerous condition for such a length of time as to charge the city with notice thereof in connection with evidence that its condition has not been substantially altered in the interval. Hunt *v.* City of Dubuque, 96 Iowa, 314, 65 N. W. Rep. 319. And so evidence is admissible that persons were seen to stumble at the defective part of a walk, and that one person was seen to stop and push the broken part down with his cane before the accident in question. Id. See also Woolsey *v.* Village of Ellenville, 155 N. Y. 573, 50 N. E. Rep.

270; Teasdale *v.* Malone Village, 17 App. Div. (N. Y.) 185; Chacey *v.* City of Fargo, 5 N. D. 173, 177, 64 N. W. Rep. 932; Strudgeon *v.* Village of Sand Beach, 107 Mich. 496, 498, 65 N. W. Rep. 616. But evidence of similar disconnected accidents is not admissible to show the defective condition of a portion of the walk upon which the plaintiff slipped and fell. Langhammer *v.* City of Manchester, 99 Iowa, 295, 68 N. W. Rep. 688.

But in Franklin *v.* Engel, 34 Wash. 480, 76 Pac. Rep. 84, evidence of injuries received by others at the same place in the walk, prior to the accident, was held competent, "on the ground of being descriptive of the condition of the walk."

Evidence of the condition of certain premises two months after an accident is admissible for the purpose of showing that the same condition existed at the time of the injury. Smith *v.* Missouri, etc., Tel. Co., 113 Mo. App. 429, 87 S. W. Rep. 71.

In an action against a railroad corporation by a passenger for a personal injury caused by a car being thrown off the track in consequence of a worn-out rail, the admission of evidence of the general condition of that portion of the road which included the place of the accident had long been bad, and that the rails had been in use a great many years, affords the defendant no ground of exception. Vicksburg, &c. R. Co. *v.* Putnam, 118 U. S. 545.

But in an action for damages for personal injuries caused by a car's jumping the track, evidence as to the condition of the car immediately after the accident is admissible as tending to show its condition prior thereto. Weldon *v.* Omaha, etc., R. Co., 93 Mo. App. 668, 67 S. W. Rep. 698.

So in an action to recover damages for personal injuries inflicted by an electric railway company, in consequence of the breaking of a trolley wire, evidence that this trolley wire had broken frequently recently theretofore is admissible. Richmond Ry., &c. Co. *v.* Bowles, 92 Va. 738, 24 S. E. Rep. 388. In an action against the proprietors of a stage coach for an injury caused to a passenger by the misbehavior of one of the horses, evidence of subsequent similar misbehavior of the horse is admissible, in connection with evidence of his misbehavior at and before the time of the accident, as tending to prove a vicious disposition and fixed habit. Kennon *v.* Gilmer, 131 U. S. 22. Where the accident occurred by a fall down an elevator shaft, and it was claimed that the door was open at the time because of the defective condition of the lock, it was held competent for the plaintiff to show that the door in question was open at times antecedent to the accident, and that other persons came near falling into the shaft. Colorado Mortgage Co. *v.* Rees, 21 Colo. 435, 440–441, 42 Pac. Rep. 42. But in an action for personal injuries occasioned to the plaintiff, who was a tenant of the defendant, by falling on a step

of a staircase attached to the house, another tenant, having been allowed to state that the steps were loose at the time, cannot be allowed to testify that he had fallen on the same step in the same manner before the accident to the plaintiff, and that the condition of the step when he so fell was the same as when the plaintiff was hurt. Dean *v.* Murphy, 169 Mass. 413, 48 N. E. Rep. 283. In getting before the jury in a personal injury case how and in what manner the plaintiff was injured, it is competent to show, as part of the *res gestæ*, all that occurred, although in so doing it may appear that other persons than the plaintiff were injured. West Chicago St. R. Co. *v.* Kennelly, 170 Ill. 508, 48 N. E. Rep. 996. In the trial of an action for damages by fire, alleged to have been communicated by a locomotive engine, when the question at issue is whether, as a matter of fact, the fire was caused by any locomotive, evidence that other fires were caused by the defendant's locomotives, at about the same time and in the same vicinity, is relevant and admissible. Dunning *v.* Maine Central R. Co., 91 Me. 87, 39 Atl. Rep. 352; Kimball *v.* Borden, 95 Va. 203, 210–211, 28 S. E. Rep. 207; Thomas *v.* New York, &c., R. Co., 182 Pa. St. 538, 38 Atl. Rep. 413; Brown *v.* Benson, 101 Ga. 753, 29 S. E. Rep. 215; Henderson *v.* Phil., &c. R. Co., 144 Pa. St. 461, 27 Am. St. Rep. 652. But where the particular locomotive alleged to have caused the fire is identified, evidence of other fires set by different locomotives of the company is not admissible. First Nat. Bank *v.* Lake Erie, &c. R. Co., 174 Ill. 36, 50 N. E. Rep. 1023; Atchison, &c. R. Co. *v.* Osborn, 58 Kans. 768, 51 Pac. Rep. 286. Evidence of fires caused several months earlier by the same engine is incompetent where, after them and before the fire in question, the engine had been thoroughly overhauled and put in proper condition. Menominee River Sash, &c. Co. *v.* Milwaukee, &c. R. Co., 91 Wis. 447, 65 N. W. Rep. 176. Evidence that the same engine, less than ten days after the fire in question, was seen going up the same grade, near the location of the fire "throwing cinders from its smokestack," is admissible, but the defendant has the right to disprove that fact or show that the engine had since got out of repair. Baltimore, &c. Ry. Co. *v.* Tripp, 175 Ill. 251, 51 N. E. Rep. 833. The Illinois act on fires by locomotives, which makes proof of the fact of the communication of the fire *prima facie* proof of negligence, is a rule of evidence, and plaintiff, after establishing that fact, may rest without proving particular acts of negligence. Chicago, &c. R. Co. *v.* Glenny, 175 Ill. 238, 51 N. E. Rep. 896. The court can take judicial notice of the fact that diamond stack and straight stack spark arresters are in very general use upon the railroads of the country and that they are both well-known systems for arresting sparks, while no system that has

other similar place, if adduced, is not competent for the purpose of proving dangerousness, unless it shows that all material conditions were the same.[31]

8. Time of Existence of Defect.

Evidence of the existence of the defect to which plaintiff attributes the disaster, is not confined to the very time of the disaster.[32] If one party, without objections gives evidence overstepping these limits, the other may rebut by similar, but not greater liberty.[33]

9. Other Defects.

The mere existence of defects in a structure at other places than that where the casualty occurred,—as, for instance, a defect in track half a mile away from the scene of a railway wreck,—is not evidence that a similar defect existed at the place of the casualty, and caused it.[34]

yet been invented can wholly prevent the emission of live sparks from an engine under certain circumstances. Frace *v.* New York, &c. R. Co., 143 N. Y. 182, 187, 38 N. E. Rep. 102.

"Evidence of a situation existing after an injury, though a considerable time may have elapsed, is admissible to show the situation existing at the time of the injury, if preceded by *prima facie* proof that no change has taken place in the meantime." Green *v.* Ashland Water Co., 101 Wis. 258, 77 N. W. Rep. 722, 70 Am. St. Rep. 911, 43 L. R. A. 117.

[31] See Fillo *v.* Jones, 2 Abb. Ct. App. Dec. 121; Haynes *v.* Burlington, 38 Vt. 350, 363. Compare Kent *v.* Lincoln, 32 Vt. 591, 597.

[32] Compare Kline *v.* Queen's Ins. Co., 69 N. Y. 614, affi'g 7 Hun, 267; Hutchinson *v.* Methuen, 1 Allen, 33.

Thus where the negligence consisted in the failure to provide a certain appliance on a car, evidence is admissible to show that there was no such appliance on the car shortly before and after the accident. St. Louis, etc.,R. Co. *v.* Dorsey, 189 Ill. 251, 59 N. E. Rep. 593.

[33] For illustrations of this rule see Walker *v.* Westfield, 39 Vt. 246; Baird *v.* Daly, 68 N. Y. 547; Jacques *v.* Bridgeport Horse R. R. Co., 41 Conn. 61.

[34] It would be otherwise if the defect proved was shown to be the result of a cause presumably operating at the place of casualty also. Reed *v.* N. Y. Central R. R. Co., 45 N. Y. 574, overruling 56 Barb. 493. *Contra*, Murphy *v.*

10. Incompetency.

Evidence of negligence having been given, the incompetency or unskillfulness of the actor may be proved,[35] but the limit of time depends on the nature of the structure and of the defect.[36]

11. Reputation.

Evidence of general reputation for negligence is inadmissible to prove negligence upon a particular occasion.[37]

N. Y. Central R. R. Co., 66 Barb. 125; and see Cox *v.* Westchester Turnpike Co., 33 Barb. 414.

[35] Bigley *v.* Williams, 80 Penn. St. 107, 115; Penn. R. R. Co. *v.* Brooks, 57 Id. 339, 343; McKinney *v.* Neil, 1 McLean, 540.

Where the sole issue is as to the negligence of defendant's servant, a motorman, on the occasion in question, evidence of the general incompetency of such motorman, as shown by his method of operating his car on former occasions, is inadmissible. "The inference sought to be drawn (from such evidence) is that, if he was generally incompetent, it was more probable that he operated the car improperly on this occasion. Such an inference might at first blush seem to be a legitimate one, but it is too remote and conjectural to be permissible. Any such rule of evidence would drag innumerable issues into the trial of a case; for evidence of general incompetency would necessarily result in the introduction of evidence of particular acts." Fonda *v.* St. Paul City R. Co., 71 Minn. 438, 74 N. W. Rep. 166, 70 Am. St. Rep. 341. See paragraph 29.

[36] Where the question at issue was as to the cause of an accident occurring at a railroad switch, it was not error to permit a witness to testify as to the condition of the switch over four hours after the accident although there was no evidence that it was in the same condition at the time of the accident. Reynolds *v.* Metropolitan St. Ry. Co., 136 Mo. 282, 116 S. W. Rep. 1135.

Evidence of ice on the sidewalk must be confined within a brief period, for its formation and removal are quick; but evidence of a flaw in a boiler plate may relate to the original making of the boiler though at a remote time.

[37] Jacobs *v.* Duke, 1 E. D. Smith, 271; Baldwin *v.* Western Railroad, 4 Gray, 333; Hays *v.* Millar, 77 Penn. St. 238, s. c., 18 Am. Rep. 445. The habit or practice of the plaintiff in departing from cars on other occasions, either before or after the injury complained of, is not admissible testimony for the purpose of illustrating his conduct

12. Intemperance.

Intoxication is competent, but not conclusive [38] evidence of negligence.[39] Evidence of the intemperate habits of the servant, whose negligence caused the injury, and that defendants were aware of such habits, is admissible for the purpose of making a case for exemplary damages:[40]

13. Opinions of Witnesses.

On a subject proper for an expert's testimony,[41] such as a question of navigation or seamanship,[42] or the management of steam,[43] and of railroad trains,[44] the construction of

at the particular time under investigation. Atlanta Consol. St. Ry. Co. *v.* Bates, 103 Ga. 333, 30 S. E. Rep. 41; Mulville *v.* Pacific Mut. Life Ins. Co., 19 Mont. 95, 100–101, 47 Pac. Rep. 650. But in an action against a railroad company for causing the death of plaintiff's intestate at a street crossing, testimony that deceased was a man of careful habits may be admitted, where the evidence leaves it in doubt whether any person saw the deceased when he was struck by the train. Illinois, &c. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. Rep. 521.

[38] Stuart *v.* Machiasport, 48 Me. 477; Baker *v.* Portland, 58 Id. 199, s. c., 4 Am. Rep. 274.

[39] Wynn *v.* Allard, 5 Watts & S. (Penn.) 524. The intoxication of a person having charge of machinery used in hoisting heavy materials, liable from their great weight to break away and fall, is material upon an issue as to who was in fault for an injury occurring from such a fall, and tends legitimately to prove the incompetency of such engineer to perform the duties with which he was charged. Probst *v.* Delameter, 100 N. Y. 266, 271, 3 N. R. Rep. 184.

[40] Cleghorn *v.* N. Y. Central & Hudson River R. R. Co., 56 N. Y. 44.

[41] See chapter XVI, paragraph 23 of this vol.

[42] The City of Washington, 92 U. S. (2 Otto) 39; Transportation Co. *v.* Hope, 95 Id. 297.

[43] The contrary held of the necessity of a spark arrester. Teall *v.* Barton, 40 Barb. 137.

[44] Galveston, etc., A. R. Co. *v.* Hughes, 54 S. W. Rep. 264, 22 Tex. Civ. App. 134; Cincinnati, &c. R. R. Co. *v.* Smith, 22 Ohio St. 277, s. c., 10 Am. Rep. 729; Mott *v.* Hudson River R. R. Co., 8 Bosw. 345. But compare Keller *v.* N. Y. Central R. R. Co., 2 Abb. Ct. App. Dec. 480.

railroad cars,[45] and tracks,[46] and of bridges,[47] the fastening of vessels, &c.[48]—a witness, shown to be an expert, may state his opinion. It is competent, thus, to prove what would have been the proper construction [49] and mode of operation;[50] the effect of a particular thing therein;[51] what is or what is not prudent;[52] whether a person of competent skill would

[45] Baldwin *v.* Chicago, &c. R. R. Co., 8 Cent. L. J. 497. The contrary held of the construction of cattle bars. Enright *v.* San Francisco, &c. R. R. Co., 33 Cal. 230, 236.

[46] Carpenter *v.* Central Park, etc. R. R. Co., 11 Abb. Pr. N. S. 416.

The opinion of men who are conversant with some particular phase of railroad service and operation from years of experience, though not technical experts, is admissible, as for instance, an opinion concerning the relative safety of different kinds of railroad switches. Galveston H. & S. A. Ry. Co. *v.* Hughes, 22 Tex. Civ. App. 134, 54 S. W. Rep. 264.

[47] Conrad *v.* Village of Ithaca, 16 N. Y. 173.

[48] Moore *v.* Westervelt, 27 N. Y. 234, affi'g 9 Bosw. 558.

In an action for injuries received while engaged in loading logs, "the plaintiff or the defendant may be allowed to prove, by persons having experience and skill in the business of loading logs, what is the usual and proper way of loading such logs, and what are the dangers attending the work; but witnesses who have not had such experience in the business as to be considered experts, should not be allowed to give their opinions on the subject." Louisville, etc., R. Co. *v.* Morton, 121 Ky. 398, 89 S. W. Rep. 243, 28 Ky. L. 355.

[49] Conrad *v.* Village of Ithaca (above); Baldwin *v.* Chicago, &c. R. R. Co. (above); Scheider *v.* American Bridge Co., 78 N. Y. App. Div. 163, 79 N. Y. Supp. 634.

[50] Galveston H. S. & A. Ry. Co. *v.* Hughes, 22 Tex. Civ. App. 134, 54 S. W. Rep. 264; Baldwin *v.* Chicago, &c. R. R. Co. (above). The manner of running electric cars, their rate of speed, and the facility with which they can be stopped or handled, is a proper subject of expert evidence, and not a matter of such common knowledge that the jury can judge as intelligently as one skilled in their use. Howland *v.* Oakland Consolidated St. Ry. Co., 110 Cal. 513, 42 Pac. Rep. 983.

[51] Id.

A witness who was a passenger on a train, cannot give his "conclusion" that the brake was applied just before the accident, which conclusion he bases upon the sudden stopping of the train. Alabama Great Southern R. Co. *v.* Burgess, 114 Ala. 587, 22 So. Rep. 169.

[52] Transportation Co. *v.* Hope, 95 U. S. (5 Otto) 297; Delaware,

have done what the witness testifies was done, or what is hypothetically put;[53] and whether the casualty could have been avoided by proper care.[54] It is objectionable to ask whether the person was negligent,[55] or whether he exercised proper care,[56] or whether he omitted anything that ought to have been done;[57] but if the point is a proper subject of opinion, and the question is properly framed, it is no objection that involves the question to be decided by the jury.[58]

&c. Steam Towboat Co. *v.* Starrs, 69 Penn. St. 36. Opinions of witnesses as to what a prudent man would have done under the circumstances in which the engineer was placed are inadmissible. Fordyce *v.* Edwards, 65 Ark. 98, 44 S. W. Rep. 1034. So, the opinion of a witness that the motorman exercised good judgment in releasing the brake and allowing the car to go ahead, the circumstances being fully disclosed by the testimony, is not competent. Woeckner *v.* Erie Electric Motor Co., 187 Pa. St. 206, 41 Atl. Rep. 28.

[53] Malton *v.* Nesbit, 1 Carr. & P. 70.

[54] Fenwick *v.* Bell, 1 Carr. & K. 312; Bellefontaine, &c. R. R. Co. *v.* Bailey, 11 Ohio St. 333.

[55] Crofut *v.* Brooklyn Ferry Co., 36 Barb. 201; Camp *v.* Hall, 39 Fla. 535, 22 So. Rep. 792; Tillett *v.* Norfolk, &c. R. Co., 118 N. C. 1031, 24 S. E. Rep. 111.

[56] Louisville, &c. R. Co. *v.* Bouldin, 110 Ala. 185, 200, 20 So. Rep. 325; City of Springfield *v.* Coe, 166 Ill. 22, 46 N. E. Rep. 709.

In an action by a railroad switchman for injuries received while switching trains on defendant's railroad, a witness who qualified as "a civil engineer and familiar with the duties of switchmen" was not allowed to give his opinion "that the switchman, using ordinary care for his own safety, could perform his duties as a switchman in safety where the switch was placed with reference to the track as was the one in question." Batchelor *v.* Union Stock Yard, etc., Co., 88 Ill. App. 395.

[57] Carpenter *v.* Eastern Transp. Line, N. Y. Ct. App., 17 Alb. L. J. No. 9.

[58] Transportation Line *v.* Hope, 95 U. S. (5 Otto) 297.

As to whether a certain question is a proper subject of expert opinion, depends upon whether the facts of the case and the conclusions deducible therefrom, are matters of professional or scientific knowledge or skill. "It may be broadly stated as a general proposition that there are two classes of cases in which expert testimony is admissible. To the one class belong those cases in which the conclusions to be drawn by the jury depend upon the existence of facts which are not common knowledge and which are peculiarly within the knowledge of men whose ex-

An unskilled witness cannot testify whether anything could have done to prevent the casualty.[59]

perience or study enables them to speak with authority upon the subject. If, in such cases, the jury with all the facts before them can form a conclusion thereon, it is their sole province to do so. In the other class we find those cases in which the conclusions to be drawn from the facts stated, as well as knowledge of the facts themselves, depend upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence. In such cases, not only the facts, but the conclusions to which they lead may be testified to by qualified experts. The distinction between these two kinds of testimony is apparent. In the one instance the facts are to be stated by the experts, and the conclusion is to be drawn by the jury; in the other, the expert states the facts and gives his conclusion in the form of an opinion which may be accepted or rejected by the jury." Werner, J., in Dougherty *v.* Milliken, 163 N. Y. 527, 57 N. E. Rep. 757, 79 Am. St. Rep. 608; Consolidated Gas, etc., Co. *v.* Smith, 109 Md. 186, 72 Atl. Rep. 651.

[59] Haggerty *v.* Brooklyn, &c. R. R. Co., 61 N. Y. 624.

An unskilled person cannot render his opinion on any question unless it appears that he has had an opportunity, from personal investigation, to observe the facts upon which he bases that opinion; and even in that case, before giving his conclusions he should state the facts derived from such observation so that the jury may determine the weight to be attached to his opinion. Missouri, etc., R. Co. *v.* Baker (Tex. Civ. App.), 68 S. W. Rep. 556. Thus a witness who has had experience as a motorman, but under circumstances differing from those in question, cannot testify as to the distance within which a car could have been stopped under the conditions which existed at the time of the injury. Bliss *v.* United Tract. Co., 75 N. Y. App. Div. 235, 78 N. Y. Supp. 18. In order to allow a witness to testify as to the distance within which a motorman could bring a car to a stop, it must be shown that he had facilties for knowing the fact. Flynn, *v.* Louisville R. Co., 110 Ky. 662, 63 S. W. Rep. 490. The testimony of a witness that the turning on or shutting off of the power which operated a machine was an act of superintendence, was properly rejected. Gilmore *v.* Mittineagne Paper Co., 169 Mass. 471, 48 N. E. Rep. 623. It is not permissible to ask a witness whether he knows the duties of a railroad engineer as to railroad crossing, where it does not appear that he was properly qualified to furnish information on that subject. Born *v.* Philadelphia, etc., R. Co., 198 Pa. St. 409, 48 Atl. Rep. 263. But the testimony of a witness who testified "that though he had never ridden on an engine, he

In a matter not requiring special skill or experience,—such as the necessity of gate and signals at an open drawbridge,[60] the management of fire,[61] and the like,—opinion evidence is not generally admissible.[62] In such cases it is not competent

knew how far a common headlight would light up a track; that he had stood by the side of engines on rainy nights, and in that position could see the track for 200 yards ahead," was held competent on the question as to how far a head light would light up the tracks ahead of it. St. Louis, etc., R. Co. *v.* Shannon, 76 Ark. 166, 88 S. W. Rep. 851. In another case where the evidence was of an experiment made by the witness about a month after the accident, to determine how far a person could be seen from the place where the accident occurred, the testimony was not admitted, it not appearing that the conditions under which the experiment was made were the same as those prevailing at the time of the injury. Alabama Great Southern R. Co. *v.* Burgess, 114 Ala. 587, 22 So. Rep. 169.

[60] Nowell *v.* Wright, 3 Allen, 166, 170.

[61] Teall *v.* Barton, 40 Barb. 137; Fraser *v.* Tupper, 29 Vt. 409. It is a matter of common knowledge that the use of steam power, when threshing grain, is more or less hazardous and dangerous, and that, with a wind prevailing in the direction of the stacks, the hazard and danger greatly increase. The opinions of experts upon a question so commonly understood are not admissible. Morris *v.* Farmers' Mut. Fire Ins. Co., 63 Minn. 420, 56 N. W. Rep. 655.

[62] The work of stringing wires from one pole to another through branches of an intervening tree is one within the range of ordinary knowledge, experience and observation; and is not a matter as to which expert testimony will be admitted. Flynn *v.* Boston Electric Light Co., 171 Mass. 395, 50 N. E. Rep. 937. Whether the driver of a wagon could have stopped his horse in time to avoid running over a person had he seen him, is not a question upon which witnesses may give their opinion. Brink's Chicago City Exp. Co. *v.* Kinnare, 168 Ill. 643, 48 N. E. Rep. 446. Where the claimed defects in a county bridge are described by witnesses who have knowledge of them, and the character and extent of such defects are comprehensible by the ordinary mind, the jury are the judges of the safety of the bridge for travel, and it is not competent for a witness, even though an expert, to give in evidence his opinion as to the safety of the bridge. Murray *v.* Board of County Commissioners, 58 Kans. 1, 48 Pac. Rep. 554; Savannah R. Co. *v.* Evans, 121 Ga. 391, 49 S. E. Rep. 308. But testimony of an expert as to the customary and proper method for an employee to adopt in passing from car to car on a moving

train, is admissible where the jury is not equally competent to pass on the question. Missouri, etc., R. Co. *v.* Merrill, 61 Kan. 671, 60 Pac. Rep. 819. Questions as to whether the witness had ever observed anything on the steps that would tend to render them in a bad condition are improper upon an inquiry as to the condition of the steps in respect to the accumulation of ice and snow, as they call for the conclusion, where the facts upon which the conclusion is based can be represented to the jury. Langhammer *v.* City of Manchester, 99 Iowa, 295, 68 N. W. Rep. 688. A witness will not be permitted to give his opinion as to whether deceased was competent to select the lumber for a scaffold, when this is the issue the jury are called upon to try. Boettger *v.* Scherpe, &c Arch. Iron Co., 136 Mo. 531, 536–547, 38 S. W. Rep. 298. "Upon the trial of the action the main issue to be determined by the jury was whether the Buffalo belt fastener was suitable and safe for fastening the belt in question, and the plaintiff was permitted, against the objection of the defendant's counsel, to ask several of his witnesses their opinions as to their safety and fitness. We think these questions were objectionable. A sample of this belt fastener was produced before the jury, and also a piece of belt showing how the fastener was used. Its size and mode of use were apparent to the jury. It was competent for the plaintiff to prove the strain to which it would be subjected, its liability to break, and all the experiences of persons who had used it; and thus all the facts could be placed before the jury from which they could determine whether or not it was a suitable and safe belt fastener. It cannot be proper to have the issue determined by the opinions of experts, however skilled and experienced they may be." Harley *v.* Buffalo Car Mfg. Co., 142 N. Y. 31, 37–38, 36 N. E. Rep. 813. "The witness was asked to state whether his engine discharged as many sparks as the Diamond stock of the Erie. This the court held was asking for an opinion, the court stating that defendant might show this witness's observation, but that he could not give his opinion. He was then asked if he had observed which of the two discharged the most sparks, and he stated that he had, and that he knew by observation; and he was then asked to say which discharged the most sparks. This, upon plaintiff's objection, the court excluded. We know of no other way in which the witness could have stated his observation than by answering this question; so of the other two questions. The evidence was upon a very material issue in the case. There were no means of stating the result of the witness's observation other than the determination he came to as to the fact that the one or the other emitted the most sparks, and hence it was proper that he should have

to ask a witness whether the casualty would or would not have occurred had a specified circumstance been different.[63] Witnesses cannot express their opinions as to whether the locality at which the injury was inflicted was dangerous or not.[64]

Facts discernible by judgment or estimate, but not requiring special knowledge or skill, are not regarded as matters of opinion within these rules. Hence any person of ordinary knowledge and experience may testify to his judgment of the speed of a train or vehicle,[65] or whether a person looked sick or well,[66] and the like.

been permitted to answer questions of that nature." Collins *v.* New York, &c. R. Co., 109 N. Y. 243, 249, 16 N. E. Rep. 50.

[63] Crane *v.* Northfield, 33 Vt. 124; Weaver *v.* Alabama, &c. Co., 35 Ala. 176, 183; Otis *v.* Thom, 23 Id. 469; Unger *v.* Forty-second St. R. R. Co., 6 Robt. 237; Norfolk, &c. R. Co. *v.* Suffolk Lumber Co., 92 Va. 413, 23 S. E. Rep. 737; Brinks Chicago City Express Co. *v.* Kinmore, 168 Ill. 643, 48 N. E. Rep. 446.

[64] Childress's Admx. *v.* Chesapeake, &c. Ry. Co., 94 Va. 186, 26 S. E. Rep. 424; Musick *v.* Borough of Latrobe, 184 Pa. St. 375, 39 Atl. Rep. 226. But compare Kitchen *v.* Union Township, 171 Pa. St. 145, 33 Atl. Rep. 76.

It is not permissible for a witness to state, as his conclusion, from facts testified to by himself that the place at which plaintiff's intestate crossed the track was less dangerous than other crossings. The court said "The relative danger of crossing at the place selected by the deceased was a question for the jury to determine from the facts brought out, and was not a proper subject-matter for the expression of an opinion entertained by the witness." Savannah, etc., R. Co. *v.* Evans, 121 Ga. 391, 49 S. E. Rep. 308.

[65] Salter *v.* Utica & Black River R. R. Co., 59 N. Y. 631; Detroit, &c. R. R. Co. *v.* Van Steinburgh, 17 Mich. 99, 105. Witnesses who are familiar with trains are competent to testify as to the rate of speed at which a certain train was running when observed by them. Chicago, &c. R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E.

[66] Higbie *v.* Guardian Mut. Life Ins. Co., 53 N. Y. 603, 66 Barb. 462.

A witness who saw a piece of wood on the elevator machinery thirty minutes after the accident, may point out the location of such piece of wood on a model of the machinery which was present in court. Starer *v.* Stern, 100 N. Y. App. Div. 393, 91 N. Y. Supp. 821.

14. Declarations and Admissions Generally.

Where evidence of a declaration is admissible, a witness who was present may be allowed to state what he heard said, leaving it to others to identify the declarant; but the fairer course is to require that identification, if necessary at all, be given first.[67]

The rules as to competency of declarations, which are below stated, are to be taken with this qualification,—that declarations not competent on these grounds are often admissible for other purposes, such as to charge defendant with notice,[68] if independent evidence of the existence of the fact declared has been given;[69] or as a circumstance which fixed the fact on the witness's memory;[70] and, in some cases, a written statement may be admissible as an original memorandum auxiliary to the testimony of the writer, or in lieu of it after his death.[71]

15. Plaintiff's Declarations.

Declarations made by the injured person, though the plaintiff himself, at the time of his suffering the disaster, and growing out of it, or out of its immediate causes, and calculated to explain the character, nature or quality of the

Rep. 708; Chipman *v.* Union Pac. Ry. Co., 12 Utah, 68, 41 Pac. Rep. 562; Kitay *v.* Brooklyn, &c. R. Co., 23 N. Y. App. Div. 228. The fact that the witness is not able to testify as to the rate at which the train was running does not prevent him from testifying whether it was running fast or slow, as the weight to be attached to his testimony is for the jury. Illinois, &c. R. Co. *v.* Ashline, 171 Ill. 313, 49 N. E. Rep. 521. A witness who is not an expert may testify whether a trolley car was running fast or slow at the time of the accident. Ehrmann *v.* Nassau El. R. Co., 23 N. Y. App. Div. 21.

A witness may be asked as to the speed at which a horse was traveling upon the highway. Nesbit *v.* Crosby, 74 Conn. 534, 51 Atl. Rep. 550.

[67] Indianapolis, P. & C. R. Co. *v.* Anthony, 43 Ind. 183, 191.

[68] Parker *v.* Boston, &c. Steamboat Co., 109 Mass. 449.

[69] Hadencamp *v.* Second Ave. R. R. Co., 1 Sweeny, 490.

[70] Detroit, &c. R. R. Co. *v.* Van Steinburgh, 17 Mich. 99, 107.

[71] See Downs *v.* N. Y. Central R. R. Co., 47 N. Y. 83, and chapter

facts constituting the occurrence and its effects on him, are competent, even in his own favor,[72] if part of the *res gestæ*.[73]

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[72] Memphis St. R. Co. *v.* Shaw, 110 Tenn. 467, 45 S. W. Rep. 713; Frink *v.* Coe, 4 Greene (Iowa), 555. In favor of admitting declarations subsequent to the act, see Commonwealth *v.* M'Pike, 3 Cush. (Mass.) 181; Harriman *v.* Stowe, 57 Mo. 93. *Contra*, Cleveland, &c. R. R. Co. *v.* Mara, 26 Ohio St. 185.

[73] Brownell *v.* Pacific R. R. Co., 47 Mo. 239, 244, see paragraph 17. *Res gestæ* means the circumstances, facts, and declarations which grow out of the main fact, contemporaneous with it, and serve to illustrate its character. Hermes *v.* Chicago, &c. Ry. Co., 80 Wis. 590, 27 Am. St. Rep. 69, 50 N. W. Rep. 584; Hood *v.* French, 37 Fla. 117, 19 So. Rep. 165. A declaration, to be admissible as part of the *res gestæ*, must be contemporaneous with it, and so limit, explain, or characterize the fact it assists to constitute as to be in a just sense a part of it, and necessary to its complete understanding. Mutual Life Ins. Co. *v.* Logan's Exr., 57 U. S. App. 18, 87 Fed. Rep. 637. While proximity in point of time with the act causing the injury is in every case of this kind essential to make what was said by a third person competent evidence against another as part of the *res gestæ*, that alone is insufficient, unless what was said may be considered part of the principal fact, and so a part of the act itself. Butler *v.* Manhattan Ry. Co., 143 N. Y. 417, 423, 38 N. E. Rep. 454. The declaration need not, however, be coincident in point of time with the main fact to be proved. It is sufficient if the two are so nearly connected that the declaration can, in the ordinary course of events, be said to be the spontaneous exclamation of the real cause, or if a subsequent declaration and the main fact at issue, taken together, form a continuous transaction, the declaration is admissible. Leahey *v.* Cass Ave., &c. Ry. Co., 97 Mo. 165, 10 Am. St. Rep. 300, 10 S. W. Rep. 58; Fish *v.* Illinois, &c. Ry. Co., 96 Iowa, 702, 707, 65 N. W. Rep. 995. But declarations which are merely narrative of a past transaction are not admissible as part of the *res gestæ*. Waldele *v.* New York, &c., R. Co., 95 N. Y. 274; Haywood *v.* Hamm, 77 Conn. 158, 58 Atl. Rep. 695. The following declarations have been held admissible as *res gestæ*.

The declaration of the plaintiff "as to his condition just after his restoration to consciousness, a minute or two after" a collision. (Sutton *v.* Southern R. Co., 82 S. C. 345, 64 S. E. Rep. 401); declarations made by an injured passenger immediately after the train passed, from which he jumped, and while he lay on the platform where he fell (Pennsylvania R. Co. *v.* Lyons, 129 Pa. St. 113, 15 Am. St. Rep. 701, 18

A declaration, which is not admissible under this rule, is not rendered admissible by the circumstance that it was a dying declaration.[74]

16. Defendant's Admissions, Declarations, and Conduct. The admissions and declarations of a defendant are ad-

Atl. Rep. 759); declarations of one injured in a railroad accident, as to its cause, made at the place, within a few minutes after it occurred, and while he was still writhing under the pain inflicted by it (International, &c. Ry. Co. *v.* Anderson, 82 Tex. 516, 27 Am. St. Rep. 902, 17 S. W. Rep. 1039); declarations of a person fatally injured as to how the accident happened, made to a fellow servant a very few minutes after it occurred, and practically on the scene thereof (Christianson *v.* Pioneer Furniture Co., 92 Wis. 649, 66 N. W. Rep. 699); declarations of a decedent made immediately after he was injured, and substantially while he was being extricated from under the wheels of the car which had passed over him (Louisville, &c. Ry. Co. *v.* Buck, 116 Ind. 566, 9 Am. St. Rep. 883, 19 N. E. Rep. 453; Little Rock, &c. Ry. Co. *v.* Leverett, 48 Ark. 333, 3 Am. St. Rep. 230, 3 S. W. Rep. 50); words spoken by a driver in an effort to control a runaway horse (Trenton Passenger Ry. Co. *v.* Cooper, 60 N. J. Law, 219, 37 Atl. Rep. 730). Where the exact time of the declaration is not shown but it appears that it was made sometime within one hour from the happening of the accident, its admission was not reversible error. Chicago City R. Co. *v.* Lowitz, 218 Ill. 24, 75 N. W. Rep. 755. For cases where the declarations have been held not to form a part of the *res gestæ*, see Springfield Consol. Ry. Co. *v.* Hoeffner, 175 Ill. 634, 51 N. E. Rep. 884; Globe Acc. Ins. Co. *v.* Gerisch, 163 Ill. 625, 45 N. E. Rep. 563; Chicago, etc., Ry. Co. *v.* Becker, 128 Ill. 545, 15 Am. St. Rep. 144, 21 N. E. Rep. 524; Nat. Masonic Accident Assn. *v.* Shryock, 36 U. S. App. 658, 73 Fed. Rep. 774; Leahey *v.* Cass Ave., &c. Ry. Co., 97 Mo. 165, 10 Am. St. Rep. 300, 10 S. W. Rep. 58; Kennedy *v.* Rochester, &c. R. Co., 130 N. Y. 654, 29 N. E. Rep. 141. A remark made by the deceased to a neighbor, about an hour before her death, while performing her ordinary household duties, that she intended taking passage that morning on one of the defendant's trains, is not admissible as *res gestæ*, to show her relation as passenger. Chicago, &c. R. Co. *v.* Chancellor, 165 Ill. 438, 46 N. E. Rep. 269. But see Cincinnati, &c. Ry. Co. *v.* Howard, 124 Ind. 280, 19 Am. St. Rep. 96, 24 N. E. Rep. 892.

[74] Marshall *v.* C. & G. E. R. R. Co., 48 Ill. 475.

missible against himself,[75] and so is the fact that he referred a question of fact to a third person, together with such person's answer.[76] But such evidence is not conclusive against

[75] The admissions of a party, made after the casualty, are admissible *as against him* though not part of the *res gestæ*. Allen *v.* Barrett, 100 Iowa, 16, 69 N. W. Rep. 272; De Benedetti *v.* Mauchin, 1 Hilt. 213. And, equally, conduct indicating a consciousness of liability. Banfield *v.* Whipple, 10 Allen, 27, 31.

"It is not everything that is said in the presence of a party to a litigation in reference to the subject-matter thereof that may be given in evidence against him when he remains silent, and his silence is relied upon as an implied admission of the truth or correctness of the statement. If the party in whose presence the statement was made was physically and mentally able to hear and understand, and sufficiently near to hear, and the statement was of a character that would under the circumstances naturally call upon him for a denial or qualification if untrue, and he was at liberty to deny or qualify, then it may be given in evidence against him; otherwise not." Parulo *v.* Philadelphia, etc., Co., 145 Fed. Rep. 664.

The conduct of defendant or his servant, immediately on the happening of the casualty, in staying or fleeing, is competent as tending to show animus. Barker *v.* Savage, 1 Sweeny, 288, 291. Evidence of subsequent precautions against a recurrence of the disaster is admitted in Pennsylvania (Penn. R. R. Co. *v.* Henderson, 51 Pa. St. 315; Westchester R. R. Co. *v.* McElure, 67 Penn. St. 311; McKee *v.* Bidwell, 74 Penn. St. 218, 225); but not in New York (Dougan *v.* Champlain Transp. Co., 56 N. Y. 1, affi'g 6 Lans. 430; Salters *v.* Delaware & Hudson Canal Co., 3 Hun, 338; Payne *v.* Troy & Boston R. R. Co., 9 Hun, 526. *Contra*, Westfall *v.* Erie Ry. Co., 5 Hun, 75; Baldwin *v.* N. Y. & Harlem Nav. Co., 4 Daly, 314. And see Bevier *v.* Delaware & Hudson Canal Co., 13 Hun, 254, 256; Baird *v.* Daly, 68 N. Y. 547). The true principle is that subsequent precautions may admit inadequacy, but not fault. See section 25a this chapter. The defendant's private reprimand and dismissal of the servant as fault, held not competent as an admission of his negligence. Betts *v.* Farmers' Loan, &c. Co., 21 Wis. 80, 86.

[76] Sybray *v.* White, 1 M. & W. 435, Rosc. N. P. 73. In an action for running down a bicyclist, the remark of the defendant, "Damn the bicycles, anyway; they are no good," was held admissible as tending to show the existence of a feeling of hostility to bicycles on the part of the defendant which increased the probability that he had conducted himself with indifference to the rights of the rider of such a vehicle. Quinn *v.* Pietro, 38 N. Y. App. Div. 484, 485.

the defendant;[77] nor is it competent against a co-defendant,[78] except when made so by being part of the *res gestæ*, or when some connection between the defendants is shown to justify one in speaking for the other.[79]

An admission of having been in fault is cogent evidence; but an admission of having caused the casualty is not necessarily an admission of having been in fault.[80]

[77] Id., Sutherland *v.* N. Y. C. & H. R. R. R. Co., 41 Super. Ct. (J. & S.) 17.

Rules promulgated by the defendant railway company for the guidance of its employees only, and unknown to the plaintiff, are not admissible in evidence as admissions that reasonable care required the exercise of all the precautions therein described. "A person may," said the court, "out of abundant caution adopt rules requiring of his employees a much higher degree of care than the law imposes. This is a practice that ought to be encouraged, and not discouraged. But if the adoption of such a course is to be used against him as an admission, he would naturally find it to his interest not to adopt any rules at all." Fonda *v.* St. Paul City R. Co., 71 Minn. 438, 74 N. W. Rep. 166, 70 Am. St. Rep. 341. But several of the states have held otherwise, admitting such rules in evidence, as tending to show negligence of defendant's disobedient servant. Stevens *v.* Boston El. R. Co., 184 Mass. 476, 69 N. E. Rep. 338. On actions between master and servant disregard by the servant of general rules requiring the exercise if great care on his part in situations of danger is not contributory negligence as a matter of law if the situation producing the injury is made dangerous by the employer's negligence. Larkin *v.* New York Tel. Co., 220 N. Y. 27, 114 N. E. 1043. "Although an employer may prescribe a printed rule for his workman to follow, he may nevertheless abrogate or waive it, otherwise than in print. He may knowingly tolerate such a widespread and continuous disobedience to its terms as to make it a dead letter." Canadian Pac. R. Co. *v.* Elliott, 137 Fed. Rep. 904, 70 C. C. A. 242.

[78] Daniels *v.* Potter, 1 M. & M. 501.

But in the absence of a specific objection that such evidence is not admissible against a codefendant, its admission is not reversible error. Allen *v.* Barrett, 100 Iowa, 16, 69 N. W. Rep. 272.

[79] Compare chapter VII of this vol., and Reagan *v.* Grim, 14 Penn. St. 508.

[80] Lansing *v.* Stone, 37 Barb. 15, s. c., 14 Abb. Pr. 199. When, on the trial of an action against a railroad company for a personal injury, the plaintiff claims and testifies that the cause of the

17. Admissions and Declarations of Servants, &c.

The declarations of defendant's servants[81] and equally those of plaintiff's servants[82] are competent in favor of either

injury was the violent or improper act of the conductor in removing him from a freight train, it is competent for the defendant to show that the plaintiff, in describing the accident soon after its occurrence and before suit, omitted to state his having been forced off the train as the cause of the accident. Barrett *v.* New York, &c. R. Co., 157 N. Y. 663, 52 N. E. Rep. 659.

[81] See, for instance, Reed *v.* Dick, 8 Watts (Pa.), 479.

[82] See, for instance, Toledo, &c. R. R. Co. *v.* Goddard, 25 Ind. 185, 190. The following declarations have been held competent as *res gestæ:* Declarations of an engineer, made within a few moments after a child was killed by being run over by a locomotive in his charge (Hermes *v.* Chicago, &c. Ry. Co., 80 Wis. 590, 27 Am. St. Rep. 69, 50 N. W. Rep. 584); declarations of a railroad section foreman, who set fire on the right of way of a railroad company, while the fire was yet burning, as to the origin thereof (Mobile, &c. R. Co. *v.* Stinson, 74 Miss. 453, 21 So. Rep. 14, 522); declarations of a foreman on the ground, in charge of the work and acting directly in the line of his duty, as to the unsafe condition of the appliances immediately or within half an hour after the accident (New York, &c. Mining Syndicate *v.* Rogers, 11 Colo. 6, 7 Am. St. Rep. 198, 16 Pac. Rep. 719). The following have been held incompetent: Declarations made by an employee of a railway company while investigating the cause of the derailment of a car (Electric Ry. Co. *v.* Carson, 98 Ga. 652, 27 S. E. Rep. 156); the declaration of the engineer of the locomotive of a train which met with an accident, as to the speed at which the train was running when the accident happened, made between ten and thirty minutes after the accident occurred (Vicksburg, &c. R. Co. *v.* O'Brien, 119 U. S. 99); the statements of the conductor of a train, made an hour after an accident to his train, as to the particulars of the accident (Norfolk, &c. R. Co. *v.* Suffolk Lumber Co., 92 Va. 413, 23 S. E. Rep. 737); a conversation after the accident between the section master and the conductor of the colliding train (Willis *v.* Atlantic and Danville R. Co., 120 N. C. 508, 26 S. E. Rep. 784); the declarations of the section foreman and the depot agent of the road, made after a fire occurred in regard to the condition and management of the engine (Atchison, &c. R. Co. *v.* Osborn, 58 Kans. 768, 51 Pac. Rep. 286); declarations of a station agent as to why a car loaded at his station was not inspected by the railroad company before its acceptance for transportation, where

party, if part of the *res gestæ*, or if within the scope of agency for the party against whom they are offered. The two main rules, allowing and limiting such evidence on these grounds, have been already stated.[83] In illustration of the rule of the *res gestæ*, it will suffice to say that declarations of a railroad engineer or steamboat captain, made while running recklessly and characterizing the act,[84] are competent against the the employer, in an action for an injury caused by that recklessness; but such declarations or admissions, made after the heat of the emergency had passed, and other acts had intervened,[85]—as, for instance, on arriving at the next station, after the casualty;[86] or on a later day though while continuing the voyage;[87] or on being arrested when leaving the spot,[88]—are not competent.

the agent was not employed as agent at that station until some time after the transaction to which his declarations related (Pennsylvania Co. *v.* Kenwood Bridge Co., 170 Ill. 645, 49 N. E. Rep. 215); declarations by a train conductor as to his motives of hostility in ejecting a passenger, made to another passenger eight or ten minutes after the ejectment (Barker *v.* St. Louis, &c. R. Co., 126 Mo. 143, 47 Am. St. Rep. 646, 28 S. W. Rep. 866).

[83] Page 144 of this vol.

[84] Gerke *v.* Cal. Steam Nav. Co., 9 Cal. 251, 255; R. R. Co. *v.* Messino, 1 Sneed (Tenn.), 220, 227.

Evidence of what was said and done by a conductor in the act of abusing a passenger and carrying her beyond her destination is admissible. Memphis St. R. Co. *v.* Shaw, 110 Tenn. 467, 75 S. W. Rep. 713.

[85] The principle applied by those courts that admit such declarations most freely is to receive those which are obviously elicited by the casualty, though not literally simultaneous with it, if they follow in close connection and before other acts intervene, so as to be apparently the spontaneous expression of the natural consciousness while still under the heat of the emergency. Compare Ins. Co. *v.* Mosely, 8 Wall. 397; approved in 9 Id. 408, and cases cited. The New York courts exclude such declarations unless it affirmatively appears that they were made at the time of the injury. Whitaker *v.* Eighth Avenue R. R. Co., 51

[86] Sims *v.* Macon, &c. R. R. Co. 28 Ga. 94; Bellefontaine Ry., Co. *v.* Hunter, 33 Ind. 335, s. c., 5 Am. Rep. 201.

[87] Packet Co. *v.* Clough, 20 Wall. 528.

[88] Whitaker *v.* Eighth Ave. R. R. Co. (above). In an action to re-

Declarations made *before or after* the casualty may be made admissible by showing that the declaratant was acting in the scope of his employment at the time, in a matter involved in the duty or care required of defendant, and default in which caused the disaster,[89] or aggravated the wrong.[90] If it be shown that the declarant spoke in response to timely inquiries addressed to him, and relating to matters under his charge, in respect to which he was authorized, in the usual course of business, to give information,[91] this principle suffices to admit the declaration of the agent, and hence narratives of past facts are not necessarily excluded, as they are where only the rule of *res gestæ* is invoked.

18. — of Third Person Injured.

Where the beneficial as well as legal right of action is in another than the injured person,—as where a parent sues for injuries to his minor child,—the admissions of the latter are not competent against the plaintiff,[92] unless as part of

N. Y. 295, rev'g Whitaker *v.* Eighth Avenue R. R. Co., 5 Robt. 650; Luby *v.* Hudson R. R. Co., 17 N. Y. 131.

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cover damages for personal injuries, alleged to have been caused by the negligence of the defendant's driver, the record of a criminal action against such driver is not admissible. Summers *v.* Bergner Brewing Co., 143 Pa. St. 114, 24 Am. St. Rep. 518, 22 Atl. Rep. 707; Maisels *v.* Dry Dock, &c. R. Co., 16 N. Y. App. Div. 391.

[89] Thus declarations of those engaged in construction may be competent if the cause of disaster was a defect in that construction. Brehm *v.* Great Western R. R. Co., 34 Barb. 226; Peyton *v.* Governors of St. Thomas Hospital, 3 M. & Ry. 625, note; Matteson *v.* N. Y. Central R. R. Co., 62 Barb. 364.

The rule is otherwise when the admission or declaration is not made by the servant in the performance of his duty. Gilmore *v.* Mittineague Paper Co., 169 Mass. 471, 48 N. E. Rep. 623.

[90] For instance, the master's refusal to allow the injured passenger assistance, after the casualty. Hall *v.* Steamboat Co., 13 Conn. 319, 324. Otherwise if the conduct of the declarant is not implicated in the fault. Maury *v.* Talmadge, 2 McLean, 157; Mobile & M. R. R. Co. *v.* Ashcraft, 48 Ala. 15.

[91] See Chap. III, paragraph 50 of this vol.

[92] Ohio, &c. R. R. Co. *v.* Hammersley, 28 Ind. 371. In an action

the *res gestæ*, or brought home to plaintiff by independent evidence. And conversely in an action by a child or its personal representative to recover for negligent injury to it, the declarations of the parent of the child are not admissible.[93]

19. Strangers.

The declarations of any persons present, made in the heat of the emergency and forming part of the incident and illustrating the nature, cause or extent of the wrong, may be proved as part of the *res gestæ*.[94]

against a railroad company for damages for trespass in causing the death of the plaintiff's husband, a written statement by him while in the hospital suffering from the injuries received in the accident from which injuries he subsequently died, giving an account of the accident, should be received in evidence. The original right of action was in him and plaintiff's rights are but in succession or substitution of his. Hughes *v.* Delaware & Hudson Canal Co., 176 Pa. St. 254, 35 Atl. Rep. 190; Bradford City *v.* Downs, 126 Pa. St. 622, distinguished and its soundness doubted.

[93] Norfolk, &c. R. Co. *v.* Groseclose, 88 Va. 267, 29 Am. St. Rep. 718, 13 S. E. Rep. 454; Budd *v.* Meriden El. R. Co., 69 Conn. 272, 37 Atl. Rep. 683. Evidence that the parents were unable to hire any servant or person to aid the mother in looking after the child, is not competent to rebut proof of negligence on her part. Cumming *v.* Brooklyn, &c. R. Co., 104 N. Y. 669, 10 N. E. Rep. 855.

[94] Norwich Transp. Co. *v.* Flint, 13 Wall. 3, 7 Blatchf. 536. Under these rules a newspaper account (Downs *v.* N. Y. Central R. R. Co., 47 N. Y. 83) or a passengers' card of exoneration (Macon, &c. R. R. Co. *v.* Johnson, 38 Geo. 409, 436), are not competent. As to proving outcries, compare 1 Whart. Ev. 46, § 36; Messner *v.* People, 45 N. Y. 1. A declaration of a third person, before the principal act occurs, cannot be admissible as evidence in favor of the person by whom the principal act was done as part of the *res gestæ* thereof. Ehrlinger *v.* Douglas, 81 Wis. 59, 29 Am. St. Rep. 863, 50 N. W. Rep. 1011. Evidence of what a fellow-passenger said to the plaintiff as to whether or not a railway train upon which they were riding was going to stop at a station, in immediate connection with the plaintiff's act in attempting to get off the train, is admissible as part of the *res gestæ*, not to charge the defendant with liability, but as explanatory of the plaintiff's motives and mental condition at the time. Hemmingway *v.* Chicago, &c. Ry. Co., 72 Wis. 42, 7 Am. St. Rep. 823, 37 N. W. Rep. 804. Evidence that immediately after

20. Violation of Statute.

Although the fact that an act required by statute was omitted, or that an act done was a violation of a statute, does not alone necessarily sustain an action against the offender for negligence,[95] nor necessarily bar an action by him for negligence injurious to him while offending;[96] yet it is relevant as evidence on the question of negligence in the act; and if the statute regulated the manner for purposes of safety, and the injury resulted from the disregard of such regulations, this is sufficient *prima facie* evidence of negligence.[97] But, on the other hand, compliance with the statute is not usually conclusive evidence of due care.[98]

the accident a woman was heard to shout "Murder" is inadmissible. Leahey *v.* Cass Ave., &c. Ry. Co., 97 Mo. 165, 10 Am. St. Rep. 300, 10 S. W. Rep. 58. An entry in an accident record book kept by the police at a station near the place of injury is not admissible in an action for damages for such injury. Pennsylvania Company *v.* McCaffrey, 173 Ill. 169, 50 N. E. Rep. 713.

[95] Smith *v.* Lockwood, 13 Barb. 209, 217; Van Hook *v.* Whitlock, 2 Ed. Ch. 304.

The defendant's failure to perform the duty imposed upon him by statute must be the proximate cause of the injury to be evidence of actionable negligence. Carrigan *v.* Stillwell, 97 Me. 247, 54 Atl. Rep. 389, 61 L. R. A. 163.

[96] Hoffman *v.* Union Ferry Co., 68 N. Y. 390; Baker *v.* Portland, 56 Me. 199, s. c., 4 Am. Rep. 274.

[97] Cordell *v.* N. Y. Central R. R. Co., 64 N. Y. 535, rev'g 6 Hun, 461. See also Wooster *v.* Canal Bridge Co., 16 Pick. 541, 544; Shearm. & Red. Negl., § 484. In an action against a railroad company for negligence, at common law, evidence of its failure to give the signals required by statute at public crossings near the accident is competent to support an allegation of reckless negligence. Mack *v.* South Bound R. Co., 52 S. C. 323, 29 S. E. Rep. 905.

"The law for the protection of the public imposes a duty upon the operators of a street car in crossing a railroad track, to stop the car and go ahead to ascertain by looking and listening if the way is clear." Renders *v.* Grand Trunk R. Co., 144 Mich. 387, 108 N. W. Rep. 368.

See Nickey *v.* Steuder, 164 Ind. 189, 73 N. E. Rep. 117, as to when the employment of a minor, in violation of a statute, may constitute negligence *per se*.

[98] Caldwell *v.* N. J. Steamb. Co., 47 N. Y. 282, affi'g 56 Barb. 425. Compare Doward *v.* Lindsay, L. R. 5 P. C. 338, s. c., 8 Moak's Eng. 261.

21. —of Municipal Ordinance.

Violation of a municipal ordinance regulating the manner of the act, is relevant on the question of negligence.[99]

22. Usage.

Plaintiff may show the general course and usage of the business, so far as necessary for the purpose of showing what ought to have been done in conducting the transaction in which defendant is alleged to have been negligent.[1] Where the measure of defendant's duty is ordinary care, the man-

Evidence of a police regulation requiring cars to stop on the easterly side of a street crossing, and the practice of defendant company to comply with said regulation, is competent as tending to indicate the greater probability of the defendant's theory of an accident. Maisels *v.* Dry Dock, etc., R. Co., 16 N. Y. App. Div. 391, 45 N. Y. Supp. 41.

[99] Sturmwald *v.* Schreiber, 69 App. Div. 476, 74 N. Y. Supp. 995; Riegert *v.* Thackery, 212 Pa. St. 86, 61 Atl. Rep. 614; Harrison *v.* Sutter St. R. Co., 116 Cal. 156, 47 Pac. Rep. 1019; McGrath *v.* N. Y. Central & H. R. R. R. Co., 63 N. Y. 522; Beisigel *v.* N. Y. Central, 14 Abb. Pr. N. S. 29; Jetter *v.* New York & Harlem R. R. Co., 2 Abb. Ct. App. Dec. 458; Phila. & Reading R. R. Co. *v.* Ervin, Supreme Ct. Pa. March, 1879, Reporter, 153.

"Ordinances and their violation are admissible, not as substantive and sufficient proof of the negligence of the defendant, but as evidence of municipal expression of opinion, on a matter as to which the municipal authorities had acted, that the defendant was negligent, and are to be taken into consideration with all the other facts in the case." Ubelmann *v.* Amer. Ice Co., 209 Pa. 398, 58 Atl. Rep. 849.

Where the failure to comply with the ordinance is due to the inability and refusal of the city authorities to give the defendant such instructions and approval as were by the ordinance made conditions precedent, the defendant is excused for the failure. Porter *v.* Albany Municipal Gas Co., 220 N. Y. 152, 115 N. E. Rep. 457.

If the violation is of a statute or ordinance of a foreign state or municipality, proof thereof, if pertinent to the issues, is admissible only when it is specially pleaded. Savannah, etc., R. Co. *v.* Evans, 121 Ga. 391, 49 S. E. Rep. 308.

[1] Brown *v.* Hitchcock, 28 Vt. 452; Consolidated Gas, etc., Co. *v.* State, 109 Md. 186, 72 Atl. Rep. 651. But a statement by a witness "that other people, who dug such ditches, always braced them," should not have been received. Schermer *v.* McMahon, 108 Mo. App. 36, 82 S. W. Rep. 535.

ner in which other persons in the same general business are accustomed to do, is competent.[2] Otherwise where the duty is not to be thus measured.[3] In neither case is the defendant's own usage competent in his favor.[4]

A general usage may be proved by testimony of experts, to decide a question of duty not governed by law.[5]

23. Ownership of the Thing Causing the Injury.

Ordinarily evidence that the property, mismanagement of which caused the injury, was owned by and in the control of defendant, is *prima facie* evidence that the negligence was imputable to him.[6] To make a municipal corporation liable for the unsafe condition of public property, its custody and control of the property must be shown.[7] Ownership[8] and

[2] Chapter XXX, paragraph 43 of this vol.

"The usage and custom of well regulated shops to have no set screws in the handles of shifters attached to drill presses is a pertinent fact on the inquiry of negligence *vel non* in omitting such screws, but it is not conclusive." Going *v.* Alabama Steel, etc., Co., 141 Ala. 537, 37 So. Rep. 784.

[3] As in case of a city's liability for defective highway (City of Champaign *v.* Patterson, 50 Ill. 61, 65); or bridge (Bliss *v.* Wilbraham, 8 Allen, 564); or that of a railroad company to guard against fires from sparks (Grand Trunk Ry. *v.* Richardson, 91 U. S. [1 Otto] 454, 469); or of the keeper of gunpowder (Bradley *v.* People, 56 Barb. 72. Compare Bacon *v.* Boston, 3 Cush. (Mass.) 174, 181).

[4] Gahagan *v.* Boston, &c. R. R. Co., 1 Allen, 187; Maury *v.* Talmadge, 2 McLean, 157.

[5] Barnard *v.* Kellogg, 10 Wall. 383; The City of Washington, 92 U. S. (2 Otto) 31; The Clement, 2 Curt. 363, 369.

[6] Shearm. & R. on Neg., §§ 71, 72, 195; reviewing conflicting authorities. Compare Mullen *v.* St. John, 57 N. Y. 567; English *v.* Brennan, 60 Id. 609. See also Whitehouse *v.* Pittsburg Rys. Co., 35 Pa. Super. Ct. 581.

[7] Shearm. & R. on Neg., § 150; Terry *v.* Mayor, &c. of New York, 8 Bosw. 504, and, according to some authorities, that it received profit or advantage from it as property. Hill *v.* City of Boston, 122 Mass. 344.

A municipal corporation "is not an insurer against all injuries which may result from obstructions in the public streets. It is liable only for such injuries as are the result of its negligence or default in the performance of some duty imposed upon it by law." Colbourn *v.* Wilmington, 20 Del. (4 Pa.) 443, 56 Atl. Rep. 605.

[8] De Wolf *v.* Williams, 69 N. Y. 622.

possession[9] may each be proved by direct testimony of a witness to the fact, subject of course to cross-examination. Evidence of acts of ownership, such as applying for a license,[10] or receiving proceeds,[11] is competent. A sign-board is competent,[12] but not necessarily sufficient. Evidence that the thing was leased to a third person, is competent in defense.[13]

24. Connection of Cause with Injury.

Plaintiff cannot recover unless he proves that the injury was caused by defendant. It is not enough to prove that it was possibly, or even probably, caused by him;[14] nor

Where plaintiff's injuries were caused by the falling off of a board sign which was insecurely fastened, it will be presumed, in the absence of evidence to the contrary, that the fence was erected by the owner. Masal *v.* Tarrnowski, 128 N. Y. App. Div. 159, 112 N. Y. Supp. 556.

[9] Hardenbergh *v.* Crary, 50 Barb. 32; Knapp *v.* Smith, 27 N. Y. 277.

[10] Commonwealth *v.* Gorman, 16 Gray, 601.

[11] Grier *v.* Sampson, 27 Pa. St. 183, 192.

[12] Stables *v.* Ely, 1 Carr. & P. 614.

[13] Kastor *v.* Newhouse, 4 E. D. Smith, 20; Hart *v.* New Orleans, &c. Co., 4 La. Ann. 261.

[14] Sheldon *v.* Hudson River R. R. Co., 29 Barb. 226; Lehman *v.* City of Brooklyn, Id. 234.

When the facts of the case might, with equal consistency, support an inference that the accident was due to a cause or causes other than the negligent act of defendant, the plaintiff cannot rely merely upon proof of the surrounding circumstances. The doctrine of *res ipsa loquitur* does not apply to such cases and it is not incumbent upon the defendant either to explain the cause of the accident or to purge himself of the inference of negligence. Moriarty *v.* Schwarzschild, etc., Co., 132 Mo. App. 650, 112 S. W. Rep. 1034. "While it is not necessary for the plaintiff to exclude every possibility that the accident may have happened through some cause other than the negligence of the defendants, he is bound to introduce evidence enough to remove the cause from the realm of speculation, and give it a solid foundation upon facts, for the harmful effect of which the defendants are responsible." Pryor *v.* Murname, 82 Con. 48, 72 Atl. Rep. 571. Thus evidence that the defendants put the wagon in question in a yard about 11 o'clock in the morning and that it remained there until seven o'clock in the evening when it ran backwards across the

that his negligence was the remote cause or mere occasion.[15] What is the proximate cause is ordinarily a question for the jury, to be determined upon a view of all the circumstances.[16] Plaintiff is not bound to show the precise cause. It is enough if he shows the injury to be attributable to one or other of several causes, for each of which defendant is responsible.[17]

yard causing the injury, is in itself insufficient to show negligence. Groarke *v.* Laemmle, 56 App. Div. 61, 67 N. Y. Supp. 409.

Where the injury result from the concurring negligence of two individuals and would not have occurred in the absence of either, both parties are responsible, since the negligence of both was the proximate cause of the injury. Southwestern Tel., etc., Co. *v.* Bruce, 89 Ark. 581, 117 S. W. Rep. 564.

[15] For illustrations, see Card *v.* City of Elsworth, 65 Me. 547, s. c., 20 Am. Rep. 722; Kellogg *v.* St. Paul, &c. R. R. Co., 94 U. S. (4 Otto) 469; Burke *v.* Louisville, &c. R. R. Co., 7 Heisk. (Tenn.) 451, s. c., 19 Am. Rep. 618; Clark *v.* Chambers, 38 L. T. R. N. S. 454. But it is not necessary that the negligence complained of be the sole cause of the injury. Pollett *v.* Long, 56 N. Y. 200.

[16] Kellogg *v.* St. Paul, &c. R. R. Co. (above).

Negligence is a mixed question of law and fact. When the evidence is conflicting and reasonable men might differ as to the proper conclusion to be drawn from the facts shown, the question of fact should be submitted to the jury, but where there is no dispute as to the fact, it is then a question of law for the court. Pittman *v.* Reno, 4 Okla. 638, 46 Pac. Rep. 495; Toppi *v.* McDonald, 128 App. Div. 443, 112 N. Y. Supp. 821; American Express Co. *v.* Risley, 179 Ill. 295, 53 N. E. 558; Swift *v.* Rutkowski, 182 Ill. 18, 54 N. E. Rep. 1038; Lunde *v.* Cudahy Packing Co., 139 Iowa, 688, 117 N. W. Rep. 1063.

[17] See, for instance, Bevier *v.* Delaware & Hudson Canal Co., 13 Hun, 254, 257.

If the injury could have been the result of either of two causes, operating independently, for only one of which defendant would be liable, the plaintiff has the burden of showing within reasonable certainty that the injury was produced by the cause for which defendant would be liable, and if the evidence leaves it to conjecture, the plaintiff must fail. Reynolds *v.* Metropolitan St. R. Co., 136 Mo. App. 282, 116 S. W. Rep. 1135; White *v.* Lehigh Valley R. Co., 220 N. Y. 131; James *v.* Boston El. Ry. Co., 201 Mass. 263, 87 N. E. Rep. 474; Rubuck *v.* McCleary, 220 N. Y. 188, 115 N. E. Rep. 449; Groarke *v.* Laemmle, 56 App. Div. 61, 67 N. Y. Supp. 409.

If an act or omission constitutes "negligence, and an injury to one

Where the facts suggest several hypotheses, an expert may be asked, what would have been the indications on one or another hypothesis without first proving it to be the true one.[18]

Evidence of the true source of injury is admissible under a general denial.[19]

25. Notice of Defect; Request.

Notice to defendant of the defect in his premises which caused the injury, may be presumed from its existence for a sufficient lapse of time previously; but such pre-existence will not be presumed without evidence.[20] Express notice to an agent or servant, whose duty it was to attend to or to report on the defect, is enough.[21]

Under an allegation of request, evidence of excuse for not making request is not competent.[22]

25a. Subsequent Precautions or Repairs.

Upon the question whether it is competent to show that subsequent to the accident the defendant made repairs or took precautions there has been some difference of opinion in the courts of the several States. But it is now settled, by

not chargeable with fault follows, of such a character that it might have been anticipated as a natural result of such negligence, and the particular injury would not have occurred without such negligence; then, though other causes, whether wrongful or otherwise, contributed to the injury, the negligence without which the injury would not have occurred must be considered as contributing proximately thereto." Pennsylvania Co. *v.* Fertig, 34 Ind. App. 459, 70 N. E. Rep. 834.

"An unsuccessful attempt to prove by direct evidence the precise cause of an accident does not estop the injured party from relying upon the presumption applicable to it." Louisville, etc., Tract. Co. *v.* Worrell (Ind. App.), 86 N. E. Rep. 78.

[18] Erickson *v.* Smith, 2 Abb. Ct. App. Dec. 64.

[19] Schaus *v.* Manhattan Gas-Light Co., 14 Abb. Pr. N. S. 371.

[20] Sherman *v.* Western Transp. Co., 62 Barb. 150.

[21] Conger *v.* Chicago, &c. R. R., 24 Wis. 157, s. c., 1 Am. Rep. 164; Parker *v.* Steamboat Co., 109 Mass. 449; compare Black *v.* Camden & Amboy R. R. Co., 45 Barb. 40; Swords *v.* Edgar, 59 N. Y. 28.

[22] Lyman *v.* Eclerton, 29 Vt. 305.

the decisions of the highest courts of most of the States in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and create a prejudice against the defendant.[23]

[23] U. S.—Columbia, &c. R. Co. *v.* Hawthorne, 144 U. S. 202, 207.

Conn.—Waterbury *v.* Waterbury Tract. Co., 74 Conn. 152, 50 Atl. Rep. 3; Nalley *v.* Hartford Carpet Co., 51 Conn. 524, 50 Am. Rep. 47.

Ga.—Georgia, etc., R. Co. *v.* Cartledge, 116 Ga. 164, 42 S. E. Rep. 405, 59 L. R. A. 118.

Ill.—Hodges *v.* Percival, 132 Ill. 53, 23 N. E. Rep. 423; Stonington Coal Co. *v.* Young, 137 Ill. App. 462; Leggett *v.* Illinois Cent. R. Co., 72 Ill. App. 577.

Ind.—Terre Haute, etc., R. Co. *v.* Clem, 123 Ind. 15, 23 N. E. Rep. 965, 18 Am. St. Rep. 303, 7 L. R. A. 588; Chicago, etc., R. Co. *v.* Lee, 17 Ind. App. 215, 46 N. E. Rep. 543.

Iowa.—Beard *v.* Guild, 107 Iowa, 476, 78 N. W. Rep. 201.

Ky.—Louisville, etc., R. Co. *v.* Morton, 121 Ky. 398, 89 S. W. Rep. 243, 28 Ky. L. 355.

Mass.—Whelton *v.* West End St. R. Co., 172 Mass. 555, 52 N. E. Rep. 1072; Dacey *v.* New York, etc., R. Co., 168 Mass. 479, 47 N. E. Rep. 418; Shinners *v.* Lock, etc., 154 Mass. 168, 28 N. E. Rep. 10, 26 Am. St. Rep. 226, 12 L. R. A. 554.

Mich.—Lombar *v.* East Tawas, 86 Mich. 14, 48 N. W. Rep. 947.

Minn.—Hammargren *v.* St. Paul, 67 Minn. 6, 69 N. W. Rep. 470; Morse *v.* Minneapolis, etc., R. Co., 30 Minn. 465, 16 N. W. Rep. 358.

Mo.—Ely *v.* St. Louis, etc., R. Co., 77 Mo. 34; Schermer *v.* McMahon, 108 Mo. A. 36, 82 S. W. Rep. 535.

N. Y.—Corcoran *v.* Peekskill, 108 N. Y. 151, 15 N. E. Rep. 309.

Tex.—Missouri Pac. R. Co. *v.* Hennessey, 75 Tex. 155, 12 S. W. Rep. 608.

Wis.—Green *v.* Ashland Water Co., 101 Wis. 258, 77 N. W. Rep. 722, 70 Am. St. Rep. 911, 43 L. R. A. 117.

If the purpose of the evidence of the subsequent changes, whether they be in the way of repairs or additional precautions, is to show the actual conditions prevailing at the time of the injury, it is admissible. Consolidated Gas, etc., Co. *v.* State, 109 Md. 183, 72 Atl. Rep. 651. In an action for damages occasioned by a collision with an obstruction in a highway, evidence that the obstruction had since been removed, though incompetent to prove the character

26. The Delinquent an Agent or Servant of Defendant.

In addition to what has been said in the previous chapter,[24] it should be observed that the fact that the delinquent was, at the time of the disaster, in charge of the property of the defendant which caused the injury, is sufficient evidence to go to the jury that he was defendant's agent or servant, and that the property was in use for defendant's benefit.[25]

of the obstruction, was held admissible to show that the obstruction was unnecessary. Dillon *v.* Raleigh, 124 N. C. 184, 32 S. E. 548. See also Leggett *v.* Illinois Cent. R. Co., 172 Ill. App. 577. While the use of a different appliance after an accident cannot be shown as an independent fact to prove negligence, it seems that a witness, who has testified in his examination in chief that the appliance was a safe and proper one in his opinion, may be asked on cross-examination, for the purpose of abating the probative force of his opinion, whether he had not substituted another appliance after the accident. Going *v.* Alabama Steel, etc., Co., 141 Ala. 537, 37 So. Rep. 784.

"After an accident has happened it is ordinarily easy to see how it could have been avoided; and then for the first time it frequently happens that the owner receives his first intimation of the defective or dangerous condition of the machine or structure which caused or led to the accident. Such evidence has no tendency whatever, we think, to show that the machine or structure was not previously in a reasonably safe and perfect condition, or that the defendant ought, in the exercise of reasonable care and diligence, to have made it more perfect, safe and secure. While such evidence has no legitimate bearing upon the defendant's negligence or knowledge, its natural tendency is undoubtedly to prejudice and influence the minds of the jury." Corcoran *v.* Village of Peekskill, 108 N. Y. 151, 155, 15 N. E. Rep. 309. "Upon whatever pretense such evidence is put into the case it is generally used to mislead the jury. It is sometimes accepted by them as an admission of negligence, and its natural tendency is undoubtedly to influence them in that direction." Clapper *v.* Town of Waterford, 131 N. Y. 382, 390, 30 N. E. Rep. 240.

[24] Chapter III, paragraphs 44 and 45; chapter XXVI, paragraph 5 and chapter XXX, paragraph 59 of this vol.

[25] Norris *v.* Kohler, 41 N. Y. 42, rev'g 1 Sweeny, 39, and see Boniface *v.* Relyea, 5 Abb. Pr. N. S. 259, s. c., 6 Robt. 397; Svenson *v.* Atlantic Mail Steamship Co., 57 N. Y. 108, affi'g 33 Super. Ct. (1 J. & S.) 277. The presence of a workman engaged in his work on the defendant corporation's premises, is presumably directly or in-

If the delinquent was acting within the scope of his employment,[26] the master is liable; and is not exempt simply because the servant acted maliciously.[27]

directly at its instance. Barnum, etc., Mfg. Co. *v.* Wagner, 64 Ill. App. 375. "The rule is well established by many authorities that an employer, when sued by one who has sustained an injury in consequence of a particular negligent act on the part of his servant, is not at liberty to disprove the charge by evidence tending to show that the servant was a person of general good repute, who, in the discharge of his duties, had always theretofore displayed the requisite skill and caution, because such evidence is not relevant to the issue, and is only admissible in those cases where the master is accused of having knowingly employed an incompetent servant. Persons sometimes fail to exercise ordinary care, although as a rule they are careful, and for this reason proof that one is generally prudent and cautious has no necessary tendency to show that on a particular occasion he was *not* negligent. Besides, the practice of establishing the quality of one's acts in a given instance by his conduct at other times or by his general line of conduct would have an inevitable tendency to create collateral issues. When, therefore, a complaint does not charge incompetency, but simply alleges that an employee acted carelessly on a given occasion, the proof should be confined to his acts on that occasion, and should not embrace an inquiry concerning his conduct on other occasions, or his general conduct, which is a subject in no wise involved in the issue." Harriman *v.* Pullman's Palace Car Co., 56 U. S. App. 313, 314, 85 Fed. Rep. 353.

"In suing a defendant for the negligence of its servant it is entirely permissible to allege that the defendant did the acts alleged to be negligent and averring generally that it was negligently and carelessly done." Gayle *v.* Missouri Car, etc., Co., 177 Mo. 427, 76 S. W. Rep. 987.

"The master is liable for the wilful torts of its servants without the master authorizing or ratifying such torts." Carson *v.* Southern R. Co., 68 S. C. 55, 46 S. E. Rep. 525.

[26] A stevedore's foreman, dissatisfied with a cartman's unloading, zealously took the cartman's place, and, in throwing a package, injured plaintiff. *Held*, evidence to go to the jury that he was acting for the stevedore. The question was, did he act, perhaps overzealously, in his employment, or did he act for a purpose of his

[27] Mott *v.* Consumers' Ice Co., 73 N. Y. 543, and cases cited. Under a general denial, testimony tending to show that an accident, alleged to have happened by the negligence of the master, was

27. Contractor or Servant.

In determining whether a person is a "contractor" or not, the circumstance that he always serves the same person affords a very strong presumption that he has no independent occupation; but this presumption is not conclusive.[28] The fact that a person doing work is subject to dismissal by his employer at any moment, is a circumstance

own? Burns *v.* Poulson, L. R. 8 C. P. 563, s. c., 6 Moak's Eng. 261. On the other hand, a master was held liable for negligent act of clerk when watching for thief (Courtney *v.* Baker, 60 N. Y. 1, 37 Super. Ct. [5 J. & S.] 249); but not liable for malicious act in shooting a trespasser. Fraser *v.* Freeman, 43 N. Y. 566, rev'g 56 Barb. 234. A driver went out with the team on an errand of his own, and returning called for some of his master's goods on the way, and while carrying them had a collision. *Held*, that he was not acting within the scope of his employment. Rayner *v.* Mitchell, 25 Weekly R. 633. On the other hand, a driver took a load of coal to the wrong house, and delivered it to one who had not ordered it but subsequently paid for it; and the driver left the coal-hole open. *Held*, that he was acting within the scope of his employment. Whitely *v.* Pepper, 36 L. T. R. N. S. 588.

In an action for injuries caused by a runaway horse, testimony of the defendant "that his son was in charge of the horse on the day in question, and was using it to attend to some of his own business, and probably some of his (the father's) also," is sufficient *prima facie* proof of agency. Haywood *v.* Hamm, 77 Conn. 158, 58 Atl. Rep. 695.

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caused by the negligence of a fellow-servant, is competent. Wilson *v.* Charleston, &c. Ry. Co., 51 S. C. 79, 28 S. E. Rep. 91.

It is no defense that the negligence of a fellow-servant of plaintiff contributed with that of the master in causing the injury. Moriarty *v.* Schwarzschild, etc., Co., 132 Mo. App. 650, 112 S. W. Rep. 1034.

[28] Shearm. & R. on Neg., § 76.

"When the facts are undisputed no doubt exists that the court may declare as a matter of law whether one is an independent contractor or merely a servant; . . . but where the facts are disputed the proper course it seems to us must be to leave it to the jury under proper instructions to say whether one was an independent contractor or a servant, accordingly as the facts are found." Gayle *v.* Missouri Car, etc., Co., 177 Mo. 427, 76 S. W. Rep. 987.

raising a presumption that he is a servant and not a contractor, but not conclusive.[29]

28. Common Employment.

If defendant relies on the fact that plaintiff was a fellow servant of the delinquent,[30] and plaintiff's case only shows an injury received through defendant's negligence, the defendant has the burden of showing that the relation of master and servant existed between them.[31] If that relation is shown or admitted, the servant must prove that the risk by which he was injured was not one of those which he assumed.[32] The presumption that the servant contracted with a view to peril, cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it.[33]

[29] Id., § 78.

[30] For the grounds of this exemption, see 3 Am. Rep. 146, n., 3 South. L. Rev. N. S. 735, 2 Id. 108, 5 Id. 200, 380; Mullan *v.* Philadelphia, &c. Mail Steamship Co., 78 Penn. St. 25, s. c., 21 Am. Rep. 2, and cases cited; Malone *v.* Hathaway, 64 N. Y. 5, 12.

To be fellow servants the employees must be engaged by the same master, in the same general business and for the purpose of accomplishing the same general object. Highes *v.* Oregon Imp. Co., 20 Wash. 294. "Mere difference in the grade of employment, or the fact that one servant is the foreman or boss of another, does not take them out of the general rule of the common law upon the subject, and that the common master is not responsible for the negligent acts of the foreman or boss unless the latter has been entrusted with the power to employ and discharge." Young *v.* Hahn, 96 Tex. 99, 70 S. W. Rep. 950. Generally it is for the jury to say whether the relation exists; but if the facts upon which the relationship depends are determined it becomes a question for the court. Wilkinson Co-operative Glass Co. *v.* Dickinson, 35 Ind. A. 230, 73 N. E. Rep. 957; Tubelowish *v.* Lathrop, 104 Ill. App. 82.

[31] Whart. on Neg., §§ 226, 243.

The fact that one is engaged in learning the duties of a brakeman and is serving without pay while so learning does not affect his status as a fellow servant of the other brakeman on the train. Weisser *v.* Southern Pac. R. Co., 148 Cal. 426, 83 Pac. Rep. 439, 7 Ann. Cas. 636.

[32] Beaulieu *v.* R. R., 48 Me. 291.

[33] Railroad Company *v.* Fort, 17 Wall. 553.

A person who voluntarily enters

If defect of machinery is proved, there must be evidence imputing or implying cognizance of it in the master, unless it was a defect which he was bound to know.[34] The burden of proving that the plaintiff also knew of the defect which caused the injury, but continued his service notwithstanding, rests upon the defendant.[35] If defendant proves this,

the service of another assumes whatever risks are incident to such employment, and is presumed to have contracted with respect thereto. Big Stone Gap Iron Co. *v.* Ketron, 102 Va. 23, 45 S. E. Rep. 740.

"Whether or not the cleaning of the elevators was within the ordinary duties of a janitor, the fact is that appellant undertook the performance of this labor without objection, and it may therefore be regarded as within the scope of his employment." Tubelowish *v.* Lathrop, 104 Ill. App. 82.

In an action between employer and employee where there is no allegation that the plaintiff (the employee) had not assumed the risk, it is error to permit a recovery wholly regardless of this issue which is clearly made by the evidence. Chicago, etc., R. Co. *v.* Walker, 137 Ill. App. 428.

[34] Whart. on Neg., § 243; Columbus, Chicago & Indiana Central Ry. Co. *v.* Froesch, 68 Ill. 545, s. c., 18 Am. Rep. 578.

"The principle that it is the duty of the master to see to it that appliances or instrumentalities furnished for the use of his servant are reasonably safe does not extend so far as to require him to attend to the regulation of those parts which necessarily have to be adjusted in the course of the use with regard to the particular work to be done, and the adjustment of which is incident to the ordinary use of the appliances." Lone Star Brewing Co. *v.* Willie, 52 Tex. Civ. App. 550, 114 S. W. Rep. 186; Divver *v.* Hall, 21 Misc. 452, 47 N. Y. Supp. 630.

Where the employees are engaged in making the very place in which they are working as a tunnel, the rule as to a safe place to work does not apply. Toppi *v.* McDonald, 128 N. Y. App. Div. 443, 112 N. Y. Supp. 821.

[35] Shearm. & R. on Neg., § 99. Evidence that he knew that some of the cars were not adequately provided is enough, although he did not notice the condition of the particular car which caused the accident. Ladd *v.* New Bedford Railroad Company, 119 Mass. 412, s. c., 20 Am. Rep. 331.

"A servant will be presumed to have notice of risks which to a person of his experience and knowledge ought to be patent and obvious, and also such as by the exercise of ordinary care he can see and understand." Allen B. Wrisley Co. *v.* Burke, 203 Ill. 250, 67 N. E. Rep. 818.

But he is not presumed to have

plaintiff may then show that defendant induced him to continue his work by promising to remedy the defect.[36]

29. Negligent Employment of Unfit Servant.

Where a servant in common employment relies on negligence of the employers in engaging an incompetent fellow servant, the negligence may be proved by evidence that the latter was an unfit person, and was known to defendants, or generally known and reputed, to be such.[37] The negli-

notice of defects which can be noted only by investigation and inspection for the purpose of ascertaining that there was no danger. Allen B. Wrisley Co. *v.* Burke, 203 Ill. 250, 67 N. E. Rep. 818.

Where an employee of an electric power company was killed while working on certain dead wires as directed, it was unnecessary to allege that the deceased was without knowledge of his danger as presumably the wires would not be rendered dangerous without warning to him. Hough *v.* Grants Pass Power Co., 41 Ore. 531, 69 Pac. Rep. 655.

[36] Shearm. & R. on Neg., § 99.

[37] Lambrecht *v.* Pfizer, 49 App. Div. 82; Consolidated Coal Co. *v.* Seniger, 179 Ill. 370, 53 N. E. Rep. 733; Gilman *v.* E. R. R. Co., 10 Allen, 233, s. p., 20 Mich. 105, s. c., 4 Am. Rep. 364; Cook *v.* Parham, 24 Ala. 21, 33. "We are aware that in some states the courts have permitted incompetency of servants to be shown by general reputation, but we have never gone to that extent in this state. It appears to us that the safer and better rule is to require incompetency to be shown by the specific acts of the servant, and then that the master knew or ought to have known of such incompetency. The latter may be shown by evidence tending to establish that such incompetency was generally known in the community." Park *v.* New York, &c. R. Co., 155 N. Y. 215, 218–219, 49 N. E. Rep. 674.

Where the evidence showed that a railroad engineer had had several accidents during his employment by the defendant, it was a question of fact from all the evidence as to whether the defendant was negligent in continuing him in its employ. Barkley *v.* New York Cent., etc., R. Co., 35 N. Y. App. Div. 228, 54 N. Y. Supp. 766.

The Massachusetts Court holds that the incompetency of a servant cannot be shown by specific acts of negligence because such evidence "might present a multiplicity of issues that could not properly be tried together." The same rule obtains in Texas. In these, and other states following the rule, general incompetency can be shown only by evidence of an habitual course of conduct. In an action for personal injuries

gence of the employee, on the occasion of the injury, is not by itself sufficient evidence to charge the defendants with negligence in appointing or retaining the employee;[38] but the evidence of his incompetency may show circumstances which raise a fair inference that they were negligent in selecting him, or in omitting ordinary inquiries as to his qualifications, etc.[39] For the purpose of charging the de-

occasioned to plaintiff by being run over by a derrick car, while employed in repairing a bridge for defendant, a foreman testified that he had complained to defendant's agent, who hired defendant's employees about the employment of the engineer, because he did not like the way he handled the derrick car. The foreman also testified that upon several previous occasions, while working on another job, he told the agent that he did not like the way the engineer was working the derrick car, that he was handling it nervously, that "he was nervous, and foolish and might run over somebody," and that "he was liable to run over some man if he did not take him away," and further that "he would shut right up and snap his eyes when any responsibility was required, and go ahead. Open his throttle and let her go quick." The Massachusetts Court admitted this testimony, saying that "upon this question the conduct of the engineer just before the accident might be considered by the jury." Olsen *v.* Andrews, 168 Mass. 261, 47 N. E. Rep. 90. In a similar case in Texas, a witness testified: "I knew Thomas Henry when he was employed on the road as a fireman and afterwards when he ran an engine. He pulled my train very often. The conductor is in charge of the train. The crew usually consists of an engineer, fireman, two brakemen and a conductor. He differed in a good many respects from an ordinary competent engineer. He had no more idea of speed than a three year old boy. He would pull a train down hill just as fast as he could turn a wheel. I know that he would do this because he did it every time he pulled my train. I am not an engineer and never ran an engine." *Held* that the evidence did not refer to a single act of negligence but to an habitual course of negligent conduct during his employment and was therefore admissible on the issue of the general incompetency of the engineer. Galveston, etc., R. Co. *v.* Davis, 92 Tex. 372, 48 S. W. Rep. 570.

[38] Whart. on Neg., § 240; Shearm. & R. on Neg., § 91. See Big Stone Gap Iron Co. *v.* Ketron, 102 Va. 23, 45 S. E. Rep. 740, 102 Am. St. Rep. 839.

[39] Shearm. & R. on Neg., § 91.

Testimony as to the unfitness of an employee alleged to have been responsible for an injury to a co-employee at a date previous to the

fendants with notice of the incompetency, it may be shown that the servant had been guilty of specific acts of carelessness, unskillfulness and incompetency, and that such acts were known to defendants or their officers prior to his employment, or that he had been retained in service after notice of such acts.[40] For, when character is the subject of investigation, specific acts tend to exhibit the peculiar

accident in question is proper as tending to show a fact material to the question of his employer's negligence. Terrell *v.* Russell, 16 Tex. Civ. App. 573, 42 S. W. Rep. 129.

[40] Pittsburgh, Fort Wayne & Chicago Ry. Co. *v.* Ruby, 38 Ind. 294, s. c., 10 Am. Rep. 111, and cases cited, 1 Whart. Ev. 68, § 56. Compare Frazier *v.* Penn. R. R. Co., 38 Penn. St. 104, 110. See Olsen *v.* Andrews, 168 Mass. 261, 47 N. E. Rep. 90; Stasch *v.* Cornwall Ore. Bank Co., 19 Pa. Super. Ct. 113.

"No definite rule can be laid down as to what length of time must elapse, where actual notice is not shown, to charge the company with negligence in failing or neglecting to ascertain the habits of its employees with reference to drinking intoxicating liquors to excess. If they exercise due care and diligence in seeing that their employees are competent, careful and sober, and fail to discover any vicious habits, they cannot be held liable for negligently retaining incompetent men. The presumption is that they discharge their duty in this respect, and the burden of proof is upon those who assert negligence in the discharge of such duty. When, however, as in this case, it is shown that the accident occurred through the negligent act of the servant, who was in an intoxicated condition, and when it is shown further that he was in the habit of drinking intoxicating liquors to excess, and such habit had extended over a period of nine months while in defendant's employ, and no actual knowledge or notice ever reached any superior officer of the engineer, we think the jury may be justified in concluding from such evidence that the defendant was negligent in failing to learn such habit and in retaining the engineer in its employment." Hilts *v.* Chicago, etc., R. Co., 55 Mich. 437, 21 N. W. Rep. 878.

"Where one competent at the time of his employment becomes incompetent or indulges in a habit which renders him incompetent during its indulgence, notice of the incompetency or of the habit must be brought home to the company, or the incompetency or habit must be so notorious as to charge the company with knowledge; but when the incompetency does not arise after the employment, but existed at the time, proof of notice to the company is not necessary." Lee *v.* Michigan Cent.

qualities and indicate the adaptation or unfitness for a particular duty.[41] One single act of negligence by a servant does not of itself have any tendency to establish general incompetency.[42]

The declarations of the agent for hiring and discharging servants, made to the plaintiff, are admissible to show his knowledge of the unfitness of a servant whom he neglected to discharge, if part of the *res gestæ;* [43] otherwise not,[44] except for the purpose of charging defendant with notice, for which purpose evidence of declarations made before the disaster, is competent.[45] If there is no evidence that the

R. Co., 87 Mich. 574, 49 N. W. Rep. 909.

[41] Baulec *v.* N. Y. & Harlem R., R. Co., 59 N. Y. 356, s. c., 48 How. Pr. 399, affi'g, in effect, 14 Abb. Pr. N. S. 310, s. c., 5 Lans. 436, 62 Barb. 623.

[42] Lee *v.* Detroit Bridge, &c. 62 Mo. 565; Baulec *v.* N. Y. & Harlem R. R. Co., 59 N. Y. 356; Galveston, etc., R. Co. *v.* Davis, 92 Tex. 372, 48 S. W. Rep. 570; Montgomery First Nat. Bank *v.* Chandler, 144 Ala. 286, 39 So. Rep. 822, 113 Am. St. Rep. 39.

"It is true that a competent engineer may be negligent on a particular occasion and not be above the ordinary frailties of human nature, and that incompetency is not shown by some particular act of negligence; and yet, one who knows how to run and handle an engine properly, and who has the physical strength to do so, cannot be said to be competent for the position of engineer if he is habitually imprudent, careless and reckless. One is incompetent who is wanting in the requisite qualifications for the business entrusted to him." Consolidated Coal Co. *v.* Seniger, 179 Ill. 370, 53 N. E. Rep. 733.

[43] Laning *v.* N. Y. Central R. R. Co., 49 N. Y. 521, affi'g, in effect, 2 Lans. 506. See Olsen *v.* Andrews, 168 Mass. 261, 47 N. E. Rep. 90.

[44] Huntington R. R. *v.* Decker, 3 Weekly Notes, 120.

[45] Chapman *v.* Erie Ry. Co., 55 N. Y. 579, rev'g 1 Supm. Ct. (T. & C.) 526.

"A superior servant charged with the duty of supervising the men under him and their work, but unauthorized to hire or discharge them, is performing the duty of a fellow servant, and not that of a master. His acts is knowledge, and his negligence are those of the servant, and not of the employer." Weeks *v.* Scharer, 111 Fed. Rep. 330, 49 C. C. A. 372.

"Knowledge acquired by a conductor in charge of a train touching the recklessness or misconduct of the engineer is notice to the company, since the conductor is

person engaged was unfit before his engagement, he may be presumed by the jury to have become so, if at all, after his engagement; and the jury may presume that the employer made due inquiries. The burden is on the plaintiff to show the contrary.[46]

30. Plaintiff's Title.

Plaintiff must show that he has some title or interest in the thing injured.[47] A witness may testify directly, in the first instance, who owned the thing, and who was in pos-

the immediate superior of the engineer and represents the company while in charge of the train." East Tennessee, etc., R. Co. *v.* Wright, 100 Tenn. 56, 42 S. W. Rep. 1065.

"If the servant knew of the incompetency of the offending servant as well as the master, or had equal knowledge and notwithstanding such knowledge, continue in the employment without objection, he waives the negligence of the master in this respect." Montgomery First Nat. Bank *v.* Chandler, 144 Ala. 286, 39 So. Rep. 822, 113 Am. St. Rep. 39; Weeks *v.* Scharer, 111 Fed. Rep. 330, 49 C. C. A. 372.

[46] Davis *v.* Detroit & Milwaukee R. R. Co., 20 Mich. 105, s. c., 4 Am. Rep. 364.

The burden is upon plaintiff to prove that the master was negligent in selecting or continuing an unfit servant. Big Stone Gap Co. *v.* Ketron, 102 Va. 23, 45 S. E. Rep. 740, 102 Am. St. Rep. 839. Plaintiff must also show that the accident happened as a result of such incompetency. Walkowski *v.* Penokee, etc., Mines, 115 Mich. 629, 73 N. W. Rep. 895, 41 L. R. A. 33. Where it appears that the master has exercised due care in employing a servant, he may rely upon the presumption of competency until he has notice or knowledge to the contrary. Walkowski *v.* Penokee, etc., Mines, id. The servant must also prove that the master had or should have had notice of the incompetency, if it existed. Wilkinson Co-Operative Glass Co. *v.* Dickinson, 35 Ind. App. 230, 73 N. E. Rep. 957. "In the absence of any evidence as to the exercise of care in his selection, the proof that a servant, who has been in that service but two or three weeks, was incompetent when employed, need not be supplemented by proof of the company's knowledge of his incompetency. The presumption that defendant had done its duty is overcome by proof that the servant was incompetent when employed." Lee *v.* Michigan Cent. R. Co., 87 Mich. 574, 49 N. W. Rep. 909.

[47] See Cook *v.* Champlain Transp. Co., 1 Den. 91; Ohio, &c. R. R. Co. *v.* Jones, 27 Ill. 41.

session,[48] subject, of course, to cross-examination. Defendant's recognition of the thing as plaintiff's, is competent.[49] Slight evidence is enough, if uncontradicted. As to personal property, possession is *prima facie* enough.[50]

31. Manner of Injury.

If negligence alleged is substantially proved, a variance in the manner of resulting injury is not usually material.[51]

32. Condition of Person or Thing Injured.

The person injured may be asked, as a witness, to state the effect of the injury upon him, and may detail the nature and extent of the injury, stating facts within his knowledge, as distinguished from matters of opinion requiring professional skill in their just formation.[52] The injury must be proved by witnesses; but the thing injured may be produced for the inspection of the jury under such testimony.[53] A photograph of the place[54] or of the injured parts is admissible.

[48] See De Wolf *v.* Williams, 69 N. Y. 622; Miller *v.* Long Island R. R. Co., 9 Hun, 194.

[49] See Smith *v.* Causey, 28 Ala. 655; Grand Trunk R. R. Co. *v.* Richardson, 91 U. S. (1 Otto) 454.

[50] Fish *v.* Skut, 21 Barb. 333.

[51] Pollard *v.* New Haven R. R. Co., 7 Bosw. 437; and see Antisdel *v.* Chicago, &c. R. R. Co., 26 Wis. 145.

It was held that there was no material variance where the declaration alleged that the plaintiff sustained certain serious and permanent injuries, to wit, a fracture of the right arm near the shoulder, and several other serious bruises, etc.; and the proof in respect to the fracture of the arm showed that the fracture was just below the shoulder joint, and that the injury extended to and affected the joint and produced restriction thereof. Atchinson *v.* Willis, 21 App. Cas. D. C. 548.

[52] Creed *v.* Hartman, 8 Bosw. 123, affi'd, on other points, 29 N. Y. 591. The rules applicable to testimony to the condition of persons and things have been already indicated. See paragraphs 13 to 16 and 32 of this chapter.

[53] Mulhado *v.* Brooklyn City R. R. Co., 30 N. Y. 370. *Contra*, Jacobs *v.* Davis, 34 Md. 204, 216.

[54] New York, etc., R. R. Co. *v.* Robbins, 38 Ind. App. 172, 76 N. E. Rep. 804; Cozens *v.* Higgins,

33. Burden of Proof as to Contributory Negligence.

Three rules contend for control as to whether plaintiff must prove his own freedom from contributory negligence. 1. That ordinary care is presumable; and if plaintiff can prove his case without showing contributory negligence, the

1 Abb. Ct. App. Dec. 451; Alberti *v.* New York, &c. R. Co., 118 N. Y. 77, 88, 23 N. E. Rep. 35; Warner *v.* Village of Randolph, 18 N. Y. App. Div. 458; Kansas City, &c. R. Co. *v.* Smith, 90 Ala. 25, 24 Am. St. Rep. 753, 8 So. Rep. 43; Miller *v.* Louisville, &c. Ry. Co., 128 Ind. 97, 25 Am. St. Rep. 416, 27 N. E. Rep. 339; State *v.* Hersom, 90 Me. 273, 38 Atl. Rep. 160; Dederichs *v.* Salt Lake City R. Co., 14 Utah, 137, 46 Pac. Rep. 656. Any change in the appearance of the locality, arising from the views being taken at a different season of the year, is open to explanation. Dyson *v.* New York, &c. R. Co., 57 Conn. 9, 14 Am. St. Rep. 82, 17 Atl. Rep. 137. An x-ray photograph, showing the overlapping bones of one of the legs of plaintiff, broken by an injury for which suit is brought, taken by a physician and surgeon familiar with fractures and with the process of taking such photographs, who testifies that it accurately represents the condition of the leg, is admissible in evidence. Bruce *v.* Beall, 99 Tenn. 303, 41 S. W. Rep. 445. Photographs, being secondary evidence, are not admissible in evidence when the original can be produced in court. White Sewing Mach. Co. *v.* Gordon, 124 Ind. 495; 19 Am. St. Rep. 109; 24 N. E. Rep. 1053; Matter of Foster's will, 34 Mich. 23; Eborn *v.* Zimpleman, 47 Tex. 503; Miller *v.* Johnson, 27 Md. 6; Tome *v.* Parkersburg, &c. R. Co., 39 Md. 36. "Photographs are competent evidence, and when properly taken are judicially recognized as of a high order of accuracy. But in careless or inexpert, or interested hands they are capable of very serious misrepresentation of the original. Before they are permitted to be used in the trial, therefore, there should always be preliminary proof of care and accuracy in the taking of them, and of their relevancy to the issue before the jury." Beardslee *v.* Columbia Township, 188 Pa. St. 496, 502, 41 Atl. Rep. 617.

Duly authenticated photographs of the wrecks of railroad trains are admissible to illustrate the testimony of witnesses. Denver & R. G. Ry. Co. *v.* Roller, 100 Fed. Rep. 738, 49 L. R. A. 77; Wabash Ry. Co. *v.* Prast, 101 Ill. App. 167. The determination of the court as to whether a photograph offered is properly authenticated is not the subject of exception unless it is exercised in an arbitrary manner. Consolidated Gas, etc., Co. *v.* State, 109 Md. 186, 72 Atl. Rep. 651. Evidence of the physical

burden is on defendant. 2. That plaintiff's care is not presumed, and the burden is on him to disprove contributory negligence. 3. That neither care, nor the want of it, is presumable, in the absence of evidence; and that, if the facts show a duty of care, plaintiff must give some evidence from which the jury may infer that he exercised it; otherwise, he need not.

34. — the United States Court Rule.

The rule applied by the Supreme Court of the United States [55] is that the plaintiff is not bound to prove affirmatively that he was himself free from negligence. If he can prove his case without showing contributory negligence, it is a defense to be proved by the defendant.[56]

and topographical facts surrounding the place of injury is competent. Alabama Great Southern R. Co. *v.* Burgess, 114 Ala. 587, 22 So. Rep. 169. Likewise where it appears that a plan of the place where the injury occurred was a substantially correct diagram of the situation, it was admissible as illustrative of the testimony of the witness. Franklin *v.* Engel, 34 Wash. 480, 78 Pac. Rep. 84.

[55] Following and extending the doctrine of the New York cases stated in Oldfield *v.* N. Y. & Harlem R. R. Co., 14 N. Y. 310, affi'g 3 E. D. Smith, 103.

[56] Ellsworth *v.* Hunt, 168 Fed. Rep. 506, 93 C. C. A. 662; Jefferson Hotel Co. *v.* Warren, 128 Fed. Rep. 565, 63 C. C. A. 193; Railroad Co. *v.* Gladmon, 15 Wall. 401; Indianapolis, &c. R. R. Co. *v.* Holst, 93 U. S. (3 Otto) 291. *Contra*, Hull *v.* Richmond, 2 Woodb. & M. 337; Beardsley *v.* Swann, 4 McLean, 333. Applied also in *Alabama* (Smoot *v.* Mayor, &c., 24 Ala. 112; Pullman Palace-Car Co. *v.* Adams, 120 Ala. 581, 24 So. Rep. 921; Alabama West Ry. *v.* Williams, 114 Ala. 131, 21 So. Rep. 827). *Arkansas* (Little Rock, &c. R. Co. *v.* Leverett, 48 Ark. 333, 3 Am. St. Rep. 230, 3 S. W. Rep. 50; Choctaw, etc., R. Co. *v.* Doughty, 77 Ark. 1, 91 So. Rep. 768). *California* (Gay *v.* Winter, 34 Cal. 153; Daly *v.* Hinz, 113 Cal. 366, 45 Pac. Rep. 693). *Delaware* (Boyd *v.* Blumenthal 19 Del. 564, 52 Atl. Rep. 330). *Florida* (Hainlin *v.* Budge, 56 Fla. 342, 47 So. Rep. 825). *Georgia* (n. 3, below). *Kentucky* (P. & M. R. R. Co. *v.* Hoehl, 12 Bush, 41). *Indiana* (By statute since 1899, New Castle Bridge Co. *v.* Doty, 37 Ind. App. 84, 76 N. E. Rep. 557; Indiana Natural Oil, etc., Co. *v.* O'Brien, 160 Ind. 266, 65 N. E. Rep. 918, 66 N. E. Rep. 742). *Maryland* (Northern Cent. Ry. *v.* State, 31

Md. 357). *Minnesota* (Hocum *v.* Witherick, 22 Minn. 152). *Missouri* (Thompson *v.* North Mo. R. R., 51 Mo. 190). *Nebraska* (Omaha St. Ry. Co. *v.* Martin, 48 Neb. 65, 66 N. W. Rep. 1007). *New Hampshire* (White *v.* Concord R. R. Co., 30 N. H. 188, 207; Smith *v.* Eastern R. R. Co., 35 Id. 356, 366). *New Jersey* (Durant *v.* Palmer, 29 N. J. L. [5 Dutcher], 244; N. J. Express Co. *v.* Nichols, 33 Id. [4 Vroom], 434). *North Carolina* (Norton *v.* North Carolina R. Co., 122 N. C. 910, 29 S. E. Rep. 886). *Ohio* (Cleveland, &c. R. R. Co. *v.* Crawford, 24 Ohio St. 631, 636). *Pennsylvania* (Pennsylvania R. R. Co. *v.* Weber, 76 Penn. St. 157, s. c., 18 Am. Rep. 407). *Rhode Island* (Cassidy *v.* Angell, Mar. 1879, cited in 20 Alb. L. J. 305). *Texas* (Texas, &c. R. R. *v.* Murphy, 46 Tex. 356; Hogan *v.* Missouri, &c. Ry. Co., 88 Tex. 679, 32 S. W. Rep. 1035; Houston, etc., R. Co. *v.* Anglin, 99 Tex. 349, 89 S. W. Rep. 966, 2 L. R. A. N. S. 386; Gulf, etc., R. Co. *v.* Melville (Tex. Civ. App.), 87 S. W. Rep. 863; *contra*, Walker *v.* Herron, 22 Id. 55). *Utah* (Corbett *v.* Oregon Short Line, 25 Utah, 449, 71 Pac. Rep. 1065). *Virgina* (Southern Ry. Co. *v.* Bryant's Admr., 95 Va. 212, 28 S. E. Rep. 183); and *Wisconsin* (Hoyt *v.* Hudson, 41 Wis. 105, s. c., 22 Am. Rep. 714; Prideaux *v.* City of Mineral Point, 43 Wis. 513; Rhyner *v.* City of Menasha, 97 Wis. 523, 73 N. W. Rep. 41). Wharton approves presuming plaintiff's freedom from negligence, in the absence of all evidence on the point. Whart. on Neg., § 425.

Where it is unnecessary to plead want of contributory negligence the presence of such allegation is mere surplusage and the burden of proving such negligence is still on the defendant. Pennsylvania Co. *v.* Ferbig, 34 Ind. App. 459, 70 N. E. Rep. 834.

The rule that contributory negligence must be shown by the defendant is inapplicable where it appears from the plaintiff's own evidence that the fault was mutual or that contributory negligence is attributable to plaintiff. Missouri, etc., R. Co. *v.* Merrill, 61 Kan. 671, 60 Pac. Rep. 819; Gerity *v.* Haley, 29 W. Va. 98, 11 S. E. Rep. 901, and if the facts, as disclosed by plaintiff's own evidence, clearly show that he failed to exercise such care as a man of ordinary prudence would have exercised under the circumstances, the question of contributory negligence becomes one of law for the court. Braly *v.* Fresno City R. Co., 9 Cal. 417, 99 Pac. Rep. 400; Chaney *v.* La., etc., R. Co., 176 Mo. 598, 75 S. W. Rep. 595; Swanwick *v.* Monongohela City, 36 Pa. Super. Ct. 628. Where plaintiff's evidence has shown contributory negligence it has been held error for the court to instruct the jury "that as to the issues of assumed risk and contributory negligence the burden of proof was on the defendant." Texas Portland Cement Co. *v.* Ross, 35 Tex. Civ. App. 597, 81 S. W. Rep. 94.

It does not matter that defend-

35. — the Massachusetts Rule.

The rule applied by the Supreme Court of Massachusetts [57] is, that the burden is always upon the plaintiff to establish, either that he himself was in the exercise of due care, or that the injury is in no degree attributable to any want of proper care on his part; [58] and while the inference of such care may be drawn from the absence of all appearance of fault, either positive or negative, on his part, in complete and affirmative evidence of all the circumstances under which the injury was received,[59] yet evidence which only partially discloses the facts, leaving a case consistent alike with negligence and with care on plaintiff's part, is not enough to sustain a verdict.[60]

ants answer contained no averment of contributory negligence (Brown *v.* Oregon R., etc., Co., 41 Wash. 688, 87 Pac. Rep. 400), or, where it did, that defendant failed to introduce evidence in support of his plea (Bridges *v.* Jackson, Electric R., etc., Co., 86 Miss. 584, 39 So. Rep. 788, 4 Ann. Cas. 662). In this respect, therefore, the rule is the same as in those states following the Massachusetts doctrine.

[57] Applied also in *Georgia* (Brannan *v.* May, 17 Geo. 136; Campbell *v.* Atlanta R. R. Co., 53 Id. 488; *contra*, Thompson *v.* Cent. R. R., 54 Id. 509). *Illinois* (Dyer *v.* Talcott, 16 Ill. 300; Galena, &c. R. R. Co. *v.* Fay, Id. 558; Chicago, &c. R. Co. *v.* Levy, 160 Ill. 385, 43 N. E. Rep. 357; Jorgenson *v.* Johnson Chair Co., 169 Ill. 429, 48 N. E. Rep. 822). *Iowa* (Greenleaf *v.* Ill. Cent. R. R. Co., 29 Iowa, 14, s. c., 4 Am. Rep. 181, and cases cited). *Louisiana* (Moore *v.* Shreveport, 3 La. Ann. 645). *Maine* (Dickey *v.* Maine Tel. Co., 43 Me. 492). *Michigan* (L. S. & M. S. R. R. *v.* Miller, 25 Mich. 274; Mich. Cent. R. R. *v.* Coleman, 28 Id. 440, 447). *Mississippi* (Miss. Cent. R. R. Co. *v.* Mason, 51 Miss. 234). *North Carolina* (Doggett *v.* R. & D. R. R. Co., 78 N. C. 305; and see Manly *v.* Wilmington, &c. R. R. Co., 74 Id. 655). *Oklahoma* (Pittman *v.* El Reno, 4 Okla. 638, 46 Pac. Rep. 495.; and Oregon (Kahn *v.* Love, 3 Ore. 206). But in some of these States the rulings are equally consistent with the New York doctrine. As to *Connecticut*, see note 5.

[58] Murphy *v.* Deane, 101 Mass. 455, s. c., 3 Am. Rep. 390; Ralph *v.* Cambridge Electric Light Co., 200 Mass. 566, 86 N. E. Rep. 922.

[59] Mayo *v.* Boston & Me. R. R. Co., 104 Mass. 137; Copson *v.* New York, etc., Ry., 171 Mass. 233, 50 N. E. Rep. 613.

[60] Crafts *v.* Boston, 109 Mass. 519. To contrast the Massachusetts rule with the New York rule, compare this case with Johnson *v.* Hudson R. R. Co., 20 N. Y. 65, and Hill *v.* New Haven, 37 Vt. 501.

Plaintiff must show himself in the right, and defendant in the wrong.[61]

36. — the New York Rule.[62]

By the New York rule, it depends on the circumstances of each case whether plaintiff must introduce affirmative evidence that he was not chargeable with negligence. If his own case indicates his presence at the disaster, or his conduct, or that of his servants, in it or in the occasion of it,[63] it must appear that he exercised such care and vigilance to avoid danger, as prudent persons usually exercise

[61] Hough *v.* Railway Co., 100 U. S. 213; Northern Pacific Ry. Co. *v.* Mares, 123 U. S. 710, 720, 721; Inland, &c. Coasting Co. *v.* Tolson, 139 U. S. 551, 557–558. The rule that contributory negligence is a defense to be made out by the defendant rests upon the presumption of the exercise of due care and caution, which is removed whenever there is evidence sufficient in law, if credited, to establish conbutory negligence. Chesapeake & Ohio Ry. Co. *v.* Steele's Admx. 54 U. S. App. 550, 84 Fed. Rep. 93.

[62] Observing the distinction stated in the text, I understand the New York rule to be substantially applied in *Connecticut* (compare Park *v.* O'Brien, 23 Conn. 339, 345—where plaintiff suing for a collision, in driving on the highway, was held bound to negative contributory negligence—with Bell *v.* Smith, 39 Id. 211—where plaintiff, whose vessel was at anchor, was held to have made a *prima facie* case by proving that defendant's vessel in attempting to pass collided, and that the burden was on defendant to show contributory negligence); and in *Vermont* (compare Trow *v.* Vt. Central R. R. Co., 24 Vt. 487; Hill *v.* New Haven, 37 Id. 501; Walker *v.* Westfield, 39 Id. 246).

[63] As, for instance, where the injury was by a railroad train at a highway crossing; or in stepping over skids on which merchandise was being moved across the sidewalk; or a carriage collision when driving on the highway. See 18 Alb. L. J., pp. 144, 164, 184, where the New York cases are collected.

Under section 841-b, N. Y. Code Civ. Pro. in actions to recover damages for causing death, the contributory negligence of the person killed is a defense to be pleaded and proved by the defendant. The plaintiff's contributory negligence is also a defense to be pleaded and proved by the defendant in every action brought by an employee to recover damages for negligence arising out of and in the course of his employment. Labor Law, § 202-a. Hall *v.* New York Tel. Co., 220 N. Y. 299, 115 N. E. Rep. 337, Ann. Cas. 1917 C. 1137.

in view of the danger in question. If this does not affirmatively appear, where the want of it contributed to the casualty,[64] he must be nonsuited. If there is any evidence tending to show it was exercised, the question must be submitted to the jury.

Under this rule, the absence of contributory negligence may be inferred as well from the circumstances of the case as from evidence directly establishing the fact.[65] The cir-

[64] Rider *v.* Syracuse Rapid Transit R. Co., 171 N. Y. 139, 63 N. E. Rep. 836, 58 L. R. A. 125; Brown *v.* Oregon R., etc., Co., 41 Wash. 688, 84 Pac. Rep. 400; Haley *v.* Earle, 30 N. Y. 208. To have this effect, plaintiff's negligence must have been a proximate, not merely a remote cause of the injury. Austin *v.* N. J. Steamboat Co., 43 N. Y. 82. Compare Lewis *v.* Baltimore & Ohio R. R. Co., 38 Md. 588, s. c., 17 Am. Rep. 521; Southerland *v.* Cleveland, etc., R. Co., 148 Ind. 308, 47 N. E. Rep. 624.

[65] English *v.* New York Cent., etc., R. Co., 154 N. Y. App. Div. 181, 138 N. Y. Supp. 836.

Cases above cited. Button *v.* Hudson River R. R. Co., 18 N. Y. 248; Johnson *v.* Hudson R. R. R. Co., 20 Id. 65, affi'g 6 Duer, 633.

Plaintiff was riding in a wagon driven by his father in the direction of a car crossing. When the wagon started to cross the tracks plaintiff looked out and saw a car approaching about a block away. When the wagon was upon the track, plaintiff again looked out and saw the car about one hundred and twenty-five feet away. When plaintiff looked the third time, the horse and front of the wagon had crossed the track but before the wagon was clear off the track the car collided with it, causing plaintiff's injury. *Held*, that the plaintiff was not chargeable with contributory negligence as a matter of law for crossing the tracks under the circumstances. Whether plaintiff's conduct showed the exercise of reasonable care was a question of fact for the jury. Lopes *v.* Lynch, 220 N. Y. 64, 115 N. E. Rep. 15.

"In an action for personal injury based on negligence, freedom from contributory negligence on the part of the party injured, is an element of the cause of action. If the injured person be an adult he must prove either directly or through facts and circumstances from which an inference may be fairly drawn, that he used some care to avoid the injury of which he complains, and when such proof is made it becomes a question for the jury to determine whether he used reasonable care under all the circumstances surrounding the accident. This burden is upon an infant who seeks to recover damages because of negligence, as well as upon an adult, varying only in degree, which de-

cumstances may be considered in connection with the ordinary habits, conduct, and motives of men,[66] and the fact that when last seen, plaintiff was proceeding in view of the peril with due care,[67] or was found in a situation indicating the exercise of such care,[68] will sustain a finding; and the jury may consider also the inference of care arising from the instinct of self-preservation,[69] although this is not alone enough.

On the other hand, the circumstances of the disaster,[70] or the character of defendant's delinquency itself,[71] may be such as to prove, *prima facie*, the whole issue, without any independent evidence to indicate the conduct of plaintiff or his servants.[72]

37. Disproving Contributory Negligence.

Evidence of the acts and declarations of other persons in the same peril, is competent as part of the *res gestæ*, and also as evidence of what was deemed prudent by those thus

gree depends upon natural capacity physical development, training, habits of life, surroundings and the like." Ardolino *v.* Reinhardt, 130 N. Y. App. Div. 119, 114 N. Y. Supp. 508.

[66] Johnson *v.* Hudson R. R. R. Co. (above).

[67] Greenleaf *v.* Ill. Cent. R. R. Co., 29 Iowa, 14, s. c., 4 Am. Rep. 181; Huntingburgh *v.* First, 22 Ind. App. 66, 53 N. E. Rep. 246.

[68] Johnson *v.* Hudson R. R. R. Co. (above.)

[69] Morrison *v.* N. Y. Central & H. R. R. R. Co., 63 N. Y. 643, affi'g 4 Hun, 424, and see Greenleaf *v.* Ill. Cent. R. R. Co., 29 Iowa, 14, s. c., 4 Am. Rep. 181, 193.

[70] As, for instance, if the owner of lumber sues a wharfinger for negligently setting it on fire.

[71] Johnson *v.* Hudson R. R. Co., 20 N. Y. 65, affi'g 6 Duer, 633.

[72] In other words, the principle requiring plaintiff to negative contributory negligence is not characteristic of all actions for negligence as such, but only of those where the evidence shows his presence or conduct, or that of his servant or agent, to have been involved in the disaster or its causes. This principle is recognized even in Massachusetts. Parker *v.* Lowell, 11 Gray, 353, 356. In this class of cases, which includes nearly all those of personal injuries by negligence, except medical malpractice, the requisite degree of evidence to negative contributory negligence increases with the duty of care required in view of the peril in question.

exposed.[73] Neither the fact that the injured person was a careful and prudent person, nor that he had been careful on other occasions, is competent.[74] The fact that he was incapable, by reason of years or of physical or mental infirmity, of taking the same care as ordinarily prudent persons take, is competent.[75]

[73] Twomley *v.* Central Park, &c. R. R. Co., 69 N. Y. 158; Galena R. R. Co. *v.* Fay, 16 Ill. 558, 568; Mobile, &c. R. R. *v.* Ashcraft, 48 Ala. N. S. 16.

[74] Morris *v.* Town of East Haven, 41 Conn. 254. A party cannot show that he was not negligent upon one occasion by proving that he was careful and prudent upon other occasions. Laufer *v.* Bridgeport Traction Co., 68 Conn. 475, 37 Atl. Rep. 379. The plaintiff cannot testify that he was "careful" at the time of the accident; that being the mere opinion of the witness on a matter which is for the jury to determine. Phifer *v.* North Carolina Central R. Co., 122 N. C. 940, 29 S. E. Rep. 578. "When it does not appear that the act is positively negligent, we are of opinion that it is competent to show the custom or usage of a competent and prudent person in performing the act. In the case at bar it did not appear that the act of the plaintiff was negligent *per se*. He carefully performed his duties with the means supplied him for their performance, and we think it was competent to show, under those circumstances, that persons experienced in the performance of the same act, under the same circumstances, performed it as did the plaintiff." Prosser *v.* Montana Central R. Co., 17 Mont. 372, 382, 383, 43 Pac. Rep. 81.

[75] "In cases where a party is suddenly put in a position of peril by the negligent act of another, without sufficient time to consider all the circumstances, he is excusable for omitting some precautions, or making an unwise choice, under this disturbing influence, although if his mind had been clear, he ought to have done otherwise." Braly *v.* Fresno City R. Co., 9 Cal. App. 417, 99 Pac. Rep. 400. See Case *v.* N. Y. Central R. R. Co., 6 Abb. New Cas. 104, and note 116; Curtis *v.* Avon, 49 Barb. 148; Goldstein *v.* People's R. Co., 21 Del. (5 Penn.) 306, 60 Atl. Rep. 975. The negligence of the railroad company being established, in the absence of evidence to the contrary, the presumption, though slight, is that the traveler did his duty in approaching the track. Southern Ry. Co. *v.* Bryant's Admr., 95 Va. 212, 28 S. E. Rep. 183; Chicago, &c. R. Co. *v.* Hinds, 56 Kans. 758, 44 Pac. Rep. 993. Proof that the deceased was careful, sober, industrious, in good health, and so situated that it is fairly inferable that the instinct of self-preservation was as strong

The existence, and violation by defendant, of a statute or municipal ordinance, on which plaintiff had a right to rely for safety, is competent as tending to negative contributory evidence.[76] Plaintiff may show that notwithstanding his negligence defendant might by ordinary care have avoided doing the injury.[77]

in him as in other men may be considered by the jury in determining whether he used due care, and in the absence of eye witnesses to the accident proof of such circumstances legally tends to prove that fact. Chicago, &c. R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. Rep. 708. Evidence tending to show a custom or habit in boarding or alighting from trains elsewhere than at the depot, with the knowledge or consent of the carrier, is admissible in an action by a passenger for injuries received while so alighting. Pennsylvania Company *v.* McCaffrey, 173 Ill. 169, 50 N. E. Rep. 713; Chicago City Ry. Co. *v.* Lowitz, 218 Ill. 24, 75 N. E. Rep. 755.

"If the plaintiff thought himself in great danger, and acted under excitement, he may well be excused if he failed to adopt the best course." Olsen *v.* Andrews, 168 Mass. 261, 47 N. E. Rep. 90.

Evidence as to a witness's custom to give notice when a trap door was about to be opened, was held unobjectionable. Atchison *v.* Wills, 21 App. Cas. D. C. 548.

[76] Williams *v.* O'Keefe, 9 Bosw. 536; Lax *v.* Mayor, &c. of Darlington, 40 Law Times, N. S.; Jetter *v.* N. Y. & Harlem R. R. Co., 2 Abb. Ct. App. Dec. 458; and see McGrath *v.* N. Y. Central, &c. R. R. Co., 63 N. Y. 522.

[77] Tully *v.* Philadelphia, etc., Co., 19 Del. 455 (3 Pa.), 50 Atl. Rep. 95; Kenyon *v.* N. Y. Central, &c. R. R. R. Co., 5 Hun, 479, and cases cited.

"Where a complaint shows that the plaintiff was guilty of contributory negligence, notwithstanding the fact that it also shows the defendant was guilty of the negligence which cause the injury, such a complaint is insufficient, and advantage may be taken of such defect by demurrer." Lafayette *v.* Fitch, 32 Ind. A. 134, 69 N. E. Rep. 414.

The doctrine of *comparative negligence* (that is, allowing plaintiff to recover if his contributory negligence is slight as compared with the negligence of defendant), is adopted in *Georgia* (124 Mass. 44, 50), and *Illinois* (Chicago & Alton R. R. Co. *v.* Pondrom, 51 Ill. 333, s. c., 2 Am. Rep. 306). Not in *Maryland* (Pittsburgh & Connellsville R. R. Co. *v.* Andrews, 39 Md. 329, s. c., 17 Am. Rep. 568, 576). *Massachusetts* (124 Mass. 44, 50).

But a complaint which charges that the defendant's servants or agents committed the injury wantonly, wilfully and intentionally, is sufficient although it also shows

38. Contributory Negligence of Infants.

A child of very tender years,[78] is presumptively incapable of care, and, therefore, not chargeable with negligence. The opinion of a qualified witness as to the physical or mental capacity of a child, is admissible.[79] On the question of a

that plaintiff was wrongfully at the place where the accident occurred. Alabama Great Southern R. Co. *v.* Burgess, 114 Ala. 587, 22 So. Rep. 69.

[78] In this case, two years. Prendegast *v.* N. Y. Central, &c. R. R. Co., 58 N. Y. 652, and see Ihl *v.* 42d St. R. R. Co., 45 Id. 317; North Penn. R. R. *v.* Mahoney, 57 Pa. St. 187. It has generally been considered that the question of degree of incapacity is to be determined in each case, upon evidence of the age, maturity and capacity of the child. Railroad Co. *v.* Gladman, 15 Wall. 401; R. R. Co. *v.* Stoul, 17 Id. 657.

There is a duty upon a child to exercise care to avoid injury; and such care must be of that degree which children of the same age, of ordinary care and prudence, are accustomed to exercise under like circumstances. Goldstein *v.* People's Ry. Co., 21 Del. 306 (5 Pa.), 60 Atl. Rep. 975. The law requires of infants such reasonable care "as can fairly be expected of a child of his age, natural capacity, intelligence, physical condition, training, experience, habits of life and surroundings." Ardolino *v.* Reinhardt, 130 N. Y. App. Div. 119, 114 N. Y. Supp. 508; McGuire *v.* Richmond Guitman Transfer Co., 234 Ill. 125, 84 N. E. Rep. 624; Nowakowski *v.* New York, etc., Trac. Co., 220 N. Y. 51, 114 N. E. Rep. 1042; Tully *v.* Philadelphia, etc., R. Co., 18 Del. 537, (2 Pa.) 47 Atl. Rep. 1019, 82 Am. St. Rep. 425.

Some recent cases draw lines of presumption at seven and fourteen years respectively, holding that evidence of negligence of a child under seven is incompetent or unavailing (Government St. R. R. *v.* Hanlon, 53 Ala. 70); that as to children between that age and fourteen there must be evidence of the degree of capacity (Lynchburg Cotton Mills *v.* Stanley, 102 Va. 590, 46 S. E. Rep. 908); and that as to children over fourteen there is a presumption of ability to take full care of self, which can only be rebutted by proof of the want of such discretion and intelligence as is usual with youths of fourteen. Nagle *v.* Alleghany Valley R. R. Co., 6 Weekly Notes (Pa.) 510; Baker *v.* Seaboard Air Line, 150 N. C. 562, 64 S. E. Rep. 506, 29 L. R. A. N. S. 846, 17 Ann. Cas. 351. For the doctrine that the disability is only relevant to the question of the degree of care which was due from *defendant*, see Cent. L. J. 109 (1878).

[79] Lynch *v.* Smith, 104 Mass. 52,

parent's negligence in protecting the child, the jury may consider the probability of care resulting from maternal affection.[80]

39. Effect of Peril on Witnesses.

The law recognizes the unreliableness of the observation[81] and the declarations[82] of a witness overcome with fear in view of the peril.[83]

40. Damages.

The mode of proving value has already been stated.[84] Where the damage consists in a depreciation of pecuniary value, in an object which had a market value, a witness, qualified to testify to the value, may testify to the amount of the damage, if he first states the facts forming the basis of his opinion, or if he is an expert, speaking on a point requiring expert testimony.[85] A witness should not be al-

s. c., 6 Am. Rep. 188. As to contributory negligence of persons suffering from other incapacities, see Colt *v.* Sixth Ave. R. R. Co., 33 Super. Ct. (J. & S.) 189; Gonzales *v.* N. Y. & Harlem R. R. Co., Id. 57; Davenport *v.* Ruckman, 37 N. Y. 568, affi'g 16 Abb. Pr. N. S. 341, and note in 6 Abb. New Cas. 116.

[80] Fallon *v.* Central Park, &c. R. R. Co., 64 N. Y. 13, 17, affi'g 6 Daly, 8.

The negligence of a child's parents in the premises cannot be imputed to the infant. Roanoke *v.* Shull, 97 Va. 419, 34 S. E. Rep. 34, 75 L. R. A. 791.

[81] The Masten, 1 Brown Adm. 463.

[82] The Laura, 14 Wall. 343.

[83] So the testimony of a witness who was on a moving vessel as to the absolute movements of another vessel is likely to be deceptive. McNally *v.* Mayor, 5 Ben. 239; see also The Ship Marcellus, 1 Black, 414; The Governor, Abb. Adm. 108; The Neptune, Olc. 483; Delaware, &c. Tow-boat Co. *v.* Starrs, 69 Penn. St. 36, 41.

[84] Chapter XVI, paragraphs 20 and 85 of this vol.

[85] Hawes *v.* Warren, 119 Fed. Rep. 978. But see Chap. XVI, paragraph 20 of this vol. Evidence as to what the owner of land has been offered for it, per acre, before it was injured by a fire set from a locomotive, is not competent on the question of damages. Atkinson *v.* Chicago, &c. R. Co., 93 Wis. 362, 67 N. W. Rep. 703. In showing the quantity and value of wheat alleged to have been destroyed by fire, a witness should

lowed to testify directly to the amount of damages recoverable; but if he is questioned within the limits of the above rule, it is no objection to his testimony that it gives the sum for which the jury ought to give a verdict.[86]

41. Loss of Earnings.

In the case of personal injuries, evidence of the employment in which he was engaged, its extent and the rate of his earnings previous to the injury, and the consequent loss arising to him from his inability to prosecute it, is competent.[87] Uncertain profits such as those of a mer-

be confined to his individual knowledge and judgment, and not be permitted to give the estimate and conclusion of another, who also made an examination as to the quantity and value. Atchison, &c. R. Co. *v.* Osborn, 58 Kans. 768, 51 Pac. Rep. 286. There can be no lawful recovery against a railway company for the killing of an animal, when there is no evidence at all as to its value. Southern Ry. Co. *v.* Varn, 102 Ga. 764, 29 S. E. Rep. 822.

Where the plaintiff alleges the market value of an animal killed by a locomotive, and there was a market for horses at the place of the killing, such value, at that time and place, of an animal of this description, would be the measure of damages. If there was no market at that place, then the nearest place where there was a market would afford the evidence. St. Louis, etc., R. Co. *v.* Droddy (Tex. Civ. App.), 114 S. W. Rep. 902.

[86] McCrary *v.* Chicago, &c. R. Co., 109 Mo. App. 567, 83 S. W. Rep. 82; Miller *v.* Long Island R. R. Co., 9 Hun, 194, 1 Whart. Ev., 416, § 450; Wells *v.* Cone, 55 Barb. 585; and see chapter XVI, paragraph 85 of this vol. Compare Simons *v.* Monier, 29 Barb. 419; Harger *v.* Edmonds, 4 Barb. 256; Whitmore *v.* Bowman, 4 Greene (Iowa), 128.

[87] Nebraska City *v.* Campbell, 2 Black, 590; Walker *v.* Erie Ry. Co., 63 Barb. 260; Grant *v.* City of Brooklyn, 41 Barb. 381. Evidence as to plaintiff's earning capacity as a physician is admissible. Cleveland, &c. Ry. Co. *v.* Gray, 148 Ind. 266, 46 N. E. Rep. 675. Where plaintiff was prevented from performing her work as a stenographer, it was held proper to show, as bearing on the question of damages, that under her contract of employment she was to receive an increase of salary in a short time, if her work proved satisfactory. Bryant *v.* Omaha, &c. Ry. Co., 98 Iowa, 483, 67 N. W. Rep. 392. Testimony that the plaintiff was a sober and industrious man is competent. Metropolitan

chant [88] or a vessel [89] are not; but the question is, what was usually paid for such services done for others? Loss of earnings should be specially alleged.[90] If the business was illegal without license, he must prove his license, in order to recover for loss of income.[91]

41a. Expenses Incurred—Medical Services.

In an action for personal injuries evidence is admissible of the actual expense incurred by plaintiff in procuring medical treatment. But it is not sufficient to prove the amount paid to, or charged by, the physican; it must be shown that the amount is the reasonable value of the services.[92]

St. Ry. Co. *v.* Kennedy, 51 U. S. App. 503, 82 Fed. Rep. 158. The plaintiff may testify as to the value of his services as a farmer, without showing that he or any one else within his knowledge has ever hired farm labor, where he states the amount necessary to make a living for himself, implying that he is making a living. Arkansas Midland Ry. Co. *v.* Griffith, 63 Ark. 491, 39 S. W. Rep. 550.

When the ability of the plaintiff to earn money was a fact to be arrived at, it was not competent for him to give an opinion as to his ability in this regard. "That was to be shown by what he had earned in the past, considered in the light of his age, his physical and mental condition, and education and experience." Wimber *v.* Iowa Cent. R. Co., 114 Iowa, 551, 87 N. W. Rep. 505.

[88] Masterton *v.* Village of Mount Vernon, 58 N. Y. 391. Compare Chandler *v.* Allison, 10 Mich. 460; Hanover R. R. Co. *v.* Coyle, 55 Penn. St. 396, 402. Evidence of the profits of the business of a person injured, while it may tend to show the possession of business qualities, does not fix their value. Such evidence is not admissible for that purpose; nor is the value of earning power to be settled by expert testimony. Goodhart *v.* Pennsylvania R. Co., 177 Pa. St. 1, 35 Atl. Rep. 191.

[89] The R. L. Maybey, 4 Blatchf. 439.

[90] Stapenhorst *v.* Am. Manuf. Co., 15 Abb. Pr. N. S. 355; Baldwin *v.* Western R. R., 4 Gray, 333; Chicago *v.* O'Brennan, 65 Ill. 160. Evidence of the income of plaintiff is admissible under an averment that he has been prevented from attending to his usual business, and from earning and receiving large gains and profits. Chicago, &c. R. Co. *v.* Meech, 163 Ill. 305; 45 N. E. Rep. 290.

[91] Kane *v.* Johnston, 9 Bosw. 154.

[92] Wheeler *v.* Tyler Southestern Ry. Co., 91 Tex. 356, 43 S. W. Rep.

In order to recover for expenses of medical treatment, it is not necessary to prove by the record that the physician rendering the services was licensed to practice under the statute. Proof that he practiced as a physician raises the presumption in actions between third parties that he was licensed to do so.[93]

Evidence that plaintiff had incurred a liability to pay a sum of money is not admissible under an allegation that he has expended such sum.[94] The defendant may show that for some particular reason the plaintiff would not have earned any wages if he had not been injured, as that he was under such a contract with his employer that his

876; Gumb *v.* Twenty-third St. R. Co., 114 N. Y. 411, 414, 21 N. E. Rep. 993; Golder *v.* Lund, 50 Neb. 867, 70 N. W. Rep. 379. A married woman, who has in fact incurred liability for medical attendance made necessary by an injury for which another is liable, may recover as part of her damages a sum equal to the amount of such liability the same as a *feme sole*, although she has not paid for such medical attendance at the time of the trial. Chacey *v.* City of Fargo, 5 N. D. 173, 64 N. W. Rep. 932. An attending physician may give his opinion as to the value of the services of one who acted as a nurse. Keenan *v.* Getsinger, 1 N. Y. App. Div. 172.

In an action by an administratrix to recover damages for the death of her intestate, it is error to instruct the jury that they might take into consideration the amount for which the estate will be liable for medical services and funeral expenses where there is no proof of the value of such services and expenses and where it does not appear that claims therefor had been established within two years from the issuance of the letters of administration. St. Louis, etc., R. Co. *v.* Sweet, 63 Ark. 563, 40 S. W. Rep. 463.

Plaintiff may show not only the expense which he has actually incurred but also whether he will be subject to like expense in the future. Chicago City R. Co. *v.* Henry, 218 Ill. 92, 75 N. E. Rep. 758.

[93] Golder *v.* Lund, 50 Neb. 867, 70 N. W. Rep. 379. Sums expended by the plaintiff are special damages and must be alleged. Gumb *v.* Twenty-third St. R. Co., 114 N. Y. 411, 414, 21 N. E. Rep. 993. Money expended in hiring another to work in his place. Gumb *v.* Twenty-third St. R. Co., 114 N. Y. 114, 414, 21 N. E. Rep. 993.

[94] McLaughlin *v.* San Francisco, &c. Ry. Co., 113 Cal. 590, 592, 45 Pac. Rep. 839.

wages went on without service, or that his employer paid his wages from mere benevolence.[95]

42. Suffering and Impaired Powers.

Any physical injury or physical suffering[96] may be considered, though not specially alleged.[97] Mental suffer-

[95] Drinkwater *v.* Dinsmore, 80 N. Y. 390, 392, 393. Where plaintiff makes a claim for damages on account of the loss of probable earnings subsequent to the injury, and it appears that he was out of employment at the time of the accident, testimony that for two or three years before the injury he had been in the habit of becoming intoxicated, and that he had been the proprietor of a hotel of bad reputation is admissible as bearing upon the probability of his securing employment, and the character and continuity of the same. Kingston *v.* Fort Wayne, &c. R. Co., 112 Mich. 40, 70 N. W. Rep. 315; 74 N. W. Rep. 230.

[96] Ransom *v.* N. Y. & Erie R. R. Co., 15 N. Y. 415; Curtis *v.* Rochester & Syracuse R. R. Co., 18 Id. 534, affi'g 20 Barb. 282. For instance, even aggravation of suffering in subsequent childbirth. De Forrest *v.* City of Utica, 69 N. Y. 614.

Proof of loss of sleep and the necessity of taking narcotics is competent. Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 414, 61 N. E. Rep. 936.

[97] Curtiss *v.* Rochester & Syracuse R. R. Co., 20 Barb. 282; and though the negligence was not gross, and vindictive damages be not claimed; Morse *v.* Auburn & Syracuse R. R. Co., 10 Barb. 621. Where the complaint was in the "usual form" setting forth the injuries received by the plaintiff and the results arising therefrom, it is competent to show that the plaintiff was troubled with fainting spells after the injury although there is no allegation specifically referring thereto. Renders *v.* Grand Trunk R. Co., 144 Mich. 387, 108 N. W. Rep. 368. In an action for personal injuries, evidence as to pain suffered in other parts of the body than those alleged in the declaration to have been injured is competent, if the pain is directly traceable to the injuries alleged. Will *v.* Village of Mendon, 108 Mich. 251, 66 N. W. Rep. 58. "In an action to recover damages for personal injuries the person injured may testify concerning the condition of certain parts of his body, although such parts are not mentioned in the declaration. The sympathy of one part of the body with another is involved in a scientific determination of the effects of injuries, and, on such an inquiry, whatever in the light of science is significant in th eeye of the law is competent." Illinois Central R. Co. *v.* Griffin, 53 U. S.

ing,[98] also, as well as mental impairment,[99] may be considered. Standard life tables are admissible in evidence to show the expectancy of life, and the probable duration of ability to labor, and earning capacity of one of the age of the injured party, as a basis upon which to estimate the amount of damages he should recover. But this proof must be taken subject to the conditions surrounding the individual under investigation.[1] Such tables are admissible although plaintiff's condition and health are below the average and he is not an insurable risk, where the jury are instructed to consider the tables as qualified by the evidence as to plaintiff's physical condition.[2]

App. 22, 80 Fed. Rep. 278. "One of the consequences of the wound received by the plaintiff at the hands of defendant's servants was the loss of the power to have offspring—a loss resulting directly and proximately from the nature of the wound. Evidence of this fact was, therefore, admissible, although the declaration does not in terms specify such loss as one of the results of the wound." Denver, &c. Ry. *v.* Harris, 122 U. S. 597, 608. The fact that plaintiff's injuries were of such a character as to render child-bearing perilous to her life is admissible in an action for compensation for personal injuries, though she is not and may never be married, for it is to be assumed that every physical function and capacity is of importance in the life of every man and woman, and that occasion will arise for the exercise of each of them. Alabama, &c. R. Co. *v.* Hill, 93 Ala. 514, 30 Am. St. Rep. 65, 9 So. Rep. 722.

[98] Matteson *v.* N. Y. Central, &c. R. R. Co., 62 Barb. 364, 379, and cases cited, 53 N. Y. 28. *Contra*, Covington St. Ry. Co. *v.* Packer, 9 Bush (Ky.), 455, s. c., 15 Am. Rep. 752.

[99] T. W. & W. R. R. Co. *v.* Baddeley, 54 Ill. 19, s. c., 5 Am. Rep. 71.

[1] Western, etc., R. Co. *v.* Cox, 115 Ga. 715, 42 S. E. Rep. 74; Greer *v.* Loyisville, &c. R. Co., 94 Ky. 169, 42 Am. St. Rep. 345, 21 S. W. Rep. 649. The trial judge should instruct the jury that the value of such tables when applied to a particular case depends very much upon other matters, such as state of health, habits of life, liability to contract disease, social condition, etc. Campbell *v.* City of York, 172 Pa. St. 205, 33 Atl. Rep. 879.

[2] Arkansas Midland Ry. Co. *v.* Griffith, 63 Ark. 491, 39 S. W. Rep. 550; Harrison *v.* Sutter St. R. Co., 116 Cal. 156, 47 Pac. Rep. 1019.

43. Continuing Effect.

To show the nature and extent of the injury and suffering, it is competent to give evidence of their continuing effect up to the time of the trial,[3] and their effect in the future.[4]

44. Testimony of the Party.

The injured person may testify directly to his physical condition,[5] ability to work, travel, etc.,[6] if his testimony is confined to the facts within his knowledge or consciousness,

[3] Sheehan *v.* Edgar, 58 N. Y. 631, and cases cited.

[4] Caldwell *v.* Murphy, 1 Duer, 233, 11 N. Y. 416, T. W. & W. R. R. Co. *v.* Baddeley, 54 Ill. 19, s. c., 5 Am. Rep. 71; Wallace *v.* Vacuum Oil Co., 128 N. Y. 579, 27 N. E. Rep. 956; Griswold *v.* New York, &c. R. Co., 115 N. Y. 61, 21 N. E. Rep. 726; McClain *v.* Brooklyn City R. Co., 116 N. Y. 459, 22 N. E. Rep. 1062. As, for instance, that in the ordinary course of nature and without extrinsic superinducing cause, they will probably be fatal (T. W., &c. R. R. Co. *v.* Baddeley, 54 Ill. 19, s. c., 5 Am. Rep. 71); or permanent (Buell *v.* N. Y. Central R. R. Co., 31 N. Y. 314); or affect the general health, or that a disease induced by them will return (Filer *v.* N. Y. Central R. R. Co., 49 N. Y. 42). To authorize such evidence, however, the apprehended consequences must be such as in the ordinary course of nature are reasonably certain to ensue; consequences which are contingent, speculative, or merely possible are not proper to be considered in estimating the damages and may not be proved. Strohm *v.* New York, &c. R. Co., 96 N. Y. 305. It is not sufficient that there be a reasonable probability that the injury will be permanent and lasting. Block *v.* Milwaukee St. Ry. Co., 89 Wis. 371, 46 Am. St. Rep. 849, 61 N. W. Rep. 1101. The evidence of experts as to future consequences which are reasonably certain to follow the injury is competent. Strohm *v.* New York, &c. R. Co., 96 N. Y. 305. See also other cases above cited.

The jury may take these future effects into consideration in estimating the pecuniary loss. Wrisley Co. *v.* Burke, 203 Ill. 250, 67 N. E. Rep. 818; Chicago City R. Co. *v.* Henry, 218 Ill. 92, 75 N. E. Rep. 758. The plaintiff may show that an operation will probably be necessary to save his life or to relieve his sufferings and also the expense attending the operation. Indianapolis St. R. Co. *v.* Robinson, 157 Ind. 414, 61 N. E. Rep. 936.

[5] Creed *v.* Hartman, 8 Bosw. 123.

[6] See People *v.* Tubbs, 37 N. Y. 586.

as distinguished from matters of professional skill and opinion. The injured member may be exhibited to the jury [7] where such exhibition is necessary to enable the jury to understand the case.

45. Expressions of Suffering.

On the question of suffering at any given time,[8] the dec-

[7] Mulhado *v.* Brooklyn City R. R. Co., 30 N. Y. 370. "It is the undoubted rule that the exhibition of an injury or an injured member of the body to the jury is proper where it is the subject of examination, and when such exhibition is necessary to enable the jury to understand the circumstances surrounding the injury, or to obtain a more comprehensive and intelligent conception of the conditions which existed when the injury was received, or of the character of the injury itself. But where such exhibition is not essential or necessary to enable the jury to better understand the conditions under which it was received, or where the jury may be led to illegitimate considerations on account of it, then it may become improper." Rost *v.* Brooklyn Heights R. Co., 10 App. Div. N. Y. 477, 480. See also Mannion *v.* Hagan, 9 App. Div. N. Y. 98, 100; Pennsylvania Co. *v.* Roy, 102 U. S. 451; Going *v.* Alabama Steel, etc., Co., 141 Ala. 537, 37 So. Rep. 784.

In a proper case an examination of the plaintiff during the progress of the trial may be required. Belle of Nelson Distilling Co. *v.* Riggs, 45 S. W. Rep. 99, 20 Ky. L. 499.

Whether an injured limb may be exhibited to the jury for any purpose is a matter within the discretion of the court. Swift *v.* Rutkowski, 182 Ill. 18, 54 N. E. Rep. 1038.

[8] The competency of this natural evidence of suffering depends upon its simultaneousness with the suffering, not upon its simultaneousness with the casualty which caused the injury. Hence such manifestations observed when examining the person for the purpose of learning the physical condition, are admissible (Matteson *v.* N. Y. Central R. R. Co., 35 N. Y. 487, S. P., in a further decision, 62 Barb. 364); even though after the commencement of the action (Murphy *v.* N. Y. C. R. R. Co., 66 Barb. 125, 130; Kent *v.* Lincoln, 32 Vt. 591, 597; Barber *v.* Merriam, 11 Allen, 322), but the lapse of time affects the cogency of the evidence, and suspicion of feigning may render it worthless. This is a question for the jury. But to reduce the effect of defendant's evidence that plaintiff continued to labor long after the injury, plaintiff cannot prove his declarations of suffering while laboring. Reed *v.* N. Y. Central R. R. Co., 45 N. Y. 574, overruling 56

larations, complaints, groans,[9] exclamations, gestures,[10] and demeanor, of the injured person at that time, being manifestations in the nature of the usual concomitants and expressions of pain and distress, may be proved in his own favor.[11] But this rule does not justify receiving statements of past facts,[12] although connected with such complaints or

Barb. 493. Compare Bacon *v.* Charlton, 7 Cush. 581, 586, where the line is drawn between spontaneous manifestations of present pain and statements drawn forth by question, or made with a view to communicate information. The same evidence is, of course, admissible in favor of a parent plaintiff. Kennard *v.* Burton, 25 Me. 39, 46.

[9] As to mode of proving significance of inarticulate cries, see People *v.* Messner, 45 N. Y. 1, a doubtful authority on this point. Compare McKee *v.* Nelson, 4 Cow. 355.

[10] Bacon *v.* Charlton, 7 Cush. 581, 586.

[11] Caldwell *v.* Murphy, 11 N. Y. 416; Werely *v.* Persons, 28 N. Y. 344; Baker *v.* Griffin, 10 Bosw. 140; Phillips *v.* Kelley, 29 Ala. 628, 634; Kelly *v.* Cohoes Knitting Co., 8 App. Div. 156; Burleson *v.* Village of Reading, 110 Mich. 512, 68 N. W. Rep. 294; Will *v.* Village of Mendon, 108 Mich. 251, 66 N. W. Rep. 58; Bothell *v.* City of Seattle, 17 Wash. 263, 49 Pac. Rep. 491. Such exclamations are not excluded solely for the reason that they are made after the controversy, and after the suit was commenced. Strudgeon *v.* Village of Sand Beach, 107 Mich. 496, 500, 65 N. W. Rep. 616. Whether the pain was real or feigned is for the jury to determine. St. Louis, &c. Ry. Co. *v.* Murray, 55 Ark. 248, 29 Am. St. Rep. 32, 18 S. W. Rep. 50. Whether a witness believed the plaintiff to be in pain is incompetent. Bagley *v.* Mason, 69 Vt. 175, 37 Atl. Rep. 287. "Although the injured person is a witness and testifies at the trial, the exclamations of pain made by such person may be proved and used to corroborate other evidence, and to give a more particular or vivid description of his or her condition. If evidence of the exclamations which are the natural concomitants and signs of pain and suffering were excluded, in many cases a party testifying, as a witness in his own behalf, would be deprived of that corroboration of his evidence to which he is justly entitled." Hagenlocher *v.* Coney Island, &c. R. Co., 99 N. Y. 136, 138, 1 N. E. Rep. 536. Since parties are now competent to testify, such evidence is to be received with caution, if the declarant is living. Reed *v.* N. Y. Central R. R. Co., 45 N. Y. 574.

[12] Page *v.* N. Y. Central R. R. Co., 6 Duer, 523; Indianapolis, &c. R. R. Co. *v.* Anthony, 43 Ind. 183; Keller *v.* Town of Gilman, 93

made as the reason of them;[13] and when such statements are commingled with the declarations, and are admitted with them, they are no evidence of the truth of what was thus stated.[14]

Such declarations, if competent, may be proved by any witness who heard them; but are of greater weight if made to and proved by a medical attendant, than if proved by an ordinary witness.[15]

Wis. 9, 66 N. W. Rep. 800; Roche *v.* Brooklyn City, &c. R. Co., 105 N. Y. 294, 299, 11 N. E. Rep. 630. "Exclamations of pain, so immediately connected with the injury as to come within the rule making them part of the transaction are competent, because they are the natural expressions of bodily agony and suffering, and are, in a sense, evidence of acts, expressed in words. It is not so much what the sufferer says as the fact of giving audible expression to suffering. A groan, a sigh, a scream, or other involuntary audible exhibition of pain conveys to the mind the same impression as contortion of the features, writhing, struggling, or other physical manifestations of agony. Therefore any competent witness to such exclamations or exhibitions of pain and suffering may certainly be allowed to testify to them without injury to the opposing party. And, of course, a part of the *res gestæ* statements as to the manner of inflicting the injury, the location of the injury, and the pain and suffering, are also proper to be proved by any competent witness. We think, however, that to carry the rule so far as to permit either physicians or others to testify to declarations made so long after the infliction of the injury as to be no part of the *res gestæ*, not during treatment or attendance upon the injured party, or not upon an examination by a physician for the purpose of determining the nature, character, and extent of the injury, would be to afford an opportunity to a party to manufacture evidence on his own behalf, and which, in at least most instances, could not be refuted or overcome." West Chicago St. Ry. Co. *v.* Carr, 170 Ill. 478, 483, 484, 48 N. E. Rep. 992; West Chicago St. R. Co. *v.* Kennelly, 170 Ill. 508, 48 N. E. Rep. 996. Whether complaining of sleeplessness is a statement of past fact within the rule, compare Taylor *v.* Grand Trunk Ry. Co., 48 N. H. 304; Cleveland *v.* N. J. Steamboat Co., 5 Hun, 523, 529.

[13] See Tilson *v.* Terwilliger, 56 N. Y. 273; People *v.* Davis, Id. 95.

[14] People *v.* Williams, 3 Park. Cr. 84, 100. They need not have been made to a nurse or physician. Brown *v.* Town of Mount Holly, 69 Vt. 364, 38 Atl. Rep. 69.

[15] Howe *v.* Plainfield, 41 N. H. 135; Perkins *v.* Concord, &c. R. R.,

44 Id. 223. A physician may testify in an action for personal injuries as to plaintiff's exclamations of pain on an occasion when an examination was being made by him with a view to treatment. Heddle *v.* City Electric Ry. Co., 112 Mich. 547, 70 N. W. Rep. 1096; Mulliken *v.* City of Corunna, 110 Mich. 212, 68 N. W. Rep. 141; Board of Commissioners *v.* Pearson, 120 Ind. 426, 16 Am. St. Rep. 325, 22 N. E. Rep. 134; Louisville, &c. Ry. Co. *v.* Snyder, 117 Ind. 435, 10 Am. St. Rep. 60, 20 N. E. Rep. 284; Bagley *v.* Mason, 69 Vt. 175, 37 Atl. Rep. 287. If the statement purports to be a description of the plaintiff's symptoms, made for the purpose of medical advice and treatment, it is admissible, although made only a day or two before, or possibly during, the trial. Fleming *v.* Springfield, 154 Mass. 520, 26 Am. St. Rep. 268, 28 N. E. Rep. 910. While such declarations partake of the nature of hearsay, they derive some credibility beyond that of hearsay, from the fact that the patient expects his physician or surgeon to be guided by them in administering remedies, and so the patient has an incentive beyond the ordinary obligation to tell the truth. Consolidated Traction Co. *v.* Lambertson, 60 N. J. Law, 452, 38 Atl. Rep. 683. But while statements of a person injured, expressive of his present condition, made to a physician for the purpose of treatment, may be proved in his behalf, statements made as to the past, *i. e.*, as to pains which he had suffered or disabilities he had labored under, are not competent. Davidson *v.* Cornell, 132 N. Y. 228, 30 N. E. Rep. 573; Weber *v.* St. Paul City Ry. Co., 67 Minn. 155, 160, 69 N. W. Rep. 716; McKormick *v.* City of West Bay. 110 Mich. 265, 68 N. W. Rep. 148. The better opinion is that when statements are made to a physician, not for the purpose of treatment, but for the purpose of leading him to form an opinion to which he may testify as a witness for the declarant, they are not competent evidence on behalf of the declarant. Grand Rapids R. Co. *v.* Huntley, 38 Mich. 537; Jones *v.* Village of Portland, 88 Mich. 598; Davidson *v.* Cornell, 132 N. Y. 228; Del., &c. R. Co. *v.* Roalefs, 70 Fed. Rep. 21; Consolidated Traction Co. *v.* Lambertson, 60 N. J. Law, 452, 38 Atl. Rep. 683; West Chicago Street Railroad Co. *v.* Carr, 170 Ill. 478, 483, 48 N. E. Rep. 992. "According to the great weight of modern authorities, the mere descriptive statements of a sick or injured person as to the symptoms and effects of his malady are only admissible under the following circumstances: First, They must have been made to a medical attendant for the purpose of medical treatment. Second, they must relate to existing pain or other symptoms from which the patient is suffering at the time, and must not relate to past transactions or symptoms, however closely related to the present sickness. This was probably always the rule, but the courts are now disposed to apply

46. Opinions of Witnesses.

Any witness of *ordinary* intelligence and powers of observation, who is conversant with the facts, may testify whether a person appeared sick or well; [16] worse or better at one time than another; [17] able to work; [18] how far to help himself, and at what point requiring assistance to do what was necessary to be done;[19] and whether the attendance of a physician was necessary.[20]

An *expert* [21] may testify to his opinion as to the condition

it more strictly than formerly. Third, such statements are only admissible when the medical attendant is called upon to give an expert opinion based in part upon them. He cannot merely testify to the statements and then stop. In the absence of any expert opinion based on the statements, they stand on the same footing as if made to a non-expert witness." Williams *v.* Great Northern Ry. Co., 68 Minn. 55, 61, 62, 70 N. W. Rep. 860. Whether the statements to the physician were feigned or not, must be left to the jury. Lange *v.* Schoettler, 115 Cal. 388, 47 Pac. Rep. 139.

[16] Paragraph 13. A non-expert witness who has observed the condition of a person may express his opinion as to whether such person was sick or not, where it is impossible for such witness to present to the jury all of the facts upon which the opinion is based. Cleveland, &c. Ry. Co. *v.* Gray, 148 Ind. 266, 46 N. E. Rep. 675. A witness who attended the injured person may testify to a numbness of the patient's limb as a fact within his observation. Will *v.* Village of Mendon, 108 Mich. 251, 66 N. W. Rep. 58.

[17] Parker *v.* Boston, &c. Co., 109 Mass. 449.

[18] Id.

Where the suit was to recover damages occasioned by death from negligence, the daughter of decedent was permitted to testify that her father was a person of good health and able to perform hard labor. "We do not think," said the court, "proof of that character should be limited to medical experts as contended for." Ashley Wire Co. *v.* McFadden, 66 Ill. App. 26.

[19] Sloan *v.* N. Y. Central R. R. Co., 45 N. Y. 125.

[20] Chicago, &c. R. R. Co. *v.* George, 19 Ill. 510, 516.

[21] See note on p. 361, and following notes. A person may be qualified to testify as an expert either by study without practice or practice without study, but not by mere observation without either study or practice. Wheeler & Wilson Mfg. Co. *v.* Buckhout, 60 N. J. Law, 102, 36 Atl. Rep. 772.

The fact that a physician had been engaged and paid to make

of the person, the nature, cause,[22] curableness,[23] continance,[24] and result [25] of the injury and the mode and effect of medical treatment.[26] If the witness speaks from personal examination, his opinion must be derived from his examination, and not dependent on what was narrated to him by the attendants,[27] and he should state the facts upon which he bases his opinion.[28] He may state as a part of the fact

an examination of the injured person and for the purpose of giving testimony in the case was proper for consideration, as bearing upon the weight and value of his testimony. Allen B. Wrisley Co. *v.* Burke, 203 Ill. 250, 67 N. E. Rep. 818.

[22] Compare People *v.* Rector, 19 Wend. 569; People *v.* Bodine, 1 Den. 281, 311; Gardiner *v.* People, 6 Park. Cr. 615; Kennedy *v.* People, 39 N. Y. 245, s. c., 5 Abb. Pr. N. S. 147; Roberts *v.* Johnson, 58 N. Y. 613, affi'g 37 Super. Ct. (5 J. & S.) 157; New Orleans, &c. Co. *v.* Albritton, 38 Miss. 242, 273.

"The rule is well settled that a medical expert may form and express an opinion of the nature and cause of the bodily or mental condition of his patient,—her ills, symptoms, pains, and suffering,—derived from his own knowledge, from his attendance, treatment, and examinations, although based in part upon her statements and complaints made at different times as to her pains and sufferings, and, in this connection, to give his opinion whether her injuries are liable to be permanent, and whether her present condition is due to or caused by sickness, injury, accident, or violence." Denver, etc., R. Co. *v.* Roller, 100 Fed. Rep. 738, 49 L. R. A. 77.

[23] Matteson *v.* N. Y. Central R. R. Co., 35 N. Y. 487.

[24] Buell *v.* N. Y. Central R. R. Co., 31 N. Y. 314. Although he does not remember the particulars of the injury, or of the treatment he first prescribed. Rowell *v.* Lowell, 11 Gray, 420, Denver; etc., R. Co. *v.* Roller, 100 Fed. Rep. 738, 49 L. R. A. 77.

[25] Briant *v.* Trimmer, 47 N. Y. 96; T. W. & W. R. R. Co. *v.* Baddeley, 54 Ill. 19. s. c., 5 Am. Rep. 71; Leigh, etc., Ry. Co. *v.* Marchant, 84 Fed. Rep. 870, 28 C. C. A. 544.

[26] Barber *v.* Merriam, 11 Allen, 322.

[27] Page 362 of this vol., and see Lund *v.* Tyngsborough, 9 Cush. 36.

A physician may testify, either from knowledge or personal examination, as to the cause of a person's death; but he cannot go beyond the immediate cause of death, that being the limit of scientific investigation. Green *v.* Ashland Water Co., 101 Wis. 258, 77 N. W. Rep. 722, 70 Am. St. Rep. 911, 43 L. R. A. 117.

[28] Wendell *v.* Mayor, &c. of

on which his opinion is founded, statements, which the sufferer made, of his own condition to the witness, for the purpose of receiving his professional advice;[29] but narratives of a past fact are not thus admissible,[30] unless made in such close connection with the fact as to form part of the *res gestæ*.[31] If the witness does not speak from personal examination, the question must be hypothetical, based either upon the hypothesis of the truth of all the evidence given in the case, or upon an hypothesis specially framed of certain facts within the limits of the evidence, assumed to be proved.[32] Competent medical experts may express their opinions upon an ascertained physical condition of suffering or bad health, as to whether that condition might have been caused by or be the result of a previous injury.[33] Thus a

Troy, 39 Barb. 329, affi'd in 3 Abb. Ct. App. Dec. 563.

[29] Barber *v.* Merriam, 11 Allen, 322.

Thus a physician having qualified as an expert, may testify "that the then present condition of plaintiff as found by the witness upon a recent examination might produce pressure upon his nerves, though the witness said he had no way of knowing this positively except by the plaintiff's testimony." Batchelor *v.* Union Stock Yard, etc., Co., 88 Ill. App. 395.

[30] Chapin *v.* Marlborough, 9 Gray, 244; Illinois, &c. R. R. Co. *v.* Sutton, 42 Ill. 438. Compare Looper *v.* Bell, 1 Head (Tenn.), 373, 377.

[31] Hamman *v.* Stowe, 57 Mo. 93.

[32] Filer *v.* N. Y. Central, 49 N. Y. 42; Carpenter *v.* Blake, 2 Lans. 206, rev'd on another ground in 50 N. Y. 696; Hoard *v.* Peck, 56 Barb. 202, and see p. 149 of this vol. Where the witness has an actual knowledge of the physical condition of the patient concerning whom he testifies the question need not be hypothetical. Clegg *v.* Metropolitan Street R. Co., 1 App. Div. (N. Y.) 207.

Opinions going to the question of how a disease was contracted may properly be elicited "only on hypothetical questions, leaving the jury free to consider such opinions after finding from other evidence the existence of the foundation facts upon which they were based." Green *v.* Ashland Water Co., 101 Wis. 258, 77 N. W. Rep. 722, 70 Am. St. Rep. 911, 43 L. R. A. 117.

The existence of the state of facts presumed by the hypothetical question must be fairly and reasonably established by the evidence. Denver, etc., R. Co. *v.* Roller, 100 Fed. Rep. 738, 49 L. R. A. 77.

[33] Turner *v.* City of Newburgh, 109 N. Y. 301, 308, 16 N. E. Rep.

physician may testify that the condition of a person whom he was called upon to attend could have been produced by contact with a wire heavily charged with electricity.[34] Books of science and art are not admissible in evidence to prove the opinions of experts announced therein.[35]

46a. Disclosure of Professional Information.

The prohibition, by section 834 of the New York Code of Civil Procedure, of the disclosure of professional information by a physician, extends to information of the existence of an ailment, although not the subject of his attendance or treatment, acquired through an examination of the patient in attending him in a professional capacity, and the discovery of which was a necessary incident to the investigations made

344; Stouter *v.* Manhattan Ry. Co., 127 N. Y. 661, 27 N. E. Rep. 805; Quinn *v.* O'Keeffe, 9 App. Div. 68, 74; Tullis *v.* Rankin, 6 N. D. 44, 68 N. W. Rep. 187; Village of Chatsworth *v.* Rowe, 166 Ill. 114, 46 N. E. Rep. 763.

[34] Block *v.* Milwaukee St. Ry. Co., 89 Wis. 371, 46 Am. St. Rep. 849, 61 N. W. Rep. 1101.

Or that it might have resulted from a fright. Lehigh, etc., Ry. Co. *v.* Marchant, 84 Fed. Rep. 870, 28 C. C. A. 544.

[35] Johnston *v.* Richmond, &c. R. Co., 95 Ga. 685, 22 S. E. Rep. 694; Van Skike *v.* Potter, 53 Neb. 28, 73 N. W. Rep. 295; Union Pac. Ry. Co. *v.* Yates, 49 U. S. App. 24, 79 Fed. Rep. 584. But if a witness refers to them as an authority for his own opinions, they may be received for the purpose of contradicting him. New Jersey Zinc Co. *v.* Lehigh Zinc Co., 59 N. J. L. 189, 35 Atl. Rep. 915. And an expert, who has testified that certain books are standard works on the subject under investigation, may be asked whether or not he agrees with certain passages read therefrom. Egan *v.* Dry Dock, &c. R. Co., 12 App. Div. (N. Y.) 556. "We feel, therefore, no hesitancy in so modifying the general rule as to hold that where the scientific work containing them is concededly recognized as a standard authority by the profession, statistics of mechanical experiments and tabulations of the results thereof may be read in evidence by an expert witness in support of his professional opinion, when such statistics and tabulations are generally relied upon by experts in the particular field of the mechanical arts with which such statistics and tabulations are concerned." Western Assurance Co. *v.* Mohlman Co., 51 U. S. App. 577, 595, 83 Fed. Rep. 811.

to enable the physician to act in his professional capacity as to the subject of his attendance.[36]

Where the statutory prohinition has been expressly waived by the patient, and the waiver acted upon, it cannot be recalled; the information is then open to the consideration of the entire public, and the patient is not privileged to forbid its repetition.[37]

Acordingly where upon the trial of an action against a railroad corporation, to recover damages for injuries to plaintiff caused by negligence, a physician, who, as such, attended upon the plaintiff after the injury, was called as a witness in her behalf, and testified as to all the facts bearing upon her physicial condition, learned by him while so attending upon her, it was held that upon a subsequent trial

[36] Nelson *v.* Village of Oneida, 156 N. Y. 219, 50 N. E. Rep. 802.

But where the information acquired by the physician was not "necessary to enable him to act in that capacity," exclusion of such evidence on the ground that it was privileged was error. Green *v.* Metropolitan St. Ry. Co., 171 N. Y. 201, 63 N. E. Rep. 958, 89 Am. St. Rep. 807. By the amendment of 1905, the prohibition of this section was extended to confidential information obtained by professional nurses. Homnyack *v.* Prudential Ins. Co., 194 N. Y. 456, 87 N. E. Rep. 769. The burden is upon the party seeking to exclude the testimony, to show that the relation of physician and patient existed; and in the absence of evidence of that fact, or that the testimony had any relation to professional treatment, it is improperly excluded. Griffiths *v.* Metropolitan St. Ry. Co., 171 N. Y. 106, 63 N. E. Rep. 808; Gray *v.* New York, 137 N. Y. App. Div. 316, 122 N. Y. Supp. 118. Thus a physician cannot be prohibited from testifying that the patient told him that the injury to her hand was occasioned by her own carelessness since such information was not necessary in order to enable him to treat her hand. Travis *v.* Haan, 119 N. Y. App. Div. 138, 103 N. Y. Supp. 973. See also Benjamin *v.* Tupper Lake, 110 App. Div. 426, 97 N. Y. Supp. 512.

[37] McKinney *v.* Grand Street, &c. R. Co., 104 N. Y. 352, 10 N. E. Rep. 544.

A waiver by the representatives of a deceased patient may result from the calling of the physician by the representatives themselves for the purpose of asking him to disclose professional information falling within this section. Holcomb *v.* Harris, 166 N. Y. 257, 59 N. E. Rep. 820.

the defendant was entitled to call and examine him as a witness in regard to such facts.[38]

Upon the trial the attorney for the plaintiff has authority to waive, on his behalf, the benefit of the statutory provision.[39]

When a party who has been attended by two physicians in their professional capacity at the same examination or consultation, both holding professional relations to him, calls one of them as a witness in his own behalf in an action in which the party's condition as it appeared at such consultation is the important question, to prove what took place, or what the witness then learned, he thereby waives the privilege conferred by section 834 of the Code of Civil Procedure, and loses his right to object to the testimony of the the other physician, if called by the opposite party to testify as to the same transaction.[40]

47. Plaintiff's Family and Circumstances.

Evidence of the number of plaintiff's family,[41] his habits, industry and economy, is inadmissible.[42] So of his poverty,[43]

[38] Id.

Where the physician is called by the plaintiff to testify to her condition, the privilege is deemed waived. Speck *v.* International R. Co., 133 N. Y. App. Div. 802, 118 N. Y. Supp. 71.

[39] Alberti *v.* New York, &c. R. Co., 118 N. Y. 77, 23 N. E. Rep. 35.

Where the privilege is waived by stipulation such stipulations should be signed by the attorney as well as by the party. Geis *v.* Geis, 116 N. Y. App. Div. 362, 101 N. Y. Supp. 845.

[40] Morris *v.* New York, &c. Ry. Co., 148 N. Y. 88, 42 N. E. Rep. 410.

The rule, however, is otherwise, where the party was not examined by both physicians at the same time and where the examination by one was not in connection with that of the other. Milligan *v.* Clayville Knitting Co., 137 N. Y. App. Div. 383, 121 N. Y. Supp. 763.

[41] Louisville, &c. R. Co. *v.* Binion, 107 Ala. 645, 18 So. Rep. 75. The tendency of such evidence is to enhance the damages beyond the sum legally recoverable. City of Galion *v.* Lauer, 55 Ohio St. 392, 45 N. E. Rep. 1044.

[42] Penn. R. R. Co. *v.* Books, 57 Penn. St. 349, 334. *Contra,* Winters *v.* Hannibal, &c., R. R. Co., 39 Mo. 468.

[43] Shearm. & R. on Neg., § 606; Alberti *v.* New York, &c. R. Co.,

except, perhaps, where exemplary damages are recoverable.[44]

48. Defendant's Wealth.

Evidence of defendant's wealth is not competent, directly or indirectly.[45]

49. Exemplary Damages.

To justify exemplary damages, there should be evidence of gross negligence amounting to recklessness, or to indifference to the dangers and consequences to others.[46]

50. Action for Causing Death.

The mode of proving the family relation has already been stated.[47] The burden of proof is on plaintiff to prove the pecuniary injury which he seeks to recover, and such facts as enable the jury to determine what would be a fair and

118 N. Y. 77, 23 N. E. Rep. 35. Thus it cannot be shown that the plaintiff had been committed to the almshouse. Schwanzer *v.* Brooklyn Heights R. Co., 18 App. Div. (N. Y.) 205. But inasmuch as a person injured is bound to act in good faith and to resort to such means as are reasonably within his reach to cure himself, where defendant has drawn out testimony to show that plaintiff had not had the best medical attendance, care, and treatment, it is competent for the latter, for the purpose of showing that he resorted to such means as were reasonably within his reach, to prove the fact of his poverty and dependence upon his earnings, and consequently his inability to procure the best medical attendance. Alberti *v.* New York, &c. R. Co., 118 N. Y. 77, 23 N. E. Rep. 35.

The same rule applies to actions for negligence resulting in death, as to the pecuniary conditions of decedent's widow or next of kin. Pittsburg, etc., R. Co. *v.* Kinnare, 203 Ill. 388, 67 N. E. Rep. 826.

[44] Chicago *v.* O'Brennan, 65 Ill. 160.

[45] Myers *v.* Malcolm, 6 Hill, 292; Moody *v.* Osgood, 50 Barb. 628.

[46] Shearm. & R. on Neg., § 600, and see Caldwell *v.* N. J. Steamboat Co., 47 N. Y. 282, affi'g 56 Barb. 425; Milwaukee, &c. R. R. Co. *v.* Arms, 91 U. S. (1 Otto) 489, 493; Cleghorn *v.* N. Y. Central & Hudson River R. R. Co., 56 N. Y. 44; Memphis St. R. Co. *v.* Shaw, 110 Tenn. 467, 75 S. W. Rep. 713.

[47] Chap. V. of this vol., and see Pennsylvania R. R. *v.* Adams, 55 Pa. St. 499.

just compensation.[48] Neither evidence that the next of kin had legal claims on the deceased for support,[49] nor any positive evidence of actual pecuniary loss is, however, essential,[50] even to sustain a recovery of more than nominal damages,[51] unless the age or ability of the deceased is such that no pecuniary injury could result.[52]

To show pecuniary loss, evidence of the capacity of the deceased to conduct business and make money,[53] and of what he usually earned,[54] is proper; and, in the case of a

[48] McIntyre *v.* N. Y. Central R. R. Co., 37 N. Y. 287, s. c., 35 How. Pr. 36, affi'g 47 Barb. 515.

[49] Barron *v.* Illinois Central R. R. Co., 1 Biss. 453. Under the statutes relating to actions for wrongful death, lineal kindred of the deceased are entitled to at least nominal damages without proof of loss of support. Chicago, &c. R. Co. *v.* Gunderson, 174 Ill. 495, 51 N. E. Rep. 708; Prendergast *v.* Chicago City Ry. Co., 114 Ill. App. 156.

[50] Keller *v.* The N. Y. Central R. R. Co., 2 Abb. Ct. App. Dec. 480.

Where the relation of parent and child or of husband and wife exists the law presumes pecuniary loss from the fact of death. McKechney *v.* Redmond, 94 Ill. App. 470.

This presumption does not exist where the action is for the benefit of the brothers and sisters and nephews and nieces of the decedent. Cleveland, etc., R. Co. *v.* Drumm, 32 Ind. App. 547, 70 N. E. Rep. 286.

[51] Dickens *v.* N. Y. Central R. R. Co., 1 Abb. Ct. App. Dec. 504.

[52] As in case of a child of two years. Prendergast *v.* N. Y. Central, &c. R. R. Co., 58 N. Y. 652. Compare O'Mera *v.* Hudson River R. R. Co., 38 N. Y. 445; Mitchell *v.* N. Y. Central & Hudson River R. R. Co., 2 Hun, 535.

[53] Tilley *v.* Hudson River R. R. Co., 29 N. Y. 252.

As to measure of damages recoverable in cases of injuries resulting in death, see Ward *v.* Dampskibselskabet Kzoebenhaven, 144 Fed. Rep. 524, and cases cited.

[54] Tully *v.* Phila. W. & B. R. Co. (Del.), 50 Atl. Rep. 95; McIntyre *v.* N. Y. Central R. R. Co., 37 N. Y. 287, s. c., 35 How. Pr. 36, affi'g 47 Barb. 515. Evidence as to the income of the deceased previous to his death is admissible. Louisville, &c. R. Co. *v.* Clarke, 152 U. S. 230. But in an action to recover for damages to the children of a decedent from her death, evidence is admissible for the purpose of restricting the damages, to show by such death they have received by devise or descent property from the estate of the decedent. Especially is this true when the only pecuniary benefit which the plaintiffs could anticipate from the continued life of the decedent was aid from her out of the

parent rearing children, the capacity to bestow such training, instruction, and education as would be pecuniarily serviceable to the children in after life.[55] In an action to recover damages for the death of a married woman, brought by the administrator of her estate, evidence of the husband's financial condition is admissible.[56] Evidence that the widow and children were dependent upon the decedent before his death, for their support, is admissible, although evidence of their pecuniary circumstances since the decease is not competent.[57]

income of the same property to which, on her death, they succeeded by devise or descent. San Antonio, &c. Ry. Co. *v.* Long, 87 Tex. 148, 47 Am. St. Rep. 87, 27 S. W. Rep. 113.

The schedule of a terminal agent, who has possession of the same in his official capacity, is admissible to show the wages earned by a fireman in the service of the defendant, in an action to recover damages for his death. Missouri, etc., R. Co. *v.* Elliott, 102 Fed. Rep. 96, 42 C. C. A. 188.

[55] Tilley *v.* Hudson River. R. R. Co. (above). In an action for damages from the death of plaintiff's mother, evidence of the financial condition of the head of the family at the time is admissible to show the extent of the pecuniary injury sustained by the daughter. The nurture and intellectual, moral and physical training received from a mother varies with circumstances, and of such circumstances it is proper to inform the jury. Gulf, &c. Ry. Co. *v.* Younger, 90 Tex. 387, 38 S. W. Rep. 1121.

[56] Thoresen *v.* La Crosse City R. Co., 94 Wis. 129, 68 N. W. Rep. 548. In a suit for damages by causing the death of plaintiff's wife, the fact that her place had been supplied by a subsequent marriage does not mitigate the damages, and evidence of such fact and of the character of the second wife, and her capacity to supply the place of the former, is not admissible. Gulf, &c. Ry. Co. *v.* Younger, 90 Tex. 387, 38 S. W. Rep. 1121. The question is as to the value of the services generally, and not what they were worth to plaintiff. Keller *v.* Town of Gilman, 93 Wis. 9, 66 N. W. Rep. 800.

[57] Swift *v.* Foster, 163 Ill. 50, 44 N. E. Rep. 837. Evidence of poverty of mother, and of her dependence on her deceased son for support and maintenance, is admissible in evidence to show the pecuniary damage suffered by her by his death, in an action brought by her under the statute, as next of kin of the deceased. Little Rock, &c. Ry. Co. *v.* Leverett, 48 Ark. 333, 3 Am. St. Rep. 230, 3 S. W. Rep. 50. Evidence of the number and ages of the plaintiff's minor children is admissible in an action by a widow to recover for the death

The probable duration of life, and the value of an annuity, may be shown by the Northampton tables,[58] or by the testi-

of her husband, where she is, at least during her widowhood, bound to support such children. Tetherow *v.* St. Joseph, &c. Ry. Co., 98 Mo. 74, 14 Am. St. Rep. 617, 11 S. W. Rep. 310.

Where the heirs of decedent were shown to have been dependent upon him for support, the court may instruct the jury to determine the probable amount of wages he would have earned during the years yet remaining to him, and after deducting from this amount a sum equal to the probable cost of his own maintainance, render a verdict which would pecuniarily compensate the heirs. Harrison *v.* Sutter St. R. Co., 116 Cal. 156, 47 Pac. Rep. 1019.

The widow's testimony is competent on the question of dependency. St. Louis, etc., R. Co. *v.* Dorsey, 189 Ill. 251, 59 N. E. Rep. 593.

[58] Robinson *v.* Helena Light, etc., Co., 38 Mont. 222, 99 Pac. Rep. 837; Ward *v.* Dampskibselskabet Kzoebenhaven, 144 Fed. Rep. 524; Sauter *v.* N. Y. Central, &c. R. R. Co., 66 N. Y. 50, affi'g 6 Hun, 446. As to these tables and others equally competent, see note to paragraph 46 of chapter XLVIII, of this vol. It is not essential, though usual, to show, as introductory, that the person enjoyed health usual to one of that age. Rowley *v.* London, &c. R. R. Co., L. R. 8 Ex. 221, s. c., 6 Moak's Eng. 293. For a person is presumed to enjoy the average condition of health and strength of persons of the same age, and the burden of proving the contrary is upon the party contending that the general rule does not obtain. Cusick *v.* Boyne, 1 Cal. App. 643, 82 Pac. Rep. 985. The widow's probable duration of life is relevant, but not the possibility of her marrying again. Balt. R. R. *v.* State, 33 Md. 542, 554. Standard life and annuity tables are competent evidence for the consideration of the jury, but not absolute guides to control their decision. Vicksburg, &c. R. Co. *v.* Putnam, 118 U. S. 545; Alabama Mineral R. Co. *v.* Jones, 114 Ala. 519, 21 So. Rep. 507; Kreuger *v.* Sylvester, 100 Iowa, 647, 69 N. W. Rep. 1059; Louisville, &c. R. Co. *v.* Kelly's Admx., 100 Ky. 421, 445, 38 S. W. Rep. 852; Boettger *v.* Scherpe, etc., Arch. Ins. Co., 136 Mo. 531, 536, 38 S. W. Rep. 298; Western, etc., R. Co. *v.* Clark, 117 Ga. 548, 44 S. E. Rep. 1; Smiser *v.* State, 17 Ind. App. 519, 47 N. E. Rep. 229.

The accuracy and correctness of such tables need not be shown as a preliminary to their introduction. Western, etc., R. Co. *v.* Cox, 115 Ga. 715, 42 S. E. Rep. 74. Such tables must be considered in the light of, and are subject to variation by proof concerning the age, health and habits of the individual in question. Damm *v.* Damm, 109 Mich. 619, 67 N. W. Rep. 984. "We can understand

mony of an expert in life insurance.[59] The opinion of a qualified witness is competent, as to how long the deceased would probably have been useful to his family.[60]

50a. Action in Another State.

An action for the injury to the person in another State is maintainable without proof of the law of the place where the injury occurred, because permitted by the common law which is presumed to exist in the foreign State. But when the right of action depends upon the statute conferring it, it can only maintained in another State upon proof that the statute law in the State in which the injury occurred gives the right of action, and is similar to the statute of the State where the action is brought.[61] The two statutes need not

that in a contest between the life tenant and the remainderman, the Carlisle tables would not serve as an authoritative guide. In such instance the question must be decided upon its own facts. But in a case like the one in hand, where the expectation of life of the deceased was a question of fact for the jury, we are unable to see why the tables referred to were not competent evidence. Being intended for general use, and based upon average results, they cannot be conclusive in a given case. That is not the question here. It is whether they are not some evidence competent to be considered by the jury. Their value, when applied to a particular case, will depend very much upon other matters, such as the state of health of the person, his habits of living, his social surroundings, and other circumstances which might be mentioned. While we are unable to say how such evidence is to be excluded, I must be allowed to express the fear that it may prove a dangerous element in this class of cases, unless the attention of juries is pointedly called to the other questions which affect it." Steinbrunner *v.* Pittsburgh, &c. Ry. Co., 146 Pa. St. 504, 28 Am. St. Rep. 806, 23 Atl. Rep. 239.

[59] Rowley *v.* London & N. W. Ry. Co. (above). It is not essential that the witness be an actuary. It is enough that he testify that he has experience in the business of life insurance—for instance, as an accountant (Id.). A life insurance agent of six months' experience is not competent. Donalson *v.* R. R., 18 Iowa, 280, 291.

[60] Pennsylvania R. R. Co. *v.* Henderson, 51 Pa. St. 315, 320.

[61] Wooden *v.* Western N. Y., &c. R. Co., 126 N. Y. 10, 22 Am. St. Rep. 803, 26 N. E. Rep. 1050; Burdict *v.* Missouri Pac. Ry. Co., 123 Mo. 221, 45 Am. St. Rep. 528, 27 S. W. Rep. 453.

be identical in their terms or precisely alike, but it is enough if they are of similar import and character, founded upon the same principle and possessing the same general attributes.[62]

II. DEFENSES.

51. Disproof of Negligence.

If the question of negligence depends on the circumstances of the case, defendant may show the nature and character of his business, in course of which the alleged negligence occurred,[63] and any circumstances showing a reasonable necessity to act as he did,[64] and that a prudent man would have acted as he did.[65] But a general custom cannot be deemed a relevant fact in an action for negligence respecting any non-contractual duty which is not performed under fixed conditions.[66]

52. Advice.

Where wilful intent to do injury, or reckless indifference, is in issue, defendant may prove, in connection with

[62] Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48, 53; Wooden *v.* Western New York, &c. R. Co., 126 N. Y. 10, 15, 26 N. E. Rep. 1050.

[63] Philadelphia & Reading R. R. Co. *v.* Evin Supreme Ct. Pa., March, 1879, 8 Reporter, 153. See paragraph 22.

[64] Elliot *v.* Steamboat James Robb, 12 La. Ann. 12.

[65] Burkett *v.* Bond, 12 Ill. 87. "Where the act resulting in the injury is not negligence *per se*, it is competent to show that other persons experienced in the same business, under similar circumstances, pursued the same course. . . . Such evidence cannot avail, however, where the injury has no connection with the course of action adopted." Neary *v.* Northern Pac. R. Co., 37 Mont. 461, 97 Pac. Rep. 944, 19 L. R. A. N. S. 446.

[66] Pulsifer *v.* Berry, 87 Me. 405, 32 Atl. Rep. 986.

Likewise evidence of general knowledge on the part of residents in a particular locality as to the danger of being on defendant's track, at the point where the accident occurred, owing to the movements of trains thereabout, has been held inadmissible. Savannah, etc., R. Co. *v.* Evans, 121 Ga. 391, 49 S. E. Rep. 308.

evidence of his innocence and good faith, that he took the opinion of competent advisers and acted on it.[67]

53. Former Acquittal.

The record of an acquittal of defendant, on an indictment for the same act, is irrelevent.[68]

54. Plaintiff's Contributory Negligence.[69]

A general denial admits this defense.[70] Evidence of plaintiff's previous knowledge of the defect which caused the injury he might have avoided, is competent, but not conclusive.[71] Intoxication at the time of exposure to the peril

[67] Shearman *v.* Kortright, 52 Barb. 267. Perhaps such evidence is proper wherever it does not affirmatively appear that plaintiff claims only actual damages. Compare Furth *v.* Foster, 7 Robt. 484, and Yates *v.* N. Y. Central, &c. R. R. Co., 67 N. Y. 100.

[68] Whart. Ev., 2, § 776, citing Cottingham *v.* Weeks, 54 Geo. 275.

[69] As to the burden of proof, see paragraphs 33–36.

[70] McDonnell *v.* Buffum, 31 How. Pr. 154; Cunningham *v.* Lyness, 22 Wis. 245, 250; Indianapolis, &c. R.R. Co. *v.* Rutherford, 29 Ind. 82.

In several of the states, however, this defense must be specifically pleaded to be availed of, unless the contributory negligence is shown or can be inferred from plaintiff's own evidence. Kenny *v.* Kennedy, 9 Cal. App. 350. In New York contributory negligence is a defense to be pleaded and proved by the defendant, in actions for injuries resulting in death (N. Y. Code Civ. Proc., § 841b) and in action between master and servant. Labor Law, § 202A; Hall *v.* New York Tel. Co., 220 N. Y. 299, 115 N. E. Rep. 704.

[71] Frost *v.* Inhabitants of Waltham, 12 Allen, 85; Shearm. & R. on Neg., § 414; Reed *v.* Northfield, 13 Pick. 94. Evidence that on previous occasions plaintiff was guilty of an of an act, similar to the alleged act of contributory negligence, is inadmissible. Baker *v.* Irish, 172 Pa. St. 528, 33 Atl. Rep. 558.

"The presumption indulged in favor of the plaintiff that he was free from negligence contributing to the injuries sued for will be overcome by specific averments of facts which show that he knew, or had appeared to know, of the danger, and knowing of the danger, he did not use care commensurate therewith." Lafayette *v.* Fitch, 32 Ind. App. 134, 69 N. E. Rep. 414.

"If a person knows there is an obstruction in a street and he attempts to pass the place, when, in consequence of the darkness of the night, or other hindering causes, he cannot see the obstruction and

is competent,[72] but not conclusive.[73] Intoxication at other times, though habitual, is not competent.[74] The intoxication may be proved by opinions of eye witnesses,[75] but not by declarations of a third person, not made as part of the *res gestæ*.[76] Evidence that plaintiff had admitted that he was in fault, is not necessarily conclusive against him.[77]

runs upon it, he has no reason to complain of the injury he may sustain. In such a case he takes the risk upon himself." Pittman *v.* El Reno, 4 Okla. 638, 46 Pac. Rep. 495. See also Swanwick *v.* Monongahela City, 36 Pa. Super. Ct. 628.

But the mere fact that plaintiff knew that a sidewalk was dangerous, does not constitute contributory negligence on her part where she used the walk cautiously, and exercised such care as was proportionate to the known danger. Huntingburgh *v.* First, 22 Ind. App. 66, 53 N. E. Rep. 246.

Evidence of plaintiff's previous knowledge is admissible under a general denial. Indiana Natural Gas, etc., Co. *v.* O'Brien, 160 Ind. 266, 65 N. E. Rep. 918, 66 N. E. Rep. 742.

[72] Barker *v.* Savage, 1 Sweeny, 288.

It is proper to show that when deceased was picked up from the place where the accident happened, his breath smelled of liquor, that he had drank beer shortly before the accident and that he had been drinking between eleven and twelve A. M. on the day of the accident. Wabash Ry. Co. *v.* Prast, 101 Ill. App. 167.

As to responsibility of a carrier toward an intoxicated person, see Paris, etc., R. Co. *v.* Robinson, 53 Tex. Civ. App. 12. 114 S. W. Rep. 658.

[73] Shearm. & R. on Neg., § 487.

[74] Barker *v.* Savage (above).

[75] People *v.* Eastwood, 14 N. Y. 562, affi'g 3 Park. Cr. 25. A witness, although not an expert, may testify to his conclusion as to whether the defendant was drunk or sober, and is not limited to a narration of the condition, action, conduct, etc., which he observed, without drawing therefrom a conclusion as to the defendant's condition. People *v.* Gaynor, 33 N. Y. App. Div. 98; Felska *v.* New York, &c. R. Co., 152 N. Y. 339, 46 N. E. Rep. 613. While this rule does not wholly apply to a case of drunkenness produced by drugs, yet, if a person has seen many times a certain condition resulting from the use of a certain drug there can be no objection to his giving his opinion, when he finds the same condition existing, caused by the same drug. Burt *v.* Burt, 168 Mass. 204, 206, 46 N. E. Rep. 622.

[76] Chicago, &c. R. R. Co. *v.* Bell, 70 Ill. 102.

[77] Zemp *v.* Wilmington, &c. R. R. Co., 9 Rich. (S. C. L.) 84.

Gross negligence in respect of treatment or conduct, which retarded recovery, is competent on the question of damages.[78] Where there is evidence of negligence in this respect, plaintiff may show that he acted under the advice of a competent physician, for the purpose of showing that he acted in good faith, and used proper care.[79]

55. Plaintiff's Conduct Illegal.

Defendant cannot set up the separate or distinct wrongful act of plaintiff, done not to himself nor to his injury, and not necessarily connected with, or leading to, or causing or producing the wrongful act complained of.[80]

Illegality, when amounting to contributory negligence, may be shown under a general denial.[81]

56. Mitigation.

Where plaintiff may enhance the damages by showing circumstances of aggravation, defendant may mitigate them by showing circumstances of palliation.[82]

The existence of a remedy against a third person,[83] or even the receipt of insurance against fire, accident or death, cannot be considered in reduction of damages.[84]

Declarations of the plaintiff against his interest, made to a physician before the trial, as to the cause of certain of his physical disorders, are admissible. Chicago City Ry. Co. *v.* Henry, 218 Ill. 92, 75 N. E. Rep. 758.

[78] But see 23 Am. Rep. 21, note.

[79] Lyons *v.* Erie Ry. Co., 57 N. Y. 489; Gilman *v.* Deerfield, 15 Gray, 577.

[80] Sutton *v.* Town of Wanwatosa, 29 Wis. 21, s. c., 9 Am. Rep. 534. Thus traveling on Sunday, in violation of the Sunday law, does not contribute to a disaster caused by a defect in the highway or vehicle. Id.; Carrol *v.* Staten Island R. R. Co., 58 N. Y. 126, and see Baker *v.* Portland, 58 Me. 199, s. c., 4 Am. Rep. 274; Steele *v.* Buckhardt, 104 Mass. 59, s. c., 6 Am. Rep. 191, and cases cited. *Contra*, Johnson *v.* Town of Irasburgh, 47 Vt. 28, s. c., 19 Am. Rep. 111, and see cases cited in 18 Alb. L. J. 84, and see 18 Id. 163.

[81] Jones *v.* Andover, 10 Allen, 18.

[82] Millard *v.* Brown, 35 N. Y. 297.

[83] Nims *v.* Mayor, &c. of Troy, 59 N. Y. 500, affi'g 3 Supm. Ct. (T. & C.) 5.

[84] Lansing *v.* Stone, 37 Barb.

15, s. c. 14 Abb. Pr. 199; Yates *v.* Whyte, 4 Bing. (N. C.) 272; Drinkwater *v.* Dinsmore, 80 N. Y. 390, 392; Althorf *v.* Wolfe, 22 N. Y. 355; Harding *v.* Town of Townshend, 43 Vt. 536; Allen *v.* Barrett, 100 Iowa, 16, 69 N. W. Rep. 272; Cox *v.* Chicago, 83 Ill. App. 540.

CHAPTER XXXII

ACTIONS AGAINST TELEGRAPH COMPANIES

1. The undertaking to carry.
2. Burden of proof as to cause of error.
3. Damages.

1. The Undertaking to Carry.

The original dispatch delivered to the operator is the primary evidence and must be produced, or be accounted for, to let in secondary evidence.[85] Evidence that plaintiff did not read the conditions at the head of the paper signed by him is unavailing.[86]

[85] Western Union, &c. Co. *v.* Hopkins, 49 Ind. 224; Oregon Steamship Co. *v.* Otis, 100 N. Y. 446.

When in a prosecution for bribery, a reply telegram was shown to have been destroyed by the telegraph company, a copy was held admissible as secondary evidence. Peo. *v.* Hammond, 132 Mich. 422, 93 N. W. Rep. 1084.

"It is the law that the sender, being the actual contracting party, has an interest in the transmission of the message, and a benefit conferred, to the extent that such interest might be disclosed by the message or extrinsic information given at the time, in connection with the language and subject matter." Western Union Tel. Co. *v.* Steele, Tex. Civ. App., 110 S. W. Rep. 546.

The recipient of a telegram is bound by the terms of the contract between the company and the sender. Halsted *v.* Postal Tel., etc., Co., 193 N. Y. 293, 85 N. E. Rep. 1078, 127 Am. St. Rep. 952, 19 L. R. A. N. S. 1021.

"On well settled principles, founded on public policy, a telegraph company can not contract to be relieved from the exercise of due care and diligence in the transmission of telegrams to a point of destination over its own lines, and when it undertakes to secure the transmission of a message to a point of destination beyond the terminus thereof over connecting lines, the same rule applies as to transmission to the terminus of its own lines." Western Union Tel. Co. *v.* Way, 83 Ala. 542, 4 So. Rep. 844.

[86] Grinnell *v.* Western Union Co., 113 Mass. 299, s. c., 18 Am. Rep.

485; Breese *v.* U. S. Tel. Co., 48 N. Y. 139, s. c., 8 Am. Rep. 526; and see chap. XVI, paragraph 6 of this vol. But compare Tyler *v.* West. Union Co., 60 Ill. 421, s. c., 14 Am. Rep. 38, and Dig. Am. Rep. pp. 774–7.

One who admits knowledge of the printed stipulations on a telegraph blank is bound thereby, even though he writes his message on a business card and hands it to the telegraph operator when the latter is away from the telegraph office. Western Union Tel. Co. *v.* Buchanan, 35 Ind. 429, 9 Am. Rep. 744.

Where one has used telegraph blanks for twenty-five years, it is his own fault if he is ignorant of the contents of the printed stipulations. Dixon *v.* Western Union Tel. Co., 3 App. Div. 60, 38 N. Y. Supp. 1056, 3 N. Y. Ann. Cas. 126.

Where a plaintiff was shown to have used a telegraph company's blanks for years and to have frequently read the words at the bottom of them, "Read the notice and agreement at the top," he must be held to have assented to the terms and stipulations printed thereon. And even where it might be assumed that the blank used by the plaintiff was mutilated, if it was not proved that the mutilation was done for the purpose of cancelling or altering the agreement, then the previous use of similar printed blanks is sufficient to bind the plaintiff to its terms. Kiley *v.* Western Union Tel. Co., 109 N. Y. 231, 16 N. E. Rep. 75, [aff'g 39 Hun, 158].

But see Pearsall *v.* Western Union Tel. Co., 44 Hun, 532, [aff'g 124 N. Y. 256.] In this case a message, written on a plain sheet of note paper was handed to one whom the court held to be an agent of the telegraph company. The message was addressed to T. W. Pearsall & Co., but by error of the telegraph company's servants was delivered at the address given with the words "& Co." omitted. In the absence of T. W. Pearsall, the message could not be opened by employees of T. W. Pearsall & Co., where by a delay in carrying out the directions contained in the telegram, to purchase stock, damage was caused for which action was brought. The company offered in evidence its rules limiting its liability for mistakes where the sending party does not ask for a repeat, but the evidence was excluded as not proper where the message was written on a blank sheet of note paper and the plaintiff testified that it had no knowledge of the terms printed on the company's blanks. Furthermore the plaintiff could not be estopped from making denial of such knowledge, though admitting that it had on previous occasions used the printed forms and had bundles of them in its office.

The law is settled that a telegraph company may regulate by rules printed on its blanks, its liability for the errors of its employees, such as mistakes or delays or non-delivery of unrepeated messages. Telegraph companies are not under the obligations of

2. Burden of Proof as to Cause of Error.

In the absence of special conditions, plaintiff makes a *prima facie* case by proving (1) The undertaking to carry,—shown by delivery of the message to the apparently proper clerk,[87] and payment of charges, if prepaid; (2) A default,

common carriers to insure absolute and accurate transmission of messages delivered to them. "They have the right to make reasonable regulations for the transaction of their business, and to protect themselves against liabilities which they would otherwise incur through the carelessness of their numerous agents and the mistakes and defaults incident to the transaction of their peculiar business." Kiley *v.* Western Union Tel. Co., 109 N. Y. 231, 16 N. E. Rep. 75, aff'g 39 Hun, 158.

But on the other hand, when unreasonable conditions are incorporated in the printed stipulations, viz., that whenever a message is sent to the Company's office by one of its messengers, the latter is deemed to be the agent of the sender,—the provision is not binding upon the sender. Will *v.* Postal Tel. Cable Co., 3 N. Y. App. Div. 22, 37 N. Y. Supp. 933, 3 N. Y. Ann. Cas. 123.

A telegram company cannot exempt itself from liability for negligence by contract. Postal Tel. Cable Co. *v.* Nichols, 159 Fed. Rep. 643, 89 C. C. A. 585, 16 L. R. A. N. S. 870, 14 Ann. Cas. 369.

Where the addressee of a telegram is the undisclosed principal of the sender, the former may maintain an action against the company for negligence in transmission. Milliken *v.* Western Union Tel. Co., 110 N. Y. 403, 18 N. E. Rep. 251, 1 L. R. A. 281.

[87] See chapter XV, paragraph 4 and chapter XXVI, paragraph 5 of this vol.

The fact that a message was written on paper other than the blanks usually employed is no defense to liability for failing to transmit the message, where the company's agent received and charged for the message. Western Union Tel. Co. *v.* Jones, 69 Miss. 658, 30 Am. St. Rep. 579, 13 So. Rep. 471.

Where the company's agent receives a message for transmission to a place where there is no office or agent of the company, the company will be liable for not delivering the message, it being within the scope of the agent's duties and authority to know where offices and agents are. West. Union Tel. Co. *v.* Jones, (above).

It seems "when it is proved that a message in a foreign tongue is accepted for delivery in the foreign country using the language of the telegram, that the company contracting to deliver it contracts also to have agents who can intelligently receive and deliver the message in the foreign country, and that, in order to defend on the

apparently due, not to the nature of the electric telegraph, but to want of ordinary care—such as non-delivery,[88] or misdelivery;[89] and (3) Damages.

ground of lack of notice as to the importance of telegrams, the telegraph company must show that the telegram in the language in which it was written would not convey to a person thoroughly understanding that language notice of the emergency of the case and the relationship of the parties." Western Union Tel. Co. *v.* Olivarri (Tex. Civ. App.), 110. S. W. Rep. 930.

A telegraph company is liable in tort for refusing to receive a message duly presented to it. Cordell *v.* Western Union Tel. Co., 149 N. C. 402.

[88] Western Union Tel. Co. *v.* Graham, 1 Col. T. 230.

As to the duty of the telegraph company to search for the addresee in order to make delivery, see Southwestern Tel. & Tel. Co., *v.* McCoy, 114 S. W. Rep. 387.

As to the duty of the telegraph company to deliver outside of the free delivery limits, see Martin *v.* Western Union Tel. Co., 81 S. C. 432, 62 S. E. Rep. 833.

But where a complaint fails to allege that the usual charge for transmitting the message was tendered or payment therefor made, and shows no waiver of payment by the telegraph company, there can be no contractual relation arising whereby the telegraph company may be held responsible for the failure to deliver the message. Macpherson *v.* Western Union Telegraph Company 52 N. Y. Super. Ct. (20 J. & S.) 232.

"It is too late now to question the proposition that if a telegraph company receives a message from the sender and undertakes to deliver it to the sendee at a time not within its office hours, it is its legal duty to do so, because of the special undertaking, which constitutes a waiver by it of the benefit of office hours." Suttle *v.* Western Union Tel. Co., 148 N. C. 480, 62 S. E. Rep. 593, 128 Am. St. Rep. 631.

The fact that wires are broken down by storm does not relieve a telegraph company from liability for delay in sending a message which on its face and because of the company's knowledge of the character of the sender's business

[89] Baldwin *v.* U. S. Tel. Co., 45 N. Y. 751, s. c., 1 Allen's Tel. Cas. 613. Or stoppage at a way office. U. S. Tel. Co. *v.* Wenger, 55 Pa. St. 262; W. U. Tel. Co. *v.* Fontaine, 58 Ga. 433.

When it was proved as a fact that there was a misdirection and a misdelivery of the message on the part of the telegraph company the plaintiff made out a *prima facie* case of want of ordinary care. Pearsall *v.* Western Union Tel. Co., 44 Hun, 532, aff'g 124 N. Y. 256, 26 N. E. Rep. 534, 21 Am. St. Rep. 662.

If the error apparently resulted from risks and contingencies peculiar to the nature of the telegraph, plaintiff may recover if the evidence will sustain an inference that it resulted from negligence or other default on part of defendants.[90]

Notwithstanding the usual condition, evidence of gross negligence or wilful misconduct is competent;[91] but an offer to prove "negligence" is not enough.[92]

requires haste, where after knowledge of the condition of the wires, the agents of the telegraph company receive the message without notifying the senders of a possible delay in delivery and the cause thereof. Western Union Tel. Co. *v.* Birge-Forbes Co., 29 Texas Civ. App. 526, 69 S. W. Rep. 181.

[90] Whether the burden is on plaintiff to show this or, in the present state of the art, on the defendants to explain the cause of error, is disputed. For the former view see Baldwin *v.* U. S. Tel. Co. (above); Sweetland *v.* Illinois, &c. Co., 27 Iowa, 433, s. c., 1 Am. Rep. 285. For the latter, see Bartlett *v.* Western Union Co., 62 Me. 209, s. c., 16 Am. Rep. 437; Rittenhouse *v.* Independent Line, 44 N. Y. 263, affi'g 1 Daly, 474; Edw. on B., § 489; Shearm. & R. on Neg., § 559; Turner *v.* Hawkeye, 41 Iowa, 458, s. c., 20 Am. Rep. 605; Western Union Co. *v.* Tyler, 74 Ill. 168, s. c., 24 Am. Rep. 279.

A provision printed on the back of a telegram that the company will not be liable for any mistakes or delays in transmission unless the message is repeated, does not excuse the company from negligently delaying transmission of the message. Box *v.* Postal Tel.-Cable Co., 165 Fed. Rep. 138, 91 C. C. A. 172, 28 L. R. A. N. S. 566.

Proof of the delivery of a telegram in a form different from that in which it was sent is *prima facie* proof of negligence. Western Union Tel. Co., *v.* Cork, 61 Fed. Rep. 624, 9 C. C. A. 680.

[91] Breese *v.* U. S. Tel. Co., 48 N. Y. 141, and cases cited; s. c., 8 Am. Rep. 526.

A stipulation in a telegram against liability for mistakes and delays in transmission will not protect the company from the negligent delay of the agent in delivering the message, such not being a delay in transmission. Western Union Tel. Co. *v.* Burrow, 10 Tex. Civ. App. 122, 30 S. W. Rep. 378.

Where the company held a mes-

[92] Grinnell *v.* Western Union Co., 113 Mass. 299, s. c., 19 Am. Rep. 485.

Where a message has not been correctly transmitted, and the blank filled out by the plaintiff provided that the company should not be liable for an unrepeated

The reply of the operator at the terminal office, in response to the inquiry of the sender why the message had not been delivered, is not admissible in evidence against the company.[93]

sage, which showed on its face that delay would occasion possible loss, for seven days, it was guilty of gross negligence. Mowry *v.* Western Union Tel. Co., 51 Hun, 126, 4 N. Y. Supp. 666; Dixon *v.* Western Union Tel. Co., 3 App. Div. 60, 3 N. Y. Ann. Cas. 124, 38 N. Y. Supp. 1056.

When an agent of the telegraph company sends a message to the wrong place, in ignorance of the existence of a town which is the county seat of an adjoining county, the company is guilty of gross negligence. Western Union Tel. Co. *v.* Buchanan, 35 Ind. 429.

Even though a telegraph company proves that the defendant had failed to read its rules printed on the message blank, it is not thereby excused from gross negligence, such as omitting the word "fifty" in a message which, as given to the defendant's employee, read "one dollar fifty." Dixon *v.* Western Union Tel. Co., 3 N. Y. App. Div. 60, 38 N. Y. Supp. 1056, 3 N. Y. Ann. Cas. 124.

But it has been held that there is no evidence of negligence when one delivers into the hands of an operator a message so illegibly written that the word "two" could just as well be read "ten," and the message was sent using the word "ten" when the sender intended the word "two." Koons *v.* Western Union Tel. Co., 102 Pa. St. 164.

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message, the company can be held only in the case of gross negligence or willful misconduct, and the burden of proof is upon the plaintiff. Redington *v.* Pacific Postal Tel. Co., 107 Cal. 317, 40 Pac. Rep. 432, 48 Am. St. Rep. 132.

Where a telegram is sent on a form at the top of which is a provision that the company will not be liable on any claim unless the same is presented in writing within sixty days after the sending of the message, service of a complaint setting forth the claim is a compliance with the requirement. Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 7 So. Rep. 419, 18 Am. St. Rep. 148.

[93] Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. Rep. 419.

Where the telegraph company's manager, when told of the plaintiff's loss, said that he would "look into the matter," the jury was justified in finding that the company had waived the requirement in its printed form that formal notice be filed in writing within sixty days. Western Union Tel. Co. *v.* Hines, 96 Ga. 688, 23 S. E. Rep. 845, 51 Am. St. Rep. 159.

Where it appeared that fine salt was put up in sacks of fifteen

3. Damages.

To recover damages beyond the price paid for transmission, there must be evidence, from the face of the message

pounds each and coarse salt in casks of three hundred and twenty pounds each, and the plaintiff, a manufacturer of salt, received a telegram ordering "casks" instead of "sacks," and the error was due to the carelessness of an agent of the telegraph company, the latter was held for damages reckoned as the difference in the market value of the salt at the plaintiff's place of business and that at the place of delivery and sale, plus the cost of transportation. Leonard *v.* New York, etc., Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446.

Where the message read, "one dollar fifty, freight thirteen cents, answer quick," it was held that the claim of the telegraph company that it had no means of knowing the special purpose of the message was untenable. Dixon *v.* Western Union Tel. Co., 3 N. Y. App. Div. 60, 38 N. Y. Supp. 1056.

The measure of damages for refusing to receive a message is not limited to the amount which the parties contemplated, but extends to all damages proximately resulting therefrom, such being the rule in case of a tort. Cordell *v.* Western Union Tel. Co., 149 N. C. 402.

Mental anguish as a result of negligent delay in transmitting a telegram is special damage for which the company will not be liable unless it had notice of such probable result of its negligence. Suttle *v.* Western Union Tel. Co., 148 N. C. 480, 62 S. E. Rep. 593, 128 Am. St. Rep. 631.

The facts recited in the telegram itself may be sufficient notice to the company of special damages, such as mental anguish, which will likely ensue if the telegram is not promptly delivered. Western Union Tel. Co. *v.* Porter (Tex. Civ. App.), 26 S. W. Rep. 866.

Damages for mental anguish may be recovered even though such damage is the only damage caused. Mentzer *v.* Western Union Tel. Co., 93 Iowa, 752, 62 N. W. Rep. 000, 57 Am. St. Rep. 294, 28 L. R. A. 72.

There is a presumption of mental anguish where a telegram is delivered too late to enable a parent to reach the bedside of a dying child. Western Union Tel. Co. *v.* Blair (Tex.), 113 S. W. Rep. 164.

"It has been decided that where the message is for the benefit of both the husband and wife, the mental anguish of the wife, arising from the absence of the husband during the serious sickness and death of their children, is recoverable." Western Union Tel. Co. *v.* Steele (Tex. Civ. App.), 110 S. W. Rep. 546.

The addressee may recover special damage. Hadley *v.* Western Union Tel. Co., 115 Ind. 191, 15 N. W. Rep. 845.

or otherwise, from which it may be inferred that defendants or their servant had notice that other and further loss might occur from a breach of the undertaking.[94]

[94] Hildreth *v.* Western Union Tel. Co., 56 Fla. 387, 47 So. Rep. 820; Baldwin *v.* U. S. Tel. Co. (above); McCall *v.* Western Union Co., 7 Abb. N. C. note. Where a telegraph company has contracted to transmit and deliver a message summoning a physician, it cannot excuse its liability for delay in delivery by proof that it was not the custom of the physician to make professional calls at a distance, without prepayment, or guaranteed payment, of his charges. Western Union Tel. Co. *v.* Henderson, 89 Ala. 510, 18 Am. St. Rep. 148, 7 So. Rep. 419.

Where the message does not itself advise the company of the probable loss consequent upon its non-delivery, and the blank upon which it was sent exempted the company from liability for unrepeated messages, the company is not liable for any damage. Western Union Tel. Co. *v.* Coggin, 68 Fed. Rep. 137, 15 C. C. A. 231.

The measure of damages for breach of a contract to transmit a cipher telegram, is such damages, as according to the usual course of things, naturally grew out of such breach; but not damages arising out of any special circumstances which were not communicated. Western Union Tel. Co. *v.* Way, 83 Ala. 542, 4 So. Rep. 844.

Where a message is in cipher, unintelligible to the company's operator, and the company is not informed as to the nature of its contents, it is liable only for the price of the message, that being the only damages that can be said to have been contemplated by the parties. Candee *v.* Western Union Tel. Co., 34 Wis. 471, 17 Am. Rep. 452.

Where a telegram sent in reply to another telegram sent by the same company, is negligently delayed, both telegrams may be considered together in order to determine whether or not the company had notice of facts showing that special damage would be caused by the delay of the telegram. Postal Tel.-Cable Co. *v.* Sunset Const. Co. (Tex.), 114 S. W. Rep. 98.

Speculative damages are not allowed to one showing delay in delivery of a message. Kiley *v.* Western Union Telegraph Co., 39 Hun, 158, affi'd 109 N. Y. 231.

See also Western Union Tel. Co. *v.* Birges-Forbes Co., 29 Tex. Civ. App. 526, 69 S. W. Rep. 18.

CHAPTER XXXIII

ACTIONS BY AND AGAINST SHERIFFS, CONSTABLES AND MARSHALLS

1. Official character and acts.
2. Officer's action against receiptor.
3. Officer's action for conversion or trespass.
4. — for price of goods sold.
5. — against attorney or party, for fees.
6. Action against officer, for failure to serve or collect process.
7. — defenses.
8. Action for storage.
9. Action for loss of property from custody.
10. — for failure to pay over.
11. — for taking insufficient security, or as bail.
12. — for escape.
13. — defenses.
14. — for failure to return.
15. — for false return.
16. Admissions, declarations, and conduct of deputies, &c.

1. Official Character and Acts.

The general rules have been already stated [95]

2. Officer's Action Against Receiptor.

The rules governing the mode of proving the contract are elsewhere stated.[96] Defendant's refusal to deliver is evidence of a conversion.[97]

[95] Chapter VII, ACTIONS BY AND AGAINST PUBLIC OFFICERS.

"When property is already in the sheriff's possession under former writs, his levy of other process upon it by merely making an indorsement to that effect imports only nominal damages to the owner of the property, if it is not subject to the process, if that levy is discharged before anything more is done under it." Smith *v.* Johnston, 95 Ala. 482, 11 So. Rep. 20.

An officer who levies on property under a void attachment makes himself liable to an action for conversion. Jones *v.* Buzzard, 2 Ark. 415.

[96] Chapter XXX, ACTIONS AGAINST BAILEES, AGENTS, &c.

A sheriff suing upon an indemnity bond makes a *prima facie* case by showing the recovery of judgment against him, its payment, and the costs and expenses incurred in defending the action. O'Brien *v.* McCann, 58 N. Y. 373.

[97] Dezell *v.* Odell, 3 Hill, 215.

The receiptor is estopped from showing that the property belonged to himself[98] or to a third person,[99] or that the property not accounted for was less than the value fixed upon it by the receipt.[1] or that the levy was exces-

[98] Cornell *v.* Dakin, 38 N. Y. 253, and cases cited. Except, perhaps, in mitigation of damages in some cases. Bursley *v.* Hamilton, 15 Pick. 40.

For the distinction between a receipt as an absolute undertaking and as a bailment in which latter case the receiptor "may always excuse himself for non-delivery by showing that the goods were not the property of the debtor, but of a third person, into whose possession they have gone." See Mason *v.* Aldrich, 36 Minn. 283, 30 N. W. Rep. 884.

One who held a mortgage on property for which he became a receiptor, could not thereafter defend an action on the receipt on the ground that he was the owner of the property. "He (was) estopped by the admissions in his receipt from setting up that defense." Drew *v.* Livermore, 40 Me. 266.

Nor could a receiptor as a defense to the deputy sheriff's action on the receipt show a factor's lien in himself. Potter *v.* Sewall, 54 Me. 142.

When the defendant acknowledged himself, in the receipt to a sheriff, as an owner of an undivided half of attached property of a value of $800, he could not later deny this by claiming that the property belonged to an insolvent partnership of which he was a member. Easton *v.* Goodwin, 22 Minn. 426.

Where a bailee receipted to a sheriff for attached goods upon the strength of which the latter gave possession to the bailor, the receiptor was not allowed to attack the judgment, under which the sheriff attached the property on the ground that it had been obtained by fraud and perjury. Holcomb *v.* C. N. Nelson Lumber Co., 39 Minn. 342, 40 N. W. Rep. 352.

When a receipt is given in a form such as to show that it was intended as an absolute assurance for a certain amount or value of attachable property, the receiptors are never allowed to defeat its purpose by proof that the debtor's title to the particular property mentioned was defective. Bacon *v.* Daniels, 116 Mass. 474.

[99] Id.

In Ross *v.* Libby, 92 Me. 34, 42 Atl. Rep. 230 it was held to be no defense to an action against a receiptor that the goods in question which were attached as property personally belonging to a certain party were in fact held by him as trustee, since the receipt was conclusive of the receiptor's liability to the officer under all circumstances.

[1] Id.

The value placed upon the goods in the receipt was held to be the

sive.[2] But he may show fraud or gross mistake in these respects,[3] or a re-delivery.[4] Otherwise he is discharged only by act of God, or the public enemy.[5]

3. Officer's Action for Conversion or Trespass.

The process, with plaintiff's return, is evidence of levy;[6] and, with proof of possession or of the judgment,[7] is sufficient to show his title.

The consent of the officer to the taking of the property is a bar to an action in his own name.[8]

amount of the damages sustained in the absence of other evidence. Ross *v.* Libby, 92 Me. 34, 42 Atl. Rep. 230.

[2] Dezell *v.* Odell, 3 Hill, 215.

[3] Id.

A mere error however by the clerk in making up the judgment records afforded a receiptor no defense where the correction of the mistake put the parties to no greater disadvantage than they would have incurred, had the record originally been accurate. Bean *v.* Ayers, 70 Me. 421.

When an officer making a levy stated (though erroneously) his opinion of the legal effect of signing a receipt, there was no duress such as would avoid the receipt, and no fraud could be predicated thereon by the receiptors who had the receipt before them but failed to read its terms. Kinsbury *v.* Sargent, 83 Me. 230, 22 Atl. Rep. 105.

Such errors as not giving the first name of the defendant or failing to write the word senior after the name are amendable and afford no defense to an action on a receipt. Hunter *v.* Peaks, 74 363.

[4] Clark *v.* Weaver, 17 Hun, 481.

It seems that where the receiptor redelivered the attached property to the debtor who filed a petition in bankruptcy within four months after the attachment, under which bankruptcy proceedings the assignor disposed of the said attached goods for the benefit of the creditors, he could not be held liable to the officer to whom he gave the receipt, even though he delivered the property to the debtor before the petition had been filed. Wright *v.* Dawson, 147 Mass. 384, 18 N. E. Rep. 1, 9 Am. St. Rep. 724.

[5] Cornell *v.* Dakin, 38 N. Y. 253.

[6] Page 555; Williams *v.* Herndon, 12 B. Mon. 484. A sheriff's return to a writ of possession is not conclusive as to the execution of the writ. Newell *v.* Whigham, 102 N. Y. 20, 6 N. E. Rep. 673.

[7] Spoor *v.* Holland, 8 Wend. 445; Pryne *v.* Westfall, 3 Barb. 496.

[8] Earl *v.* Coup, 16 Wend. 562, 570.

4. — for Price of Goods Sold.

The judgment, as well as the process, should be proved.[9]

5. — Against Attorney or Party, for Fees.

The judgment on which process was issued is competent evidence of its own existence;[10] but not of the performance of services recited in it,[11] unless the record was the act of defendant,—as may be the case with a judgment-roll in a court of record under the new procedure.[12] The liquidation of the fees by legal taxation by the proper officers, although by a certificate made after the action was brought, is conclusive evidence as to the amount.[13]

6. Action Against Officer, for Failure to Serve or Collect Process.

The existence of the judgment should be proved;[14] and,

[9] Whart. Ev., § 828, citing Gaskell *v.* Morris, 7 Watts & S. 32. For the mode of proof, see Chapter XXIX. For mode of proving auction sales, chapter XVI, paragraph 43 of this vol.

[10] Reynolds *v.* Brown, 15 Barb. 24.

Likewise a sheriff, in an action for the support and keeping of a lunatic temporarily consigned to his care, was properly permitted to offer in evidence the order of the the court giving him the custody of the said lunatic, where the objection was offered that the claim was made by the plaintiff individually and not as sheriff. Garfield County *v.* Adams, 16 Colo. App. 513, 66 Pac. Rep. 683.

[11] Id.

[12] See first note to paragraph 22 of chapter XXIX of this vol.

[13] Birkbeck *v.* Stafford, 14 Abb. Pr. 285, s. c., less fully, in 23 How. Pr. 236.

Where, on a foreclosure sale under one judgment, land was sold in parcels to different buyers, the total receipts from all the various purchases was held to be the basis for taxing the sheriff's fees. McLennan County *v.* Graves, 94 Tex. 635, 64 S. W. Rep. 861.

[14] See Chapter XXIX.

The defendant, in a suit in which an attachment had been issued, was, in a subsequent action against the sheriff for failure safely to keep the attached property, allowed to offer in evidence the judgment dissolving the attachment. Aigeltinger *v.* Whelan, 133 Cal. 110, 65 Pac. Rep. 125.

Where the process is not void but voidable only, the sheriff is liable for refusing to execute it. Bacon *v.* Cropsey, 7 N. Y. 195.

if it be a justice's judgment, the jurisdiction of the subject-matter and the person;[15] its regularity need not.[16]

If the process was a summons for commencement of an action, plaintiff must give *prima facie* evidence that he had a cause of action; and for this purpose such evidence as would be competent against the debtor,—for instance, the debtor's admission,—is competent against the officer.[17]

The issuing of the process is shown by proof of the authentication; and the delivery to the officer may be shown by parol, or in case within the statute,[18] by proof of leaving at his office, or in case of execution, by his memorandum thereon.[19] If the process has not been returned, it should be produced, or its absence accounted for, and secondary evidence given. If returned, it is proved by a certified copy.[20]

Some evidence is necessary tending to show his ability to execute the process,—such as that he knew or ought to have known that the one proceeded against was within his precinct, or that goods which he might have seized were owned by or in possession of the debtor.[21] Some evidence of

"The fact that the officer attached property greater in value than he was directed to attach in the writ is no defense." Hunter *v.* Peaks, 74 Me. 363.

The sale of property levied on will not be enjoined at the instance of the debtor on the ground that part of the property belongs to another. Corder *v.* Steiner (Tex. Civ. App.), 54 S. W. Rep. 277.

[15] Westbrook *v.* Douglass, 21 Barb. 602; Lawton *v.* Erwin, 9 Wend. 233; Cornell *v.* Barnes, 7 Hill, 35.

[16] State *v.* Miller, 48 Mo. 251.

Where an officer was sued for his failure to arrest a person on an execution, he could properly attack the judgment and execution as void. Belcher *v.* Sheehan, 171 Mass. 513, 51 N. E. Rep. 19, 68 Am. St. Rep. 445.

[17] Greenl. Ev. 525, § 584.

"The plaintiff's debt is *prima facie* evidence of the extent of the injury which he has sustained by the officer's breach of duty in regard to the service and return of the process." Dobbs *v.* Justices, Murray County Inferior Ct., 717 Ga. 624.

[18] 2 N. Y. Code Civ. Pro., §§ 100, 1363; Sherman *v.* Conner, 16 Abb. Pr. N. S. 396; Manning *v.* Keenan, 9 Hun, 686.

[19] Wardwell *v.* Patrick, 1 Bosw. 409.

[20] 2 Greenl. Ev. 525, § 584.

[21] 2 Greenl. Ev. 525, § 584. See N. Y. Code Civ. Pro., § 103.

A constable can not excuse his

his neglect is necessary,[22] though very slight evidence suffices for a *prima facie* case.[23]

7. — Defenses.

Existence of property being shown by plaintiff, it is for defendant to show inability to collect by due diligence.[24] General repute that goods in defendant's possession did not belong to him is not alone competent.[25] The fact of exemption from execution, if available,[26] must be proved by de-

failure to make a levy on personal property by showing that the execution-defendants informed him that they had filed a bond and secured a stay on appeal from the judgment on which the execution had issued. Steele *v.* Crabtree, 40 Neb. 420, 58 N. W. Rep. 1022.

When it was shown that the attachment defendant had property in the county subject to seizure; that the plaintiff's attorney gave the sheriff's deputy a list of the defendant's property at the same time informing him where the defendant lived, offering to go with the deputy and point out the goods, and giving him an order on the plaintiff directing the latter to pay for the service of the papers in the matter, this evidence was held sufficient to sustain a verdict in an action against the sheriff for failure to serve the process. Zelinsky *v.* Price, 8 Wash. 256, 36 Pac. Rep. 28.

[22] Chap. VIII, paragraph 12 of this vol.

[23] 2 Greenl. Ev. 525, § 584.

"The averment of neglect of official duty, though negative, ought, it would seem, to be supported by some proof on the part of the plaintiff, since a breach of duty is not to be presumed; but from the nature of the case, very slight evidence will be sufficient to devolve on the defendant the burden of proving that his duty has been performed." Dobbs *v.* Justices, Murray County Inferior Ct. 17 Ga. 624.

[24] Bank of Rome *v.* Curtis, 1 Hill, 275.

It is no defense to an action based upon a seizure of the plaintiff's property under a void attachment that the sheriff subsequently seized and sold the same property under a valid writ in favor of other persons. Leise *v.* Mitchell, 53 Mo. App. 563.

[25] Whitsett *v.* Slater, 23 Ala. 626.

Proof that a sheriff had made a search for the cattle on which he had been directed to make a levy, and upon being unable to find any in his own county had, as a last resort, levied on certain land pointed out by the defendant, is sufficient to show diligence. Morgan *v.* Spring, 72 Ga. 257.

[26] Compare Baker *v.* Brintnall, 52 Barb. 188, s. c., 5 Abb. Pr.

fendant.[27] Defendant is estopped from showing that his receiptor proved to be true owner.[28] When sued for not applying to an execution goods levied on under a provisional attachment, he is not estopped by the levy alone from proving that they were not the property of the debtor.[29] The value of goods levied on and not sold (if not stated in the return), may be shown in the usual manner of proving value.[30] On the question of the sufficiency of a levy the amount produced at the sale is ordinarily the best evidence; and opinions of witnesses are not competent,[31] unless it may be as showing good faith in refraining from oppression.

If plaintiff's instructions [32] or assent [33] to neglect or delay are relied on they must be shown by clear evidence, though express assent is not essential.[34] Mere omission to object is not alone evidence of assent to previous conduct.[35] Ambiguous instructions, though in writing, may be explained

N. S. 253; and People ex rel. Gaston *v.* Campbell, 40 N. Y. 133.

[27] Bonnell *v.* Bowman, 53 Ill. 460; Monmouth Second Nat. Bank *v.* Gilbert, 174 Ill. 485, 51 N. E. Rep. 584, 66 Am. Rep. 306; Kennedy *v.* Smith, 99 Ala. 83, 11 So. Rep. 665.

Proof that the defendant's property was exempt will of course preclude a recovery against the sheriff. Moss *v.* Jenkins, 146 Ind. 589, 45 N. E. Rep. 789.

[28] People ex rel. Knapp *v.* Reeder, 25 N. Y. 302; Penobscot Boom Corporation *v.* Wilkins, 27 Me. 345, and see paragraph 2.

[29] Fuller *v.* Holden, 4 Mass. 498; Penobscot Boom Corporation *v.* Wilkins, 27 Me. 345; and see West *v.* Tuttle, 11 Wend. 639.

An officer may prove paramount title in another as a matter of defense. Dobbs *v.* Justices, Murray County Inferior Ct., 17 Ga. 624.

The burden of proving title in another is on the officer. Third Nat. Bank *v.* Elliott, 42 Hun, 121.

[30] Campbell *v.* Pope, Hempst. 271, and see Chap. XVI, paragraph 20, etc., of this vol.

[31] French *v.* Snyder, 30 Ill. 339.

[32] Tuttle *v.* Cook, 15 Wend. 275.

By the New York Code a sheriff has the duty of filing notice that he has levied upon real property and if his failure to do so enables a *bona fide* purchaser of the premises to take free of the plaintiff's lien, the sheriff is liable therefor in his official capacity. Lewis *v.* Douglass, 6 N. Y. Suppl. 888.

[33] Moore *v.* Westervelt, 1 Bosw. 357.

[34] Doty *v.* Turner, 8 Johns. 20; Cornell *v.* Cook, 7 Cow. 310, 313.

[35] Moore *v.* Westervelt, 2 Duer, 59.

by parol evidence of the circumstances under which they were given.[36]

Insolvency of the debtor is competent in mitigation;[37] but the burden is on defendant to show it.[38] The evidence must be directed to the time of his duty.[39] Evidence of the debtor's present ability is not competent in mitigation.[40]

8. — for Storage.

A deputy's authority to bind the sheriff by a contract for storage is presumed; and the burden is on the sheriff to charge plaintiff with notice of a limitation of this authority.[41] The sheriff's return stating the claim for storage is evidence of his admission of its existence, but not of the amount due.[42] The amount may be proved as in other cases.[43]

9. — for Loss of Property from Custody.

The burden of proof is the same as in an action against a warehouseman.[44] Mere proof of delay to remove the goods is not enough without showing negligence.[45]

10. — for Failure to Pay Over.

The levy, and receiving the money, may be proved by parol.[46] The dockets and records of the court to which the

[36] Ely *v.* Adams, 19 Johns. 313.

[37] Dinninny *v.* Fay, 38 Barb. 18.

[38] Murphy *v.* Troutman, 5 Jones N. C. L. 379. And plaintiff may rebut this. Humphrey *v.* Hathorn, 24 Barb. 278, 280, and see French *v.* Snyder, 30 Ill. 339.

But evidence that the debtor proposed to make application to take the poor debtor's oath, in the event of his detention, was not sufficient to constitute a good defense to an action for failure to arrest, since it referred to matters too remote. Harrington *v.* Wadsworth, 63 N. H. 400.

[39] See Bank of Rome *v.* Curtis, 1 Hill, 275.

[40] Id.; Tyler *v.* Ulmer, 12 Mass. 163.

[41] Ramsey *v.* Strobach, 52 Ala. 513.

Where a deputy sheriff levied on cattle and hired a party to care for them, the sheriff was held liable to the party so hired. Rice *v.* Penfield, 49 Hun, 368, 2 N. Y. Supp. 641.

[42] Fitchburg R. R. Co. *v.* Freeman, 12 Gray, 401.

[43] Id.

[44] Witowski *v.* Brennan, 41 Super. Ct. (J. & S.) 284.

[45] Moore *v.* Westervelt, 21 N. Y. 103, rev'g 1 Bosw. 357.

[46] Bryant *v.* Dana, 8 Ill. 343.

officer belonged, are competent evidence against him to show that money has been received by him and his sureties or his deputies, upon its process.[47] The return, if proved, is conclusive on the officer.[48] Jurisdiction of the action being shown or presumable,[49] the officer cannot object to irregulartiy in the judgment or execution.[50] An appraisement participated in by the officer, and certified in his return, is competent against him.[51]

11. — for Taking Insufficient Security.

The writ, and a subsequent judgment thereon against the debtor, are sufficient *prima facie* evidence of the orginal indebtedness.[52] The officer's return indorsed, is sufficient evidence of the delivery of the process to him.[53]

A constable may in his official capacity receive notes for collection and is subject to rule under the Georgia Code for failure to pay over the proceeds thereof. Meeks *v.* Carter, 5 Ga. App. 421, 63 S. E. Rep. 517.

[47] Williams *v.* United States, 1 How. 290, s. c., 17 Pet. 144.

Failure of a constable to turn over money not received in his official capacity does not render the sureties on his official bond liable. Title Guaranty & Trust Co. *v.* Peo., 139 Ill. App. 642.

[48] Sheldon *v.* Payne, 7 N. Y. 453; Tiffany *v.* Johnson, 27 Miss. 227; Denton *v.* Livingston, 9 Johns. 96.

Thus where an officer attached certain money in a proceeding which was subsequently dismissed, his return on the writ was conclusive that he had actually attached the money in question. Major *v.* Peo., 40 Ill. App. 323.

But where a sheriff was sued for refusal to pay over money obtained at a sale and the plaintiff offered to prove that the amount so secured was more than that indicated by the return, the objection to the evidence on the ground that the return was conclusive was overruled since "at most" the return was "only *prima facie* evidence in the sheriff's favor." State *v.* Finn, 100 Mo. 429, 13 S. W. Rep. 712.

[49] Chapter XXIX, paragraph 22 of this vol.

[50] Nutzenholster *v.* State, 37 Ind. 457; Germon *v.* Swartwout, 3 Wend. 282; Walden *v.* Davison, 15 Wend. 575.

[51] Sanborn *v.* Baker, 1 Allen, 526.

[52] Young *v.* Hosmer, 11 Mass. 89.

[53] Blatch *v.* Archer, Cowp. 63.

So, also, where a constable was sued for accepting insufficient sureties on a replevin bond, the production of the writ with the officer's

The mode of proving insolvency, or pecuniary responsibility or credit, or repute, is stated in the next chapter. It is enough to show negligence, without proving wilful wrong.[54] The declarations of the bail are competent against the sheriff to show his insufficiency; for instance his repeated promises to pay creditors and his defaults.[55] In the absence of evidence of sufficiency of the bail it is not necessary for plaintiff to show proceedings taken against them.[56] In the absence of evidence as to the responsibility of the original debtor, the burden is on the sheriff to show that he had no property, if that is relied on in mitigation.[57] It is enough for the officer to show that the bail were at the time apparently in good credit, and responsible for the amount.[58] Evidence of actual inquiry is not essential.[59] Evidence that they stated to the officer at the time, that they were responsible, is not enough.[60]

12. — for Escape.[61]

In the case of original or *mesne* process, issued without judicial ascertainment of the fact and amount of *indebtedness of the original defendant*, plaintiff must give some evidence

return thereon was sufficient proof that he had accepted the bond in question. Carter *v.* Duggan, 144 Mass. 32, 10 N. E. Rep. 486.

[54] Sparhawk *v.* Bartlet, 2 Mass. 188, 197, 199; Rice *v.* Hosmer, 12 Id. 129.

[55] Gyllim *v.* Scholey, 6 Esp. 100.

In Carter *v.* Duggan, 144 Mass. 32, 10 N. E. Rep. 486 the plaintiff was allowed to offer the record of his action against the sureties wherein he was unable to obtain satisfaction, for the purpose of proving the insufficiency of the bond.

Similarly, conversations between the plaintiff and the defendant were held competent to show admissions made by the defendant tending to establish the fact that he had taken insufficient securities. Stern *v.* Knowlton, 184 Mass. 29, 67 N. E. Rep. 869.

[56] Young *v.* Hosmer, 11 Mass. 89.

[57] Young *v.* Hosmer, 11 Mass. 89. Compare People ex rel. Metcalf *v.* Dikeman, 3 Abb. Ct. App. Dec. 520; Bensel *v.* Lynch, 44 N. Y. 162, affi'g 2 Robt. 448.

[58] Hindle *v.* Blades, 5 Taunt. 225, 227.

[59] Id.

[60] 2 Greenl. Ev. 527, § 586.

[61] For definition of escape, see N. Y. Code Civ. Pro., § 155; Wilckens *v.* Willet, 4 Abb. Ct. App. Dec. 596.

thereof.[62] Whatever evidence would be competent to charge the original debtor, is competent against the sheriff.[63] In the case of final process, the judgment is sufficient evidence of the indebtedness.

The *process* should be produced, or its absence be accounted for to let in secondary evidence.[64] Showing failure to return and refusal to produce on notice, lets in secondary evidence of the writ.[65]

The return of *arrest* is conclusive against the officer.[66] Absence of a return being accounted for, the arrest may be proven by parol.[67] Under an allegation of a voluntary *escape*, plaintiff may prove a negligent escape.[68] An escape

[62] See 2 Greenl. Ev. 529, § 589.

Similarly in an action for escape, the plaintiff has the burden of proving that he held a valuable claim against the party who has escaped, but he fails to sustain this burden by merely proving that he held a note signed by him which on its face appeared to have been barred by the statute of limitations. Slocum *v.* Riley, 145 Mass. 370, 14 N. E. Rep. 174.

[63] Sloman *v.* Herne, 2 Esp. 695, Lord KENYON. The New York rule is that declarations of the debtor, adduced against the sheriff, must be shown to have been made before escape. Patterson *v.* Westervelt, 17 Wend. 543, 549. *Contra*, Hart *v.* Stevenson, 25 Conn. 499, 506, unless part of the *res gestæ*.

The sheriff, when sued by a creditor for allowing a debtor in his custody to escape may avail himself of all the defenses which the debtor may have had. Cosgrove *v.* Bowe, 2 N. Y. Civ. Proc. R. 61.

[64] Van Slyk *v.* Taylor, 9 Johns. 146.

In an action against a sheriff for conversion of property sold on execution, testimony of a witness as to the regularity of the writ of execution which he had examined is inadmissible as being secondary evidence. Faville *v.* State Trust Co. (Iowa), 96 N. W. Rep. 1109.

[65] Hinman *v.* Brees, 13 Johns. 529, Dygert *v.* Crane, 1 Wend. 534.

[66] 2 Greenl. Ev. 529, § 589. So is a bond given to the officer's predecessor, reciting the process and custody. Tallmadge *v.* Richmond, 9 Johns. 86.

[67] Hinman *v.* Brees, 13 Johns. 529.

[68] Bonafous *v.* Walker, 2 T. R. 126.

But proof of an unwarranted refusal to receive a judgment debtor into his custody will not render a sheriff liable under an allegation of escape. Saffier *v.* Dike, 82 N. Y. App. Div. 485, 81 N. Y. Supp. 593.

is presumed to be only negligent in the absence of anything to show that it was voluntary.[69]

The escape may be proved by oral evidence that the prisoner was not in custody.[70] The fact of the prisoner being off the limits, must be affirmatively and satisfactorily shown by direct and positive proof. Nothing will be intended or inferred.[71] But evidence that he was seen at large, is sufficient, *prima facie*.[72] If it be shown that the prisoner was in defendant's custody under the process, a subsequent return of not found, is evidence of the escape.[73] To prove the debtor beyond the limits, ineffectual search, and a letter received from him, are competent.[74]

The *damages* are presumptively the amount of the judgment or bail.[75] Where the judgment is not conclusively the measure of damages,[76] plaintiff should be prepared with

[69] Patterson *v.* Westervelt, 17 Wend. 543, 545.

[70] Fairlie *v.* Birch, 3 Campb. 397.

But it is necessary to prove that the officer did at some time have the custody of the debtor, thus evidence that the officer had admitted that after the execution had been placed in his hands, he had collected some money from the judgment debtor but that the latter "had got away from him" was insufficient to show even that an arrest had taken place. Jackson *v.* Comisky, 30 Misc. 622, 62 N. Y. Supp. 705.

[71] Visscher *v.* Gansevoort, 18 Johns. 496.

[72] Stewart *v.* Kip, 7 Johns. 165.

[73] Bensel *v.* Lynch, 44 N. Y. 162, affi'g 2 Robt. 448; Wheeler *v.* Hambright, 9 Serg. & Rawle, 390, 395.

[74] *Per* COWEN, J., Patterson *v.* Westervelt, 17 Wend. 543, 549.

[75] Patterson *v.* Westervelt, 17 Wend. 543; State ex rel. Shirk *v.* Mullen, 50 Ind. 598; Latham *v.* Westervelt, 26 Barb. 256, but see N. Y. Code Civ. Pro., § 158, sub. 1.

Under N. Y. Code Civ. Pro., § 158 the sheriff is liable to the extent of the damages suffered by the plaintiff by reason of the escape of one who was in his custody by virtue of an order of arrest or in consequence of a surrender in exoneration of bail before judgment.

See also Dunford *v.* Weaver, 84 N. Y. 445 holding that the sheriff was liable for the amount of a surrogate's decree with interest thereon.

[76] Where it appears that the one who escaped was without property and insolvent, it has been held that the plaintiff suffered no damage. Buczynski *v.* Anderson, 174 N. Y. App. Div. 790, 161 N. Y. Supp. 697. As in case of final process, &c., under N. Y. Code Civ. Pro. § 158, sub. 2.

evidence of actual loss. Declarations by the prisoner, made before escape, tending to show that he had property, are competent against the sheriff.[77]

13. — Defenses.

An *error or irregularity* in the judgment or process is not material, unless rendering it void.[78] Even reversal of the judgment does not necessarily exonerate the officer.[79]

A general question as to the manner of *escape* is irrelevant, unless counsel states an intention to show facts which would excuse the officer.[80] A *voluntary return* is not admissible under a general denial.[81] In an answer of voluntary return, an allegation that prisoner continued in custody to time of suit brought, is immaterial, though put in issue.[82]

The sheriff can justify under a *discharge* by showing that the court had jurisdiction. The regularity of the proceedings is not material.[83] If the jurisdictional facts do not appear by the recitals in the discharge, they may be proved *aliunde*.[84]

As to *damages*,—in the case of negligent escape,[85] or of escape from *mesne* process,[86] it is competent to give in evidence the circumstances of the debtor, in order to limit the recovery to what the plaintiff has actually lost.[87] Insolvency of the

[77] Patterson *v.* Westervelt, 17 Wend. 549.

In an action against an officer for an escape on *mesne* process, the declarations of the defendant in the original suit are admissible against the sheriff for the purpose of proving the indebtedness of the original defendant. Hart *v.* Stevenson, 25 Conn. 499.

[78] Jones *v.* Cook, 1 Cow. 300; Ross *v.* Luther, 4 Cow. 158, 163; Ontario Bank *v.* Hallett, 8 Cow. 192. Compare Carpentier *v.* Willet, 1 Abb. Ct. App. Ct. App. Dec. 312.

[79] Smith *v.* Knapp, 30 N. Y. 581.

[80] Fairchild *v.* Case, 24 Wend. 381.

[81] Howland *v.* Squier, 9 Cow. 91.

[82] Middle District Bank *v.* Deyo, 6 Cow. 732.

[83] Cantillon *v.* Graves, 8 Johns. 472; Wiles *v.* Brown, 3 Barb. 37; Bush *v.* Pettibone, 5 Barb. 273.

[84] Bullymore *v.* Cooper, 46 N. Y. 236, modifying 2 Lans. 71.

[85] Patterson *v.* Westervelt, 17 Wend. 546, and cases cited.

[86] Compare N. Y. Code Civ. Pro. § 158.

[87] Smith *v.* Knapp, 30 N. Y. 581, 592. As to the mode of proving insolvency, see the next chapter. As to the test of pleading, distinguishing between this action and that on the officer's liability as

debtor, though not pleaded, may be proved in mitigation.[88] General reputation of insolvency is inadmissible.[89]

14. Action for Failure to Return.

Proof of the delivery of an execution to the sheriff and his failure to return it within the time fixed by statute establishes *prima facie* plaintiff's right to recover the full amount defendant was commanded by the execution to collect.[90] Plaintiff is, *prima facie*, entitled to recover the whole amount due on his judgment, upon proving the judgment,[91] the delivery of the writ to the defendant to be executed,[92]

bail, compare Smith *v.* Knapp, 30 N. Y. 581; Metcalf *v.* Stryker, 31 N. Y. 255; People *v.* Dikeman, 3 Abb. Ct. App. Dec. 520; Bensel *v.* Lynch, 44 N. Y. 162, affi'g 2 Robt. 448.

[88] Barnes *v.* Willett, 35 Barb. 514.

[89] Fairchild *v.* Case, 24 Wend. 381, 384.

[90] Pach *v.* Gilbert, 124 N. Y. 612, 27 N. E. Rep. 391.

But when a clerk who taxed costs failed to include such amount in the sum allowed by the judgment, and the execution issued upon this judgment was for the amount in the judgment and the costs taxed thereon, the plaintiff suing the sheriff for failure to make a return was not entitled to a judgment of amercement. Fisher *v.* Franklin, 38 Kan. 251, 16 Pac. Rep. 341.

An execution which is defective but amendable is not void and therefore the defect constitutes no defense for the sheriff who did not make his return until after proceedings were commenced against him. Johnson *v.* Price, 47 Fla. 265, 36 So. Rep. 1031.

Similarly the fact that a second execution was issued before the first one has been returned is not available as a defense to a sheriff charged with a failure to return the second one, inasmuch as it is irregular only. Mollineau *v.* Mott, 78 N. Y. App. Div. 493, 79 N. Y. Supp. 661.

But a sheriff is not liable for his failure to execute or return a writ issued on a void judgment. Peo. *v.* Whitehead, 90 Ill. App. 614, 622.

[91] See, as to the mode, Chapter XXIX; Cornell *v.* Barnes, 7 Hill, 35; Smith *v.* Geraty, 61 Misc. 101, 112 N. Y. Supp. 1100.

But where the judgment was void, the sheriff incurred no liability for his failure to return the execution issued thereon. Dailey *v.* State, 56 Miss. 475.

It appears that a plaintiff who sues a sheriff for his failure to return a *fieri facias* upon a judgment has the duty of proving the judgment. Cox *v.* Ross, 56 Miss. 481.

[92] See paragraphs 6 and 15.

together with his neglect to return it.[93] The nature of an action against an officer for neglect to return an execution is sufficient notice to defendant to produce the execution.[94] That the officer had sufficient time to proceed under the writ, may be inferred from circumstances.[95] It is best to give some evidence of failure to return.[96] Very slight evidence is enough to shift the burden of proof. It is not necessary to show the collection of money,[97] nor the existence of property out of which it might have been collected;[98] but this may be proved if alleged.[99]

Plaintiff need not show that the debtor had property.[1]

It is not necessary to allege in the complaint that the sheriff's fees were paid, since the failure to pay such fees is an affirmative matter. Van Cleave *v.* Bucher, 79 Cal. 600, 21 Pac. Rep. 954.

[93] Pardee *v.* Robertson, 6 Hill, 550.

A mere indorsement of a return upon the execution "does not avoid the liability of the sheriff for a failure to make an actual return to the clerk of the execution itself." Wilson *v.* Young, 58 Ark. 593, 25 S. W. Rep. 870.

The Georgia courts have distinguished between a final and a *mesne* process. In the former case "where the plaintiff has established the validity of his debt, recovered a judgment, obtained a lien, and placed the *fi. fa.* in the hands of the officer for levy and return, and the sheriff fails to comply with the mandate of the writ, . . . the presumption arises that the plaintiff has been damaged to the amount of the debt." The burden is then on the sheriff. But in the case of a *mesne* process no such presumption exists and the plaintiff must set out and prove that he has been actually damaged. Beck, etc., Hardware Co. *v.* Knight, 121 Ga. 287, 48 S. E. Rep. 930, 3 L. R. A. N. S. 420, 2 Ann. Cas. 9.

[94] Story *v.* Patten, 3 Wend. 486; Wilson *v.* Gale, 4 Id. 623.

[95] Wilson *v.* Gale, 4 Wend. 623.

[96] That this is unnecessary was held in State *v.* Schar, 50 Mo. 393.

But it has been held in an action against a constable that when the plaintiff proved the judgment, the execution issued thereon and the delivery of the execution to the officer, it then devolved upon the officer to show what was done with the execution, since the disposition of it is then within his peculiar knowledge. State *v.* Schar, 50 Mo. 393.

[97] Sloan *v.* Case, 10 Wend. 370.

[98] Pardee *v.* Robertson, 6 Hill, 550.

[99] Stevens *v.* Rowe, 3 Den. 327. Compare Ledyard *v.* Jones, 7 N. Y. 550.

[1] Pardee *v.* Robertson (above). The officer when sued for his

Prima facie the measure of damages is the amount required to be raised by the execution; [2] but the officer may show that the debtor had nothing from which the money could have been made; [3] or anything which attacks the judgment; or shows that plaintiff's interest is affected.[4]

failure to return an order of sale had the burden of showing that there was not property sufficient to satisfy the judgment. In the absence of such proof it was presumed that the debtor had sufficient property. Ranken *v.* Jones, 53 S. W. Rep. (Tex. Civ. App.) 583.

Where the execution plaintiff pointed out property to be levied on, the sheriff was *prima facie* liable for his failure to make the levy and the burden of proving that the property pointed out was not subject to the levy rested upon him. Evidence in support of the sheriff's claim was therefore properly admissible in an action against him for failure to make his return. Mathis *v.* Carpenter, 95 Ala. 156, 10 So. Rep. 341, 36 Am. St. Rep. 187.

[2] Ledyard *v.* Jones, 7 N. Y. 550. See 3 L. R. A. N. S. 420, notes.

"The sheriff having failed to return the execution, he was liable by force of the statute . . . for the full amount of the judgment, unless it was made to appear that no injury had resulted to the plaintiff." Hale *v.* Bickett, 34 Tex. Civ. App. 369, 78 S. W. Rep. 531.

"Where a sheriff neglects to return an execution within the time required by law or to levy upon property as commanded by the writ, *prima facie* the plaintiff in the execution has lost his entire debt, and the burden of the proof is upon the sheriff to show the contrary." Moore *v.* Floyd, 4 Or. 101.

Where according to the "return of the clerk of the court," the city marshal had made no return of an execution issued to him he was *prima facie* "liable for the amount of the judgment." Smith *v.* Geraty, 61 Misc. 101, 112 N. Y. Supp. 1100.

Proof that the sheriff failed to make a return at the instance of the attorney for the execution plaintiff will relieve him from liability. Rickham *v.* Kosminsky, 74 Ark. 413, 86 S. W. Rep. 292, 4 Ann. Acc. 978. See also Peo. *v.* Offerman, 84 Ill. App. 132.

[3] Dunphy *v.* Whipple, 25 Mich. 10; Swezey *v.* Lott, 21 N. Y. 481. For the mode of proof, see next chapter.

"The sheriff may mitigate the damages by proving the extent of the loss the plaintiff in execution

[4] Wehle *v.* Connor, 69 N. Y. 546, 549, rev'g 41 Super. Ct. (J. & S.) 201. As, for instance, that such interest was levied upon by an attachment, and liable to be applied otherwise than in payment to the plaintiff, or that plaintiff has less interest than the face of it, and

In rebuttal plaintiff may show that the debtor had property, though this be not alleged.[5]

Tardy return is no defense.[6]

has suffered, by showing that the execution debtor was insolvent, or any fact which would legally tend to show the actual amount of damages the plaintiff has sustained." Moore *v.* Floyd, 4 Or. 101.

If the defendant proves an attempt to collect the amount of the execution and that it was uncollectible, the rule seems to excuse the officer for a failure to return, where he has collected no money. Smith *v.* Geraty, 61 Misc. 101, 112 N. Y. Supp. 1100.

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has no right to demand payment to the full amount, or that the judgment was fraudulent and void, that it had been paid, assigned, and does not belong to plaintiff, or that plaintiff has directed the execution not to be returned, or that it was stayed by order of court. Id.

Though in the case of a final process there is a presumption that the plaintiff has been injured the amount of the debt, for failure to execute the process, the burden thrown on the sheriff may be shifted and the presumption rebutted if the sheriff shows facts mitigating the damages or that he could collect no money on a fi. fa. by the exercise of reasonable diligence. Beck, etc., Hardware Co. *v.* Knight, 121 Ga. 287, 48 S. E. Rep. 930, 3 L. R. A. N. S. 420, 2 Ann. Cas. 9. See also Wheeler *v.* Thomas, 57 Ga. 161.

[5] Pardee *v.* Robertson, 6 Hill, 550; Ledyard *v.* Jones (above); Humphrey *v.* Hathorn, 24 Barb. 278.

Merely showing that the execution defendant was insolvent was insufficient to excuse the sheriff in the face of evidence that the execution defendant had property subject to execution and within the sheriff's jurisdiction. Hale *v.* Bickett, 34 Tex. Civ. App. 369, 78 S. W. Rep. 531.

[6] Brookfield *v.* Remsen, 1 Abb. Ct. App. Dec. 210.

A marshal, to whom an execution had issued, could not extend the time for payment of the debt beyond the return day of the execution and procure a renewal of the execution unknown to and without the consent of the judgment plaintiff, and he was liable for damages when the judgment debtor disappeared without making payment. McGuire *v.* Bausher, 52 N. Y. App. Div. 276, 65 N. Y. Supp. 382.

Under the Kentucky statute, a mere verbal consent by the plaintiff to delay the return of an execution constitutes no defense to an action against the sheriff for damages for such delay. Ridgway *v.* Moody, 91 Ky. 581, 16 S. W. Rep. 526, 13 Ky. L. 188.

15. — for False Return.

The judgment must be proved;[7] or, in the case of *mesne* process, the original cause of action;[8] and the issue, delivery and return of the process.[9] The identity of the process is sufficiently proved by the officer's indorsement on it (made under the statute [10]) and his return, and proof of his acts intermediate these times, without extrinsic evidence of manual possession by the officer at the time of acting under it.[11]

A *return* amended by leave of court, though after action commenced, may be read in evidence with the same effect as if an original return.[12]

Plaintiff must give some evidence of *falsity;*[13] but slight evidence suffices to throw on defendant the burden of proving its truth.[14]

[7] McDonald *v.* Bunn, 3 Den. 45. *Contra,* Blivin *v.* Bleakley, 23 How. Pr. 126. As to the mode of proof, see Chapter XXIX.

[8] Parker *v.* Fenn, 2 Esp. 477, n., 2 Greenl. Ev. 531, § 592.

[9] See paragraphs 6 and 12.

[10] Paragraph 6.

[11] Williams *v.* Lowndes, 1 Hall, 578, 597.

Where the sheriff was charged with a false return it was proper to allow the return to be read to the jury with the indorsement thereon, proof being offered to show that the indorsement was made at the direction of the party controlling the execution. Bohon *v.* State, 5 Blackf. (Ind.) 467.

[12] People *v.* Ames, 38 N. Y. 484; Bradford *v.* Read, 2 Sandf. Ch. 163.

"The right of the sheriff to amend his return by leave of the court and with the aid of the written memoranda, affidavits and notices served on him, is too well settled law in this state to require more than a statement of it." State *v.* Jenkins, 170 Mo. 16, 70 S. W. Rep. 152.

[13] Watson *v.* Brennan, 66 N. Y. 621, rev'g 39 Super. Ct. (J. & S.) 81.

The law distinguishes between a false return and a failure to state all the facts. Consequently where a sheriff made a levy on goods to which third parties laid claim and released the same because the

[14] 2 Greenl. Ev. 531, § 592; Holbrook *v.* Brennan, 6 Daly, 50.

But it seems that a single affidavit stating that no counter-case on appeal had been served is not sufficient to impeach the official return of the sheriff showing that service of a case on appeal had been made. Burlingham *v.* Canady, 156 N. C. 177, 72 S. E. Rep. 324.

To prove falsity of a return of *nulla bona*, the debtor's possession of property is *prima facie* evidence of ownership, until the officer gives evidence of title or at least of some adverse claim.[15] To prove falsity of a return of not found, the fact that the debtor did not abscond, but continued in the daily exercise of his usual occupation, appeared publicly as usual, and was visible to all who came to him on business, is sufficient evidence that he could have been arrested.[16] To prove a levy, enough must be shown to make the officer a trespasser but for the process.[17]

The judgment rendered ineffectual is *prima facie* evidence of the measure of *damages;* [18] but it may be met by evidence of the total inability of the debtor; [19] not, however, by showing that the amount so directed to be levied was not due upon the judgment.[20]

A levy made under the process does not conclude the officer from showing that the debtor had no title, and that

judgment-creditor failed to give him an indemnifying bond, his failure to state these facts on his return did not constitute a false return. State *v.* Jenkins, 170 Mo. 16, 70 S. W. Rep. 152.

Where a sheriff is sued for making a false return that he had served process upon the plaintiff which resulted in a judgment being taken against him, and it is shown that the plaintiff appeared specially in that action and alleged that he had not been served, but this issue was decided against him whereupon he put in no defense on the merits, he is in fault for not so doing and cannot hold the sheriff for the judgment taken against him. State *v.* McCarthy, 134 Mo. App. 630, 114 S. W. Rep. 1110.

[15] Magne *v.* Seymour, 5 Wend. 312.

[16] Beckford *v.* Montague, 2 Esp. 475.

[17] Camp *v.* Chamberlain, 5 Den. 198; and see Bond *v.* Willett, 1 Abb. Ct. App. Dec. 165; Elias *v.* Farley, 2 Id. 11.

[18] Weld *v.* Bartlett, 10 Mass. 472; Bacon *v.* Cropsey, 7 N. Y. 195.

[19] Weld *v.* Bartlett (above).

[20] Bacon *v.* Cropsey (above).

As a defense to an action for the false return of an execution, the sheriff could show any fact which tended to annul, avoid or vacate the judgment on which the execution was issued, as for instance that the judgment debtors were bankrupts whose property belonged to their assignees. Dorrance *v.* Henderson, 92 N. Y. 406, aff'g, 27 Hun, 206.

he abandoned the levy in good faith on that account,[21] even after plaintiff had indemnified him.[22] An inquisition taken by the sheriff's jury is conclusive on the right of property,[23] unless it be shown that the sheriff did not act in good faith,[24] or that there was a sufficient tender of indemnity.[25]

The fact that the process was voidable had the debtor chosen to object is not relevant.[26] The sheriff's knowledge that the return was false, does not alone aggravate the damages.[27]

16. Admissions, Declarations, and Conduct of Deputies, &c.

Against the sheriff, the admissions and declarations of one who has given him an indemnity, being the real party in interest, are admissible.[28] So are those of his under-

[21] Lummis *v.* Kasson, 43 Barb. 373.

Where attached goods a were claimed by a stranger as his own property and subsequently to his taking them away, the attachment plaintiff secured judgment against the attachment defendant and issued execution against the property, it was proper for the sheriff in an action for a false return of *nulla bona* to support his return by proving that the title to the attached property was in the stranger. Blair *v.* Flack, 62 Hun, 509, 17 N. Y. Supp. 64.

[22] Id., but compare Curtis *v.* Patterson, 8 Cow. 65, 67.

[23] Bayley *v.* Bates, 8 Johns. 139.

[24] Id.

[25] Van Cleef *v.* Fleet, 15 Johns. 147.

[26] Bacon *v.* Cropsey, 7 N. Y. 195; Blivin *v.* Bleakley, 23 How. Pr. 124.

[27] Potter *v.* Lansing, 1 Johns. 215.

[28] Bayley *v.* Bryant, 24 Pick. 198, Rosc. N. P. 71.

A bond given by a judgment creditor to a sheriff to protect him from loss for levying upon property that the sheriff knows is not subject to levy is void; but if there is reasonable doubt as to the ownership of the goods or their being subject to levy, such bond is valid. Stanton *v.* McMullen, 7 Ill. App. 326.

Where a sheriff made a return of "no property found" which the plaintiff's evidence tended to prove was false, the officer could only discharge himself from liability by showing that the property was not subject to levy; and the burden of proof was upon him. Monmouth Second Nat. Bank *v.* Gilbert, 174 Ill. 485, 51 N. E. Rep. 584, 66 Am. St. Rep. 306.

sheriff [29] or deputy,[30] if the action is for the default of the declarant, or if they were made as part of the *res gestæ* of an act properly in evidence, or were made within the scope of the agency.[31] Proof of a person's being deputy sheriff, and of his advertising property for sale under an execution, as such, is sufficient to authorize evidence of his declarations, without proving the issuing and delivery of an execution to him.[32] Whether the sheriff recognized the act of his deputy or not need not be shown.[33]

To prove instructions from the party such as to exonerate the sheriff from liability for acts of his deputy, it must be shown, not only that the party directed the deputy to depart from the line of duty imposed by law, but that the deputy followed, or, at least, undertook to follow directions given.[34]

[29] Rosc. N. P. 74.

[30] Tyler *v.* Ulman, 12 Mass. 163, 1 Greenl. Ev. 210, § 180.

[31] Stewart *v.* Wells, 6 Barb. 79. Where a deputy was given an execution for service, his testimony in an action against the sheriff for insufficient security, that he had made diligent but futile search for property was competent. Carter *v.* Duggan, 144 Mass. 32, 10 N. E. Rep. 486.

[32] Stewart *v.* Wells (above).

[33] McIntyre *v.* Trumbull, 7 Johns. 35.

[34] Sheldon *v.* Payne, 7 N. Y. 453; Walden *v.* Davidson, 15 Wend. 575.

CHAPTER XXXIV

ACTIONS FOR DECEIT OR FRAUD

1. Frame of the action.
2. The representation.
3. Liberal rule of evidence: Cogency.
4. Falsity.
5. — as to solvency, &c.
6. — reason to believe one insolvent, &c.
7. Scienter.
8. Intent to deceive.
9. Plaintiff's reliance.
10. Damages.
11. Oral evidence to vary writing.
12. Testimony of the parties.
13. Declarations of conspirators.
14. Defenses.
15. — former adjudication.

1. Frame of the Action.

Plaintiff cannot recover on proof of a mere breach of contract,[35] even coupled with mistake [36] or conversion.[37] If the complaint contains all the allegations necessary to authorize recovery on a breach of contract, and, also, all those necessary to sustain a recovery for fraud and deceit, plaintiff cannot recover without proving the fraud.[38] The

[35] Barnes *v.* Quigley, 59 N. Y. 265; Peck *v.* Root, 5 Hun, 547.

Though unnecessary at common law, it is necessary under the code to set forth in the complaint the facts constituting the fraud complained of. See Truro *v.* Passmore, 38 Mont. 544, 100 Pac. Rep. 966.

[36] Dudley *v.* Scranton, 57 N. Y. 424.

[37] Saltus *v.* Genin, 3 Bosw. 250.

[38] Ross *v.* Mather, 51 N. Y. 108, extended by amendment of § 549 of N. Y. Code of Civ. Pro., in 1879, to all cases of an allegation of fraud in contracting the liability, except promises of marriage. Before that amendment, allegations of fraud, if incidental, in a complaint, the main scope of which was a breach of contract, might be disregarded. Graves *v.* Waite, 59 N. Y. 156. As to amending, see Crosby *v.* Watts, 41 Super. Ct. (J. & S.) 208; Saltus *v.* Genin, 8 Abb. Pr. 253; Hochstetter *v.* Isaacs, 14 Abb. Pr. N. S. 235. Fraud not alleged may be proved in avoidance to the effect of an agreement proved by the adverse party. Claflin *v.* Taussig, 7 Hun, 223.

To plead properly a cause of ac-

averment of a contract may be deemed matter of inducement merely.[39] If the deceit is proved, an allegation of conspiracy unproved does not necessarily defeat the action.[40]

2. The Representation.[41]

The fraudulent representation relied on must be stated in the complaint.[42] Proof of it in substance and legal effect is

tion for deceit, one must aver not only that the representations complained of were false but that defendant knew them to be so and made them with the intent of deceiving plaintiff who was thereby deceived and induced to act to his injury in reliance thereon. Remmers *v.* Remmers, 217 Mo. 541, 117 S. W. Rep. 1117.

Moreover, damage by reason of plaintiff's reliance upon the fraudulent representations must be alleged and proven. Anderson *v.* G. Heilman Brewing Co., 104 Minn. 327, 116 N. W. Rep. 655.

[39] Elwood *v.* Gardner, 10 Abb. Pr. N. S. 233, s. c., 45 N. Y. 349, affi'g 9 Abb. Pr. N. S. 99. As to the frame of the action, compare chapter XVI, paragraphs 1 and 68 of this vol.

See Haarstad *v.* Gates, 107 Minn. 565, 119 N. W. Rep. 390.

A complaint contains all the essential elements, where it sets forth the representations made; that they related to existing material facts; that they were false; that the defendant knew of their falsity and intended thereby to deceive the plaintiff; that the plaintiff in reliance thereon and in ignorance of their falsity acted upon them to his damage. See Simons *v.* Cissna, 52 Wash. 115, 100 Pac. Rep. 200. Greene *v.* Mercantile Trust Co., 60 Misc. Rep. 189, 11 N. Y. Supp. 802; Southern Express Co. *v.* Fox 131 Ky. 257 115 S. W. Rep. 184, 117 S. W. Rep. 270 133 Am. St. Rep. 241; Foster *v.* Oberreich, 230 Ill. 525.

In the absence of any contract, a gift induced by fraud, deceit, and misrepresentation may be recovered. Amory *v.* Nason, 125 N. Y. App. Div. 815, 110 N. Y. Supp. 131.

[40] Hayward *v.* Draper, 3 Allen, 551.

The allegations may be regarded as divisible, and the plaintiff may succeed if he can prove any one of them which of itself makes a cause of action. Crane *v.* Schaefer, 140 Ill. App. 647.

[41] For the distinction between actionable false representations and promissory representations or opinions, &c., see Sawyer *v.* Prickett, 19 Wall. 146; Simar *v.* Canaday, 53 N. Y. 298. Compare Ellis *v.* Andrews, 56 N. Y. 83; Foster *v.* Swasey, 2 Woodb. & M. 217.

[42] Ellis *v.* Andrews (above). But deceit may be proved by actions without evidence of express words. Chandelor *v.* Lopus, 1

enough.[43] If a sufficient fraudulent representation is duly alleged and proved, a representation not specifically alleged may also be proved.[44] A variance by proving only one of several representations alleged,[45] if the one alleged and proved be sufficient to maintain the action, is not material. The fact in issue is to be determined from the preponder-

Smith's L. Cas. 299, 320, and cases cited.

The representation must be as to an existing fact, and not a mere expression of opinion, judgment or expectation. Buschman *v.* Codd, 52 Md. 202; Roberston *v.* Parks, 76 Md. 118, 24 Atl. Rep. 411; Wade *v.* Ringo, 122 Mo. 322, 25 S. W. Rep. 901.

It is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. If the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion. McDonald *v.* Smith, 139 Mich. 211, 102 N. W. Rep. 668.

The facts and circumstances constituting the fraud should be set forth clearly and concisely but in sufficient detail to apprise the defendant of what he is called upon to answer. Harris *v.* Bottum, 81 Vt. 346, 70 Atl. Rep. 560; American Surety Co. *v.* Pacific Surety Co., 81 Conn. 252, 70 Atl. Rep. 584, 19 L. R. A. N. S. 83.

Merely to charge a defendant with a fraudulent intent in doing the acts complained of is insufficient if the acts themselves, as pleaded, do not constitute a case of fraud at law. Gill *v.* Manhattan L. Ins. Co., 11 Ariz. 232, 95 Pac. Rep. 89.

[43] Craig *v.* Ward, 1 Abb. Ct. App. Dec. 454, s. c., 3 Abb. Pr. N. S. 235, 3 Keyes, 387, affi'g 36 Barb. 377. In a suit upon a promissory note given as part payment of corporation stock, the defense being that the defendants were induced to make such purchase by certain false representations of the plaintiff, testimony showing that prior to such sale he made to other persons similar misstatements in the sale of a portion of the same series of stock is irrevelant and immaterial. Johnson *v.* Gulick, 46 Neb. 817, 65 N. W. Rep. 883. Where plaintiff alleged fraud in the sale of hogs that he purchased out of a drove, from defendants, their statements, as to the soundness of the hogs in the drove, made to other prospective purchasers, are admissible in evidence to show their intent in making representations of the soundness to plaintiff. Zimmerman *v.* Brannon, 103 Iowa, 144, 72 N. W. Rep. 439.

[44] Oliver *v.* Bennett, 65 N. Y. 559.

[45] Yates *v.* Alden, 41 Barb. 172; Updike *v.* Abel, 60 Barb. 15; Crane *v.* Schaefer, 140 Ill. App. 647.

ance of the evidence, notwithstanding it may impute a crime.[46]

Fraud by defendants' agent,[47] or by one of a firm, defendants,[48] when it will sustain the action, is admissible under an allegation of fraud by defendants.[49] Against a co-defendant, evidence of his original knowledge of the scheme, and of acceptance of its benefits, is sufficient to go to the jury, without evidence of direct representations by him.[50]

If representations directly to the plaintiff or his agent are not shown, there must be evidence that the defendant had in mind the plaintiff, or a class of which he was one.[51]

[46] Brown *v.* Tourtelotte, 24 Col. 204, 50 Pac. Rep. 195.

[47] Harlow *v.* Perry, 114 Me. 460, 96 Atl. Rep. 775; Elwell *v.* Chamberlain, 31 N. Y. 611; Durst *v.* Burton, 2 Lans. 137, affi'd in 47 N. Y. 167, 8 Am. L. Rev. 631, 3 Id. 442, and cases cited. Compare Lansing *v.* Coleman, 58 Barb. 611, s. P., in case of husband acting for wife. Warner *v.* Warren, 46 N. Y. 228; Graves *v.* Spier, 58 Barb. 349. Compare Birdseye *v.* Flint, 3 Barb. 500; Weckler *v.* First National Bank of Hagerstown, 42 Md. 581, s. c., 20 Am. Rep. 95.

[48] Chapter IX, paragraphs 23, etc., of this vol., and Chamberlin *v.* Prior, 1 Abb. Ct. App. Dec. 338; Tindle *v.* Birkett, 171 N. Y. 520, 64 N. E. Rep. 210, 89 Am. St. Rep. 822.

[49] King *v.* Fitch, 2 Abb. Ct. App. Dec. 508; Mackay *v.* Commercial Bank of New Brunswick, L. R. 5 P. C. 394, s. c., 9 Moak's Eng. 202. As to corporate officers, see page 130 of this vol.; 1 Redf. on Ry. 592 (14); Arthur *v.* Griswold, 55 N. Y. 400; Morgan *v.* Skiddy, 62 N. Y. 319, affi'g in part and rev'g in part 36 Super. Ct. (J. & S.) 152; Peek *v.* Gurney, L. R. 6 Ho. of L. 377, s. c., 8 Moak's Eng. 1.

[50] Miller *v.* Barber, 66 N. Y. 558, affi'g 4 Hun, 802; Levy *v.* Abramsohn, 39 Misc. Rep. 781 N. Y. Supp. 344.

[51] Tindle *v.* Birkett, 171 N. Y. 520, 64 N. E. Rep. 210, 89 Am. St. Rep. 822; Swift *v.* Winterbotham, L. R. 8 Q. B. 244, s. c., 5 Moak's Eng. 202; 2 Abb. N. Y. Dig. new ed. 334, &c. Compare Faris *v.* Peck, 10 Abb. Pr. N. S. 55, s. c., 2 Sweeny, 689; Simpson *v.* Wiggin, 3 Woodb. & M. 413; Crocker *v.* Lewis, 3 Sumn. 1; Peek *v.* Gurney, L. R. 6 House of L. 377, s. c., 8 Moak's Eng. R. 1. See Iasigi *v.* Brown, 17 How. U. S. 183.

The representations must be intended to influence the action of the person injured. If addressed to the public generally or to a class, then any person belonging to the class and misled may sue; but where they are addressed to and intended to influence only a limited class, then as a rule persons outside that class with whom the

3. Liberal Rule of Evidence; Cogency.

Evidence tending to show the true nature of the transaction is freely received, unless forbidden by settled rules.[52] Even slight evidence having a tendency to establish fraud, is competent.[53] Thus, for the purpose of throwing light on the transaction, evidence of acts, tending to effect the fraud sued for, done by some of several partners, even though before the formation of their partnership, may become competent.[54] Evidence tending to show the impossibility that the representations should have been true is relevant, as well as evidence directly to their falsehood.[55]

persons making the statement had no dealings but who may have been injured by reliance upon such statements independently coming to their knowledge, cannot maintain an action thereon. Greene *v.* Merchantile Trust Co., 60 Misc. Rep. 189, 111 N. Y. S. 802.

[52] See Bigelow on Fr. 476; Hazelton *v.* Carolus, 132 Ill. App. 512; Shock *v.* Solar Gaslight Co., 222 Pa. St. 271, 71 Atl. Rep. 94.

This is due to the fact that fraud is rarely susceptible of direct proof, and must usually be established by circumstantial evidence. See McLeroth & Co. *v.* Magerstadt, 136 Ill. App. 361.

[53] See Hubbard *v.* Briggs, 31 N. Y. 518. There is no rule of law that the evidence of a single witness is insufficient to prove fraud, if denied by the person charged with the fraud. The quality of the testimony given, as well as the number of witnesses produced, must be considered in determining the question of credibility or preponderance of evidence. Beckwith *v.* Ryan, 66 Conn. 589, 34 Atl. Rep. 488; Hinton *v.* Knott, 134 Ill. App. 294; Johnson *v.* Carter, 143 Iowa, 95, 120 N. W. Rep. 320.

[54] Chester *v.* Dickerson, 54 N. Y. 1, s. c., 45 How. Pr. 326, affi'g 52 Barb. 349; and see Gethy *v.* Devlin, 24 N. Y. 403.

[55] See, for instance, Thorn *v.* Helmer, 4 Abb. Ct. App. Dec. 408.

In Collins *v.* Chipman, 41 Tex. Civ. App. 563, 95 S. W. Rep. 666, the court said:—"The issue in this case was fraud and the burden of proving it was upon the plaintiff. From its very nature, it is usually impossible to prove it by direct and positive evidence, and for this reason a large latitude is permitted in the admission of evidence on such an issue. Evidence of facts not themselves directly in issue are admissible where such facts are relevant to the fact in issue. Such facts may be in time remote from the principal fact, but when taken together and connected with other facts, they may form links in an unbroken chain of circumstances extending back to the time of the occurrence

Testimony of a single competent witness is sufficient to sustain a verdict.[56]

4. Falsity.

The burden is on plaintiff to give evidence of falsity.[57] If the falsity consists in the existence and contents of documents, such as the fact of incumbrances on real property, the admissions of defendant are not competent without excuse for not producing the best evidence.[58] Representations

of the main fact and establish its existence by showing that each link in the chain of facts extending from it was but the sequence of which it was the parent or proximate cause. If it be shown that in May, 1905, a corporation which was in January, 1902, represented by its president as being in a prosperous condition, paying from its net earnings annual dividends of 20 per cent. upon its capital stock, is found to be out of business and practically without assets, when it is questionable whether any cause has been shown for such an overwhelming disaster, can it not be inferred from such facts, taken in connection with others, that such representations were not true, but that its depleted condition in 1905 was but an index of its condition in 1902? Such testimony certainly tends in some degree to show such representations were not true. Such tendency authorized its admission as evidence. The degree of its probative force was for the jury to determine, and is a matter of no concern to this court."

[56] Morgan *v.* Skidmore, 3 Abb. New Cas. 95. Whether more than a preponderance of evidence can be required, see chapter XXVI, paragraph 31 and notes thereto of this vol.

[57] Schagun *v.* Scott Mfg. Co., 162 Fed. Rep. 209, 89 C. C. A. 189; Carter *v.* Eastman-Gardner Co., 95 Miss. 651, 48 So. Rep. 615; Barr *v.* Sofranski, 130 N. Y. App. Div. 783, 115 N. Y. Supp. 533; Belding *v.* King, 159 Fed. Rep. 411, 86 C. C. A. 391; Bigelow on Fr. 493; and see Gray *v.* Lessington, 2 Bosw. 257. Fraud is usually proved by inferences from facts and circumstances, and not by direct and positive proof. Del Vecchio *v.* Savelli, 10 Cal. App. 79, 101 Pac. Rep. 32. Acts do not give rise to a presumption of fraud if they can be accounted for on the basis of good faith and honesty. Baillie *v.* Western Assurance Co., 49 La. Ann. 658, 21 So. Rep. 736.

The presumption of honesty prevails unless overcome by irresistible evidence of double dealing on the part of him in whose aid the presumption arises. Snow *v.* Wathen, 127 N. Y. App. Div. 948, 112 N. Y. Supp. 41.

[58] Sherman *v.* People, 13 Hun, 577.

as to the amount of property, sales, etc., are proved to be false by showing substantial exaggerations.[59]

5. — as to Solvency, &c.

On the question of solvency or pecuniary ability,[60] facts which are the usual concomitants or consequences of pecuniary ability, or the contrary, are competent; thus, a judgment and execution, and its return unsatisfied;[61] dishonor of a check drawn by a merchant upon his banker;[62] the small amount a merchant had on deposit in bank at the time of his purchases;[63] the fact of having absconded and having been proceeded against as an absconding debtor, without sufficient assets to pay in full,[64] and the like, are competent; and such evidence is received more or less freely according as direct evidence is wanting or accessible. The taking of the poor debtor's oath, or a discharge from imprisonment for insolvency, if not in a court of record, may be proved by parol;[65] and irregularity in the certificate is immaterial.[66] Insolvency cannot be proven by reputation. After the fact of insolvency has been established, notoriety of the fact is competent

[59] Westcott *v.* Ainsworth, 9 Hun, 53.

In Saxby *v.* Southern Land Co., 109 Va. 96, 63 S. E. Rep. 423, the court sustained a demurrer to a complaint which alleged that the defendant represented that certain property could not be bought for less than $8000, although he had an option thereon at $4000 and knew the owners were glad to sell at that price, for the price at which the property could be bought was entirely under the control of defendant so long as he held the option, and there was therefore no false representation.

[60] See paragraph 6.

[61] Stahl *v.* Stahl, 2 Lans. 60.

[62] Brown *v.* Montgomery, 20 N. Y. 287.

[63] Jordan *v.* Osgood, 109 Mass. 457, s. c., 12 Am. Rep. 731. As to the mode of proving the balance in bank, see Lewis *v.* Palmer, 28 N. Y. 271; Clark *v.* Dearborn, 6 Duer, 309; Sullivan *v.* Warren, 43 How. Pr. 188; Boston & W. R. R. Co. *v.* Dana, 1 Gray, 83; Jordan *v.* Osgood, 109 Mass. 457, s. c., 12 Am. Rep. 731.

[64] Ten Eyck *v.* Tibbits, 1 Cai. 427. Compare Babcock *v.* Middlesex, &c. Bank, 28 Conn. 302; Simpson *v.* Carleton, 1 Allen, 109.

[65] Richardson *v.* Hitchcock, 28 Vt. 757.

[66] Id.

evidence tending to show notice or knowledge of the fact.[67]

Ability or inability to pay debts, is a fact which a witness conversant with the particulars may directly testify to.[68] Such a witness may be asked "what were the circumstances" of the person, or "what was his situation as to property";[69] "whether he was responsible for" a given sum, and the like.[70] Solvency within a reasonable period before the date in question will, in the absence of evidence of change, support an inference that the solvency continued.[71] To testify that the person "was considered good" is hearsay, or evidence of

[67] Martin *v.* Mayer, 112 Ala. 620, 622, 20 So. Rep. 963. "The records of the court are not the only evidence of a previous insolvency. A person who knows the fact may testify that another's indebtedness exceeds the value of his assets, and that, in fact, a person is insolvent. The truth of the statement or the source of his information may be tested by cross-examination. Mere hearsay as to the indebtedness of another is not competent, nor are the admissions of the party that he is indebted or insolvent, made in the absence of the person whose rights are involved, competent." Id.

Insolvency is one of those general facts, like possession, value and the like which in many cases can be directly testified to by one in a position to know without a disclosure of the items of fact on which the general statement is based. Campbell *v.* Park, 128 Iowa, 181, 101 N. W. Rep. 861.

[68] Thompson *v.* Hall, 45 Barb. 214; Lacy *v.* Kossuth County, 106 Iowa, 16, 75 N. W. Rep. 689.

[69] Caswell *v.* Howard, 16 Pick. 567.

Thus where there is an issue as to the defendant's solvency or insolvency, a witness may testify that he has knowledge that at the time in question the defendant "had nothing" and such testimony is not objectionable as a mere conclusion. Davis *v.* Davis, 20 Tex. Civ. App. 310, 49 S. W. Rep. 726.

[70] Hard *v.* Brown, 18 Vt. 87.

[71] Walrod *v.* Ball, 9 Barb. 271, 275. Compare French *v.* Willett, 10 Bosw. 566. So, on the question of the falsity of representations as to professional income in a given year, evidence of actual income in the next year, is relevant. Thorn *v.* Helmer, 4 Abb. Ct. App. Dec. 408. Compare, as to fluctuating profits, Masterton *v.* Village of Mt. Vernon, 58 N. Y. 391.

It has been held that the fact of subsequent insolvency may be shown as tending to prove insolvency at a prior date, the conditions in the meantime having remained substantially the same.

repute only, and not competent on the question of actual condition;[72] but to testify that the witness considered him good at the time, is admissible, in connection with his testimony to the facts.[73]

A witness who states the facts on which his opinion is based, and his means of knowledge[74] may state his opinion.[75] Without the facts his opinion is incompetent.[76] To qualify the witness for this purpose, he must show some knowledge as to the existence and ownership of property.[77] Mere inference from style of living, etc., is not competent.[78] It is no objection that the opinion was based partly on what was said by others, acquainted with the person, at the place[79] and at and before the time. In connection with direct opinions, evidence that the party was industrious and of good habits, is competent.[80]

When it is essential to prove actual insolvency it cannot be proved by general reputation.[81]

6. — Reason to Believe One Insolvent, &c.

Upon the question whether a party had reasonable cause to believe another insolvent, it is competent to show that he was

State *v.* Cadwell, 79 Ia. 432, 44 N. W. Rep. 700.

[72] Sheldon *v.* Root, 16 Pick. 567.

[73] Commonwealth *v.* Thompson, 3 Dana (Ky.), 301. Compare note on testimony to belief, &c., in 3 Abb. New Cas. 234.

[74] Beans *v.* Denny, 141 Iowa, 52, 117 N. W. Rep. 1091; Sherman *v.* Blodgett, 28 Vt. 149.

[75] Hard *v.* Brown, 17 Vt. 87; Crawford *v.* Andrews, 6 Geo. 244, 251. Compare Griffin *v.* Brown, 2 Pick. 304, 309.

Thus a member of a firm may testify whether or not his firm is "solvent" or "insolvent." Swan *v.* Gilbert, 175 Ill. 204, 51 N. E. Rep. 604, 67 Am. St. Rep. 208.

[76] Andrews *v.* Jones, 10 Ala. 460, 470.

[77] Babcock *v.* Middlesex Savings Bank, 28 Conn. 302, 306. The head note is too broad.

[78] Id.

[79] Hard *v.* Brown, 18 Vt. 87, 97; Beans *v.* Denny, 141 Iowa, 52, 117 N. W. Rep. 1091.

[80] Hard *v.* Brown, 18 Vt. 87, and see paragraph 6.

[81] Fairchild *v.* Case, 24 Wend. 381; Molyneaux *v.* Collier, 13 Geo. 406, 417. So, of the admissions of plaintiff's attorney. Potter *v.* Lansing, 1 Johns. 215.

generally reputed at the place to be so,[82] or the contrary; [83] and to show his business credit and pecuniary standing among those neighbors, creditors, etc., having dealings with him; [84] also his habits affecting credit and the probability of insolvency, such as attention or inattention to business, frugality or extravagance in expenditure, habitual waste of time; [85] and defendant's knowledge of these facts.[86]

A qualified witness may state his opinion whether the credit of the party was good; [87] whether he was in good reputation for property; [88] and the like. The fact that the knowledge of the witness does not extend to the condition of the party at places other than his chief residence or domicil, does not necessarily render it incompetent.[89]

7. Scienter.

If the false representations do not imply personal knowledge, plaintiff must show that the speaker knew them to be false when he made them,[90] or had good reason to believe that they were when made,[91] or that he intended them to

[82] Lee *v.* Kilburn, 3 Gray, 594, 598; Ward *v.* Herndon, 5 Port. 382; Amsden *v.* Manchester, 40 Barb. 158.

[83] Bartlett *v.* Decreet, 4 Id. 113; Sheen *v.* Bumpstead, 2 H. & C. 193, s. c., 10 Jur. N. S. 242.

[84] Heywood *v.* Reed, 4 Gray, 574.

[85] Simpson *v.* Carleton, 1 Allen, 109, 117.

[86] Id.; Sheen *v.* Bumpstead, (above).

[87] Hard *v.* Brown, 18 Vt. 87; Iselin *v.* Peck, 2 Robt. 631.

[88] Bartlett *v.* Decreet, 4 Gray, 113.

[89] Stebbins *v.* Miller, 12 Allen, 591, 594, 597.

[90] Oberlander *v.* Spiess, 45 N. Y. 175; Hubbell *v.* Meigs, 50 N. Y. 480; Cox *v.* Stillman, 59 Misc. Rep. (N. Y.) 248, 112 N. Y. Supp. 328.

Representations honestly made and with fair reason for believing them to be true can not be deemed to constitute fraud, although it may turn out that they were not true. Furnas *v.* Friday, 102 Ind. 129, 1 N. E. Rep. 296.

[91] Or knew facts sufficient to have put him upon inquiry. Craig *v.* Ward, 1 Abb. Ct. App. Dec. 454. Otherwise of merely having the means of knowledge. Lefever *v.* Lefever, 30 N. Y. 27.

Deception, accomplished by false statements, is not excused by a groundless belief in their truth on the part of the man who makes them, and amounts to legal fraud,

be understood as communicating his own actual knowledge, though conscious that he had not such knowledge.[92]

The allegation and the proof should correspond on these points.[93]

To show scienter, plaintiff may prove other declarations by defendant, on matters relevant to the issue, presumably or actually within his knowledge, and then show their falsity.[94]

8. Intent to Deceive.

Intent to deceive must be alleged and proved.[95] Proof of a false representation knowingly made, raises a presumption

if they are uttered to induce action on the part of another from which loss naturally results. In matters susceptible of actual knowledge, if the party who has, and is known to have, the best means of knowledge makes an affirmation contrary to the truth, in order to secure some benefit to himself, the law treats him as stating that he knows that whereof he affirms, and consequently is guilty of a fraud, although he spoke in ignorance of the facts. Schoefield Gear, etc., Co. *v.* Schoefield, 71 Conn. 1, 40 Atl. Rep. 1046.

Proof of negligence is not sufficient to warrant a recovery; it is not enough that the defendant has been guilty of a recklessness of conduct which might amount to a fraud in law, but which does not constitute actual, cognizant and intentional fraud. Polhemus *v.* Polhemus, 114 N. Y. App. Div. 920, 100 N. Y. Supp. 267.

[92] Marsh *v.* Falker, 40 N. Y. 562; *per* BRADY, J., in Indianapolis, &c. R. R. Co. *v.* Tyng, 2 Hun, 311, 319; limiting Bennett *v.* Judson, 21 N. Y. 238; Cabot *v.* Christie, 42 Vt. 121, s. c., 1 Am. Rep. 313; Whitehurst *v.* Virginia L. Ins. Co., 149 N. C. 273, 62 S. E. Rep. 1067; Spead *v.* Tomlinson, 73 N. H. 46, 59 Atl. Rep. 376, 68 L. R. A. 432.

Where one repeats information received from others, under the belief that it is true, but at the time of doing so explains that he has no personal knowledge, he is not guilty of fraud. Krause *v.* Cook, 144 Mich. 365, 108 N. W. Rep. 81.

[93] Marshall *v.* Fowler, 7 Hun, 237.

[94] Coleman *v.* People, 58 N. Y. 555, affi'g 1 Hun, 596, s. c., 4 Supm. Ct. (T. & C.) 61.

Evidence of complaints previously made to the defendant as to the health of cattle sold by him to the plaintiff is admissible to show the defendant's knowledge and thereby establish the deliberate falsity of his representations to the plaintiff. Welch *v.* Dunning, 163 Wis. 535, 158 N. W. Rep. 323.

[95] Jalass *v.* Young, 3 Pa. Super.

of a fraudulent intent.[96] Representations made in defendant's hearing, and without objection from him, may be proved in connection with evidence of false representations previously made by him; as tending to show intent.[97] For the same

Ct. 422; Colorado Springs Co. *v.* Wight, 44 Colo. 258, 96 Pac. Rep. 820, 16 Ann. Cas. 644; Clement *v.* Swanson, 110 Iowa, 106, 81 N. W. Rep. 233; Summers *v.* Metropolitan L. Ins. Co., 90 Mo. App. 691; Thorp *v.* Smith, 18 Wash. 277, 51 Pac. Rep. 381; McComb *v.* C. R. Brewer Lumber Co., 184 Mass. 276, 68 N. E. Rep. 222; Lefler *v.* Field, 52 N. Y. 621. Compare John *v.* Farwell Co. *v.* Nathanson, 99 Ill. App. 185; Bauer *v.* Taylor, 4 Neb. (Unof.) 710, 98 N. W. Rep. 29; Dudley *v.* Scranton, 57 Id. 424; Marshall *v.* Fowler, 7 Hun, 237. *Contra*, O'Neal *v.* Weisman, 39 Tex. Civ. App. 592, 88 S. W. Rep. 290; Totten *v.* Burhans, 91 Mich. 495, 51 N. W. Rep. 1119; Holcomb *v.* Hoble, 69 Mich. 396, 37 N. W. Rep. 497. In Michigan it is held that where the defendant reaps a benefit from his false representations, proof of their falsity is sufficient, it not being necessary to show that the defendant either knew, or should have known, of such falsity. Aldrich *v.* Scribner, 154 Mich. 23, 117 N. W. Rep. 581, 18 L. R. A. N. S. 379; Polhil *v.* Walter, 3 Barn. & Ad. 114. Compare Watson *v.* Poulson, 15 Jur. 1111.

One who makes a misrepresentation must, to render himself liable, have made it with the intention that it should be acted upon by the person to whom it is made, or by one to whom he intended it should be communicated, and he is therefore responsible only to such persons as he intended to influence. Henry *v.* Dennis, 95 Me. 24, 49 Atl. Rep. 58, 85 Am. St. Rep. 365; Butterfield *v.* Barber, 20 R. I. 99, 37 Atl. Rep. 532.

[96] People *v.* Herrick, 13 Wend. 87, 3 Am. L. Rev. 430, and cases cited; Eastern Trust, etc., Co. *v.* Cunningham, 103 Me. 455, 70 Atl. Rep. 17; Upchurch *v.* Mizell, 50 Fla. 456, 40 So. Rep. 29; Delaney *v.* Valentine, 154 N. Y. 692, 49 N. E. Rep. 65; Weeks *v.* Currier, 172 Mass. 53, 51 N. E. Rep. 416.

Mere negligence in making a statement which proves to be false, not indicating a fraudulent intent, does not establish affirmative fraud such as is necessary to sustain the action. Bell *v.* James, 128 N. Y. App. Div. 241, 112 N. Y. Supp. 750.

It has been held that an allegation of the complaint, disclaiming any contention that the defendant's representations were intentionally fraudulent, will be construed to merely disclaim a corrupt intent, which latter is not necessary to the cause of action. Whiting *v.* Price, 169 Mass. 576, 48 N. E. Rep. 772, 61 Am. St. Rep. 307.

[97] Hubbard *v.* Briggs, 31 N. Y. 518, 537.

purpose, evidence of other similar frauds committed by defendant or other persons, at about the same time, is competent.[98] Where the alleged deceit was by fraudulent suppression of facts, it is competent to prove that, in the other instances, it was committed by actual misrepresentation concerning the same facts, if they were both false and fraudulent.[99] But such other misrepresentations will not alone sustain a recovery, unless the maker intended they should be, and they were, communicated to, and acted on, by plaintiff.[1] Plaintiff need not prove defendant's motive,[2] nor that a defendant actually guilty, was benefited, or was in collusion with one who was benefited.[3] But where the intention of the defendant is material it is competent for him to testify what his intention was.[4]

One sued for misrepresentations made by him, to be acted upon by others, may testify to his understanding in regard to the meaning of his representations.[5]

[98] Butler *v.* Watkins, 13 Wall. 464; Cary *v.* Houghtaling, 1 Hill, 311; Amsden *v.* Manchester, 40 Barb. 158; Van Kleeck *v.* Le Roy (below). *Contra*, unless such frauds were parts of one fraudulent scheme. Jordan *v.* Osgood, 109 Mass. 457, s. c., 12 Am. Rep. 731; Edwards *v.* Warner, 35 Conn. 517.

Where the plaintiff sued to recover for money obtained from him by the defendants through a confidence game and alleged in his petition a conspiracy between the defendants, for proof of such a charge resort was properly had to other cases of a similar character in which concert of action was had. Stewart *v.* Wright, 147 Fed. Rep. 321, 77 C. C. A. 499.

[99] Hall *v.* Naylor, 18 N. Y. 588, rev'g 6 Duer, 71.

Where one of the parties to a contract is mistaken in a material matter pertaining thereto, and the other party, knowing of such mistake, is silent in regard thereto, such silence is a fraud upon the mistaken party. Marietta Fertilizer Co. *v.* Beckwith, 4 Ga. App. 245, 61 S. E. Rep. 149.

[1] Van Kleek *v.* Le Roy, 4 Abb. Ct. App. Dec. 479, s. c., 4 Abb. Pr. N. S. 431, affi'g 37 Barb. 544.

[2] Gould *v.* St. John, 16 Wend. 650, and cases cited.

[3] Hubbard *v.* Briggs, 31 N. Y. 518; Green *v.* Mercantile Trust Co., 60 Misc. Rep. 189 (N. Y.), 111 N. Y. Supp. 802.

[4] Bartley *v.* Phillips, 179 Pa. St. 175, 36 Atl. Rep. 217.

[5] Nash *v.* Minnesota Title Ins. Co., 163 Mass. 574, 47 Am. St. Rep. 489, 40 N. E. Rep. 1039. Hence, where defendant has made

9. Plaintiff's Reliance on the Representations.

Plaintiff's reliance must be shown.[6] His conduct in

a statement, which, according to the ordinary signification of words, implied that certain lands were free from encumbrances, when in fact he knew they were subject to encumbrances, was sued by persons who acted on such statement to their alleged injury, it was held that the trial judge erred in excluding evidence offered by the defendant for the purpose of showing that the words were not used in the sense in which they were interpreted by the court, and that he acted honestly and without intention to state anything falsely. (Id.) "Inasmuch as the question involved is what was his state of mind, and his actual intent as distinguished from his apparent intent, he is entitled to explain his language as best he can, if it is susceptible of explanation, and to testify what was in his mind in reference to the subject to which the alleged fraud relates, In this respect his expressions, whether spoken or written, are not dealt with in the same way as when the question is what contract has been made between two persons who were mutually relying upon the language used in their agreement." (Id.) See also Hazard *v.* Loring, 10 Cush. 267; Thacher *v.* Phinney, 7 Allen, 146; Brown *v.* Massachusetts Title Ins. Co., 151 Mass. 127; Snow *v.* Paine, 114 Mass. 520, 526; Edwards *v.* Currier, 43 Me. 474; Norris *v.* Morrill, 40 N. H. 395, 401; Gifford *v.* Thomas, 62 Vt. 34, 35; Seymour *v.* Wilson, 14 N. Y. 567; Thurston *v.* Cornell, 38 N. Y. 281; Phelps *v.* George's Creek, &c. R. Co., 60 Md. 536; Berkey *v.* Judd, 22 Minn. 287.

[6] Zilke *v.* Woodley, 36 Wash. 84, 78 Pac. Rep. 299; Kemmerer *v.* Pollard, 15 Ida. 34, 96 Pac. Rep. 206; Chemical Bank *v.* Lyons, 137 Fed. Rep. 976; American Natl. Bank *v.* Hammond, 25 Colo. 367, 55 Pac. Rep. 1090; J. H. Clark Co. *v.* Rice, 127 Wis. 451, 106 N. W. Rep. 231, 7 Ann. Cas. 505; Kost *v.* Bender, 25 Mich. 515; Continental Natl. Bank *v.* Nashville First Natl. Bank, 108 Tenn. 374, 68 S. W. Rep. 497; Nauman *v.* Oberle, 90 Mo. 666, 3 S. W. Rep. 380; Hutchason *v.* Spinks, 3 Cal. App. 291, 85 Pac. Rep. 132; Belding *v.* King, 159 Fed. Rep. 411, 86 C. C. A. 391; Priest *v.* White, 89 Mo. 609, 1 S. W. Rep. 361; Burnett *v.* Hensley, 118 Iowa, 575, 92 N. W. Rep. 678; Taylor *v.* Guest, 58 N. Y. 262. And must be alleged. Goings *v.* White, 33 Ind. 125; Saxton *v.* Dodge, 57 Barb. 84, 116; Marshall-McCartney Co. *v.* Halloran, 15 N. Dak. 71, 106 N. W. Rep. 293. The seller may show by the testimony of his credit man that he would not have sold on credit had he known the purchaser's real financial condition. Jandt *v.* Potthast, 102 Iowa, 223, 71 N. W. Rep. 216.

If plaintiff was aware of the falsity of the representations at the time they were made, there

consequence of the deceit may be proved for this purpose,[7] even though it be not specially pleaded so as to be considered on the question of damages.[8] His testimony that his subsequent acts were in consequence of, or on the faith of the representation, is competent.[9] And it is not sufficiently met by proving that he also sought, and in part relied on, information from other sources.[10] To show that the credit given by plaintiff was given to the person alleged, the plaintiff's oral declarations[11] and entries in his

obviously was no reliance thereon and there can be no recovery. Elkhart First Natl. Bank *v.* Osborne, 18 Ind. App. 442, 48 N. W. Rep. 256; Griffin *v.* Griffin, 130 Ga. 527, 61 S. E. Rep. 16, 16 L. R. A. N. S. 937, 14 Ann. Cas. 866; Bowman *v.* Carithers, 40 Ind. 90.

It is not necessary, however, that the element of belief be referred to in the charge to the jury so long as the charge is explicit upon the necessity of reliance, for reliance upon representations in respect to any fact necessarily implies a belief in the truth of the statement made. David *v.* Moore, 46 Ore. 148, 79 Pac. Rep. 415.

A statement made with an intent to deceive, but without that effect, is immaterial; mere intent without damage is insufficient. Jakway *v.* Proudfit, 76 Nebr. 62, 106 N. W. Rep. 1039, 109 N. W. Rep. 388, 14 Ann. Cas, 258.

[7] Thorn *v.* Helmer, 4 Abb. Ct. App. Dec. 408. See also Bowe *v.* Gage, 127 Wis. 245, 106 N. W. Rep. 1074, 115 Am. St. Rep. 1010.

The false statements and the acts in reliance thereon need not concur in point of time. The remoteness or nearness of the representations goes to their weight as evidential facts on the question whether they were or were not the inducement of the thing done. Chilson *v.* Houston, 9 N. Dak. 498, 84 N. W. Rep. 354.

[8] Id.; Dung *v.* Parker, 3 Daly, 89.

[9] Crouch *v.* Chamness, 21 Ind., App. 492, 51 N. E. Rep. 941; People *v.* Sully, 5 Park. Cr. 142; Bruce *v.* Burr, 67 N. Y. 237, affi'g 5 Daly, 510; Hardt *v.* Schulting, 13 Hun, 537; and see Chapter XII, paragraphs 5, etc., of this vol.

[10] Bruce *v.* Burr (above).

A false representation, coupled with such reliance thereon that except for it the transaction would not have been consummated, constitutes legal deceit even though it was not the sole inducing cause of the defrauded party's action in the matter. Shaw *v.* Gilbert, 111 Wis. 165, 86 N. W. Rep. 188; Handy *v.* Waldron, 19 R. I. 618, 35 Atl. Rep. 884; Dashiel *v.* Harshman, 113 Iowa, 283, 85 N. W. Rep. 85.

[11] Fellowes *v.* Williamson, M. & M. 306; Powell Ev. 146; Rosc. N. P. 54.

Where the plaintiff sued the defendant for deceit in falsely

books,[12] made at the time are competent. But the letters and declarations of third persons,[13] even his agents,[14] are not competent unless as part of the *res gestæ* of an act properly in evidence. If the parties dealt on equal terms, each may be presumed to have relied upon his own judgment in matters of value and opinion.[15]

10. Damages.

The price plaintiff paid defendant, under the inducement of false representations of value, is competent evidence for the jury, of what the value would have been had the representations been true.[16] Other rules for proving value and danage have been already stated.[17]

representing the financial standing of a third person it was held that as the representations made referred to a special order for goods sent by the plaintiff and paid for, the plaintiff was not entitled to rely upon them with reference to a future sale. See Lesem *v.* Miller, 10 Kan. App. 579, 62 Pac. Rep. 538.

[12] Place *v.* Minister, 65 N. Y. 89, 107. To the contrary, Moore *v.* Meecham, 10 Id. 207.

[13] Longenecker *v.* Hyde, 6 Binn. 1.

[14] Small *v.* Gilman, 48 Me. 506.

[15] Blease *v.* Galington, 92 U. S. (2 Otto) 1.

"A purchaser must exercise common prudence, and if he fails to avail himself of the ordinary means of information the law gives him no redress." Tooker *v.* Alston, 159 Fed. Rep. 599, 86 C. C. A. 425, 16 L. R. A. N. S. 818.

Generally speaking a vendor's statements as to the value of his property are regarded as mere matters of opinion and not actionable; but an exception is made where the parties occupy fiduciary relations. State Bank *v.* Brown, 142 Iowa, 190, 119 N. W. Rep. 81, 134 Am. St. Rep. 412.

Moreover the rule of nonliability is not applicable where the expression of opinion is made with an intent to deceive and thereby prevent another from making inquiries that he otherwise would have made. Olston *v.* Oregon Water Power, etc., Co., 52 Or. 343, 96 Pac. Rep. 1095, 97 Pac. Rep. 538, 20 L. R. A. N. S. 915.

[16] Miller *v.* Barber, 66 N. Y. 558, 568, affi'g 4 Hun, 802.

In an action for fraud in the sale of a newspaper the measure of damages is the difference in value between the property as it was

[17] Chapter XVI, paragraphs 21 and 85, chapter XXVI, paragraph 19, and chapter XXXI, paragraph 40 of this vol. Clark *v.* Baird, 9 N. Y. 183; McDonald *v.* Christie, 42 Barb. 36; Page *v.*

11. Oral Evidence to Vary Writing.

The rule excluding evidence contradictory of a written instrument, does not apply when fraud is the gravamen of the action or gist of the defense.[18] Oral evidence of misrep-

represented to be and as it actually was, and where one of the former owners falsely represented the receipts for the past year, the excess in earnings indicates the difference in value, and that difference is the measure of damages. Smith *v.* Werkheiser, 152 Mich. 177, 115 N. W. Rep. 964, 125 Am. St. Rep.406, 15 L. R. A. N. S. 1092.

There can be no recovery unless actual damage be suffered as a consequence of the fraud. Isman *v.* Loring, 130 N. Y. App. Div. 845, 115 N. Y. Supp. 933.

Parker, 40 N. H. 47, 59; Lane *v.* Wilcox, 55 Barb. 615; Rice *v.* Manley, 66 N. Y. 82, rev'g 2 Hun, 492, s. c., 5 Supm. (T. & C.) 14; Peters *v.* Birkett, 153 Mich. 61, 116 N. W. Rep. 538; Odell *v.* Story, 81 Nebr. 437, 116 N. W. Rep. 269; McDonough *v.* Williams, 86 Ark. 600, 112 S. W. Rep. 164.

The damage occasioned a tenant, induced to accept a lease by fraud of his landlord, is the difference between what the fair and reasonable value of the use of the *locus in quo* for the period of the tenant's occupation would have been under the lease at the stipulated rental if the property had been as represented, and what the fair and reasonable value of such use under the terms of the lease for the same period actually was, with the property in the condition in which it was found to be. Scovell *v.* Pfeffer, 139 Iowa, 283, 117 N. W. Rep. 684.

In an action for fraud in the sale of certain notes, damages are measured by the difference between the actual value of the notes when traded to the plaintiff and what their value would have been if the representations made to the plaintiff had been true, with interest at the legal rate from the date of the sale. See Schwitters *v.* Springer, 236 Ill. 271, 86 N. E. Rep. 102.

[18] Humbert *v.* Larson, 99 Iowa, 275, 68 N. W. Rep. 703; Johnson *v.* Cummings, 12 Colo. App. 17, 55 Pac. Rep. 269; Davis *v.* Driscoll, 22 Tex. Civ. App. 14, 545 S. W. Rep. 43; Lilienthal *v.* Herren, 42 Wash. 209, 84 Pac. Rep. 829; Humbert *v.* Larson, 99 Iowa, 275, 68 N. W. Rep. 703; McCarthy *v.* Woods (Tex. Civ. A.), 87 S. W. Rep. 405; Mason *v.* Postal Tel. Cable Co., 71 S. C. 150, 50 S. E. Rep. 781; Supreme Council C. K. L. A. *v.* Beggs, 110 Ill. App. 139; Hartley *v.* Gilhofer, 109 Ill. App. 527.

It matters not, in this respect, whether the foundation of the claim be a record, a deed, or a writing without seal, for in either case the instrument will be void—

resentations, though not usually admissible to show the meaning of an instrument embodying a contract,[19] admissible to show the intent of the parties,[20] is and the deceit by which assent was obtained,[21] and to show what would have been covered by the terms of the instrument if the representations had been true;[22] and the relation of the parties, under which the instrument was made, may be shown, not to vary its terms, but to show the defendant's liability in respect to the transaction.[23] The fact that certain false representations were reduced to writing and delivered, does not

or, to speak more correctly, will be voidable at the option of the injured party,—if obtained by fraud, and the fraud may be established by parol evidence. Wright *v.* U. S. Mortgage Co. (Tex. Civ. A.), 42 S. W. Rep. 789.

While the kind of fraud that causes error may always be shown by parol evidence even though title to real estate be involved, nevertheless such evidence is not admissible to show that in a sale of real estate, the vendee named in the deed was not the real vendee, but that another person was. Barrow *v.* Grant, 116 La. 952, 41 So. Rep. 220.

[19] For the limitations of this rule, see chapter XVI, paragraph 8 of this vol. Webster *v.* Hodgekins, 5 Fost. (N. H.) 128, 143.

[20] Thomas *v.* Beebe, 25 N. Y. 244; McBride *v.* Macon Tel. Pub. Co., 102 Ga. 422, 30 S. E. Rep. 999.

[21] See Salem India Rubber Co. *v.* Adams, 23 Pick. (Mass.) 256; Benj. on Sales, § 621, n.; Bigelow on Fr. 488; Culver *v.* Avery, 7 Wend. 380, and see cases cited; Leicher *v.* Keeney, 98 Mo. App. 394, 72 S. W. Rep. 145; Rambo *v.* Patterson, 133 Mich. 655, 95 N. W. Rep. 722.

Parol evidence is received in such cases, not for the purpose of varying the terms of a written instrument, but to establish fraud and thereby prove that the contract never became a valid and binding one. O'Connor *v.* Lighthizer, 34 Wash. 152, 75 Pac. Rep. 643; Howie *v.* Pratt, 83 Miss. 15, 35 So. Rep. 216; Metropolitan Lead, etc., Min. Co. *v.* Webster, 193 Mo. 351, 92 S. W. Rep. 79.

[22] Sharp *v.* Mayor, &c. of N. Y., 40 Barb. 256, 270, s. c., less fully, 25 How. Pr. 389; Gore *v.* Malsby, 110 Ga. 893, 36 S. E. Rep. 315; Vilett *v.* Moler, 82 Minn. 12, 84 N. W. Rep. 452.

But the practice by no means allows a party to recover in a legal action on an oral contract relative to the same subject-matter contained in a written one signed by him, on proving that he was misled about the contents of the latter. See Koffman *v.* Southwest Missouri Electric R. Co., 95 Mo. App. 459, 68 S. W. Rep. 212.

[23] Richards *v.* Millard, 56 N. Y. 574, s. c., below, 1 Supm. Ct. (T.

exclude evidence of other oral misrepresentations.[24] Ambiguous words used for the purpose of deceit, are taken in the sense in which the defendant intended they should be understood.[25]

12. Testimony of the Parties.

If the facts are not conclusive as to fraud, the parties may be examined as to their knowledge,[26] ignorance,[27] belief,[28] opinion,[29] and reliance,[30] at the time of the transaction; and for the purpose of showing reliance, plaintiff can testify that he would not have acted as he did had the facts been known to him,[31] but defendant cannot testify that he did not intend to deceive[32] nor that he intended only to give an opinion.[33]

Defendant is privileged to refuse to answer a question

& C.) 247; Cameron *v.* Estabrooks, 73 Vt. 73, 50 Atl. Rep. 638; Allen *v.* Konrad, 59 N. Y. App. Div. 21, 68 N. Y. Supp. 1057.

[24] Match *v.* Hunt, 6 Cent. L. J. 155. A representation or promise by which a party was induced to sign a written order for the purpose of property may be proved by parol. Bryant *v.* Thesing, 46 Nebr. 244, 64 N. W. Rep. 967; Machin *v.* Prudential Trust Co., 210 Pa. 253, 59 Atl. Rep. 273.

[25] Johnston *v.* Hathorn, 2 Abb. Ct. App. Dec. 465.

A defendant in an action for deceit in the sale of an insurance policy is not entitled to an instruction that the plaintiff cannot recover if it is found that the defendant read the policy to him, because there may be actionable deceit concerning a technical writing, the terms of which are made known. McKindly *v.* Drew, 71 Vt. 138, 41 Atl. Rep. 1039.

[26] See Reynolds *v.* Commerce Fire Ins. Co., 47 N. Y. 597.

[27] Id.

[28] Smith *v.* Countryman, 30 N. Y. 655; Watson *v.* Cheshire, 18 Iowa, 202, 210.

[29] Blanchard *v.* Mann, 1 Allen (Mass.), 433.

[30] Smith *v.* Countryman (above); White *v.* Dodds, 42 Barb. 554, s. c., 18 Abb. Pr. 250, and 28 How. Pr. 197. Such evidence is necessarily open to suspicion, since it undertakes to prove good faith by an appeal to the very good faith which is to be proved. 1 Whart. Ev. 45, § 35.

[31] King *v.* Fitch, 2 Abb. Ct. App. Dec. 515. *Contra*, Learned *v.* Ryder, 61 Barb. 552, s. c., 5 Lans. 539.

[32] Ballard *v.* Lockwood, 1 Daly, 158. *Contra*, Pope *v.* Hart, 35 Barb. 630.

[33] Waugh *v.* Fielding, 48 N. Y. 681.

and equally from producing documents,[34] if the court can see that his answer, or the documents, may in some way criminate him, directly or indirectly, in a criminal fraud, either by furnishing direct evidence of his guilt, or by establishing one of many facts, which together may constitute a chain of evidence sufficient to warrant his conviction, although the one answer or document could not itself produce such result. The witness claiming the privilege is not obliged to explain how he will be criminated, nor need the court see that he must be in some way; it is enough that the situation is such that he might be.[35] But if the party, in testifying on his own behalf, has voluntarily opened the subject, he may be cross-examined so far as necessary to sift his testimony, notwithstanding the claim of privilege.[36]

Where the privilege exists, it is personal to the witness. His counsel cannot be heard to object to the evidence as such, nor should the judge refuse to allow the objectionable question to be put, but only advise the witness of his privilege. The witness has a right to advise with his counsel in the hearing of the court, but not privately, but must give his own answer without aid in writing or otherwise. An exception lies to a refusal to require an answer, but not to a requirement of an answer.[37] As to a non-criminal fraud he has no privilege.[38] A knowledge of falsity being proved is not overcome by oath to belief, or to intent to pay.[39]

13. Declarations of Conspirators.

Slight evidence of concert or collusion between the parties to an illegal transaction, admits evidence of the acts and

[34] See Byass *v.* Sullivan, 21 How. Pr. 50.

[35] People *v.* Mather, 4 Wend. 229. But the question is for the court, not the witness. Fellows *v.* Wilson, 31 Barb. 162. If inspection of a document is necessary the court may require to see it. Mitchell's Case, 12 Abb. Pr. 249.

[36] People *v.* Carroll, 3 Park. Cr. 73.

[37] Remedy to strike out pleading for refusal to answer. Richards *v.* Judd, 15 Abb. Pr. N. S. 184.

[38] Bigelow on Fr. 498.

[39] Westcott *v.* Ainsworth, 9 Hun, 53.

declarations of one against the others, under the rule already stated.[40] It is in the discretion of the court to allow evidence of the declarations of one, to be admitted against the other in anticipation of evidence to connect.[41]

14. Defenses.

On the question of good faith, defendant may show that he previously made inquiries, and from the result believed

[40] Page 540 of this vol., 2 Whart. Ev., § 1205; Bigelow on Fr. 434; Standard Oil Co. *v.* Doyle, 118 Ky. 662, 82 S. W. Rep. 271, 26 Ky. L. 544, 111 Am. St. Rep. 331; Connecticut Mut. L. Ins. Co. *v.* Hillmon, 188 U. S. 208, 23 S. Ct. 294, 47 L. Ed. 446; Smithern *v.* Waddle (Ky.), 43 S. W. Rep. 453, 19 Ky. L. 1418; Hughes *v.* Waples-Platter Grocer Co., 25 Tex. Civ. App. 212, 60 S. W. Rep. 981; Miller *v.* John, 208 Ill. 173, 70 N. E. Rep. 27.

Where a conspiracy to defraud is shown to have existed, what one of the conspirators said or did is admissible against the others, if part of the *res gestæ*. Jansen *v.* McQueen, 112 Mich. 254, 70 N. W. Rep. 552; Lederer *v.* Adler, 46 Misc. Rep. 564, 92 N. Y. Supp. 827; Farley *v.* Peebles, 50 Nebr. 723, 70 N. W. Rep. 231; Sudworth *v.* Morton, 137 Mich. 575, 100 N. W. Rep. 769; Voisin *v.* Commercial Mut. Ins. Co., 60 N. Y. App. Div. 139, 70 N. Y. Supp. 147.

Statements of one associate not made in the presence of his other associates, but made in carrying out an enterprise in which all were jointly engaged, is evidence against the others in favor of one acting and relying upon what was then said. Pearsall *v.* Tennessee Cent. R. Co., 2 Tenn. Ch. App. 682.

But declarations made by one defendant, relating to another defendant made after the unlawful transaction in question, unaccompanied by any act relating to the fraudulent enterprise, and not part of the *res gestæ*, are not available to charge the latter with the relation of complicity with the former in the unlawful transaction in question. See Douglas *v.* McDermott, 21 N. Y. App. Div. 8, 47 N. Y. Supp. 336.

[41] Miller *v.* Barber, 66 N. Y. 558, 567, affi'g 4 Hun, 802; Drake *v.* Stewart, 76 Fed. Rep. 140, 22 C. C. A. 104.

Ordinarily the declarations of an alleged conspirator are admissible only after testimony has been given which *prima facie* tends to prove the existence of a conspiracy, or from which it may be reasonably inferred. Pacific Live Stock Co. *v.* Gentry, 38 Ore. 275, 61 Pac. Rep. 422, 65 Pac. Rep. 597.

Obviously if evidence be not forthcoming tending to establish assent or a joint conspiracy, the declarations of one defendant do not bind the other defendants.

the statement which he thereupon made.[42] If charged with deceit by suppressing information received from a document, he may prove its contents to repel the charge.[43]

Plaintiff's knowledge is admissible under a general denial.[44] It must be clearly shown, to amount to a bar.[45] Defendant may prove plaintiff's representations, on the same subject, to third persons, or his use with third persons, of representations made by others.[46]

Evidence of the good character for honesty and fair

See Whaples *v.* Fahys, 109 N. Y. App. Div. 594, 96 N. Y. Supp. 323.

[42] Oberlander *v.* Spies, 45 N. Y. 175. Compare Ballard *v.* Lockwood, 1 Daly, 158.

A false statement made through carelessness and without reasonable ground for believing it to be true may be evidence of fraud, but it does not necessarily amount to fraud. If made in the honest belief that it is true, it is not fraudulent, and does not support an action for deceit. Pittsburgh Life, etc., Co. *v.* Northern Cent. L. Ins. Co., 148 Fed. Rep. 674, 178 C. C. A. 408.

Generally either party is entitled to show the value of the consideration paid or received by him as a circumstance bearing upon the probability, not only as to whether false representations were relied upon, but also as to whether they were made. Vaupel *v.* Mulhall, 141 Iowa, 365, 118 N. W. Rep. 272.

[43] Bronson *v.* Wiman, 8 N. Y. 187, 189.

[44] Howell *v.* Biddleton, 62 Barb. 131.

Knowledge of the plaintiff's agent, being imputable to his principal, constitutes a good defense. Wright *v.* U. S. Mortgage Co. (Tex. Civ. A.), 42 S. W. Rep. 1026.

Failure of the plaintiff to make inquiries of persons to whom he was referred by defendant, and by which he would have ascertained the falsity of the representations, does not constitute a defense. Handy *v.* Waldron, 19 R. I. 618, 35 Atl. Rep. 884.

[45] Chandelor *v.* Lopus, 1 Smith's L. Cas. 299, 320, and cases cited.

It is no defense that part of what the plaintiff was induced to purchase by the defendant's fraud and deceit belonged to another party. Tooker *v.* Alston, 159 Fed. Rep. 599, 866 C. C. A. 425, 16 L. R. A. N. S. 818.

Where the defendant fraudulently induced another to invest money, he cannot urge the fact that he himself embarked upon the enterprise as affording a basis for an agency between him and the plaintiff, and thereby charge the plaintiff, as his principal, with his knowledge of the true state of affairs. Fisher *v.* Radford, 153 Mich. 385, 117 N. W. Rep. 66.

[46] Atkins *v* Elwell, 45 N. Y. 753.

dealing of the defendant,[47] or of the agent who acted for him,[48] is not competent.

15. — Former Adjudication.

The acquittal of the defendant on a criminal prosecution, is not competent in his favor.[49] A judgment for defendant in a civil action on contract, is not necessarily a bar.[50] Judgments and judicial proceedings to which the party was an entire stranger, are not competent against him, to show the truth of facts alleged or established by them.[51]

[47] Gough *v.* St. John, 16 Wend. 646; Anderson *v.* Long, 10 Serg. & R. 55; Powers *v.* Armstrong, 62 Ark. 267, 35 S. W. Rep. 228; Fahey *v.* Crotty, 63 Mich. 383, 6 Am. St. Rep. 305, 29 N. W. Rep. 876.

[48] Bassett *v.* Lederer, 1 Hun, 274, s. c., 3 Supm. C. (T. & C.) 671. *Contra*, said, where the evidence is circumstantial. See Bigelow on Fr. 478.

[49] Peek *v.* Gurney, L. R. 13 Eq. Cases, 70, 112, s. c., 1 Moak's Eng. 567, 600.

[50] N. Y. Code Civ. Proc. § 540; Nor competent. Norton *v.* Huxley, 13 Gray, 285.

[51] Degraff *v.* Hovey, 16 Abb. Pr. 120; Lefever *v.* Lefever, 30 N. Y. 27. Otherwise of a purchaser *pendente lite*. Craig *v.* Ward, 1 Abb. Ct. App. Dec. 454.

CHAPTER XXXV

ACTIONS FOR CONVERSION

1. Frame of the complaint.
2. The existence and identity of the thing.
3. Plaintiff's title.
4. Possession as evidence of title.
5. Mode of proving possession.
6. Mode of proving source of title.
7. Title by mortgage.
8. Equitable title; lien.
9. Plaintiff owner, notwithstanding void sale.
10. The conversion.
11. Demand.
12. Value.
13. Declarations of former owner.
14. Title in defense.
15. Title derived through wrongdoer.
16. Illegality.
17. Mitigation of damages.

1. Frame of the Complaint.

If the complaint alleges a wrongful conversion as the distinctive ground of the action, it is not sustained by proof of a mere breach of contract or duty.[52] Otherwise, if a

[52] Tolano *v.* National Steam Nav. Co., 5 Robt. 318, 326, s. c., 4 Abb. Pr. N. S. 316, 35 How. Pr. 496. Huntington *v.* Herrman, 188 N. Y. 622, 81 N. E. Rep. 1166 (citing Wamsley *v.* Atlas SS. Co., 168 N. Y. 533, 61 N. E. Rep. 896, 85 Am. St. Rep. 699. Compare Gordon *v.* Hostetter, 37 N. Y. 99, s. c., 4 Abb. Pr. N. S. 263.

Where an attorney collects money for the plaintiff, it is held that he thereby becomes her debtor and need not return to her the specific sum collected. A complaint which alleges his refusal to return this money is therefore one in an action on contract even though there is an allegation of conversion. Jackson *v.* Moore, 72 N. Y. App. Div. 217, 76 N. Y. Supp. 164. See also Segelken *v.* Meyer, 94 N. Y. 473.

Where a person comes into possession of and disposes of property pursuant to an agreement with the owner, he cannot be held liable for a conversion, his liability, if any, being for a disposition of the proceeds. Aylesbury Mercantile Co. *v.* Fitch, 22 Okl. 475, 99 Pac. Rep. 1089, 23 L. R. A. N. S. 573.

A complaint alleged that the defendant, a factor, sold the plaintiff's consignment of briarwood receiving a money payment therefor and a written instrument for the balance, on which, however,

cause of action on contract is sufficiently alleged, and the allegations of conversion are incidental.[53]

Under an allegation of conversion of plaintiff's property, evidence of conversion of the property of another, and a subsequent assignment of the property, or of the cause of action for conversion, is a variance.[54] The assignment should be alleged;[55] but its consideration need not be set forth.[56]

the plaintiff's name did not appear, and further alleged that the defendant had converted both the money and the written instrument. To this complaint the factor interposed a counterclaim for expenses. On demurrer thereto the court held that the plaintiff's action was on a contract and that therefore the counterclaim was proper. Conversion applies only to specific goods of which the owner has the immediate right of possession but not to money the receipt of which only creates a debt. Vandelle *v.* Rohan, 36 Misc. 239, 73 N. Y. Supp. 285.

[53] Conaughty *v.* Nichols, 42 N. Y. 83; but see 50 Id. 1; 51 Id. 108. Compare Austin *v.* Rawdon, 44 Id. 63.

Where a complaint contained allegations sufficient to constitute a cause of action upon a contract and sufficient proof to support these allegations was offered on the trial, the decision allowing a recovery therefore was upheld, even though the complaint also contained allegations of conversion. Connor *v.* Philo, 117 N. Y. App. Div. 349, 102 N. Y. Supp. 427.

[54] Bowman *v.* Eaton, 24 Barb. 528; Duell *v.* Cudlipp, 1 Hilt. 166; Hodges *v.* Lathrop, 1 Sandf. 46; Whittaker *v.* Merrill, 30 Barb. 389.

It has likewise been held that where a party, as plaintiff in an action for conversion, alleged ownership in himself, a company claiming to be the assignee or beneficial owner of the article in question could not prosecute appeal in its own name from a decision against the plaimtiff named in the declaration. Gates *v.* Thede, 91 Ill. App. 603.

[55] See Chap. 1.

The plaintiff alleged that he was the assignee of certain property which the defendant, subsequent to the assignment, had converted to his own use. The trial court dismissed the complaint upon the ground that the evidence showed that the conversion occurred prior to the assignment thus giving a cause of action in favor of the assignor. This was held error inasmuch as the time of the assignment was a question for the jury to determine. Lawrence *v.* Wilson, 64 N. Y. App. Div. 562, 72 N. Y. Supp. 289.

[56] Vogel *v.* Badcock, 1 Abb. Pr. 176.

2. The Existence and Identity of the Thing.

Defendant's representations may be used to estop him from denying that the alleged property ever existed.[57] Conversion of checks or money may be proved under allegations of conversion of property.[58] Proving the specific description of the bills or coins converted is not necessary if the amount is not doubtful.[59]

If the thing converted is a written instrument, the nature of the action is sufficient notice to produce, to let in secondary evidence of its contents[60] and indorsements.[61] If the

[57] Griswold *v.* Haven, 25 N. Y. 595; Harding *v.* Carter, Park on Ins. 4. (Lord MANSFIELD.)

[58] Knapp *v.* Roche, 37 Super. Ct. (J. & S.) 395, 62 N. Y. 614.

It has been held that a complaint which alleged that a plaintiff was the owner of and entitled to the possession of certain bank checks and drafts; that without his indorsement or permission a third party had transferred them to the defendant with forged endorsements thereon and that the defendant wrongfully converted the same and collected the proceeds therefrom, stated a cause of action for conversion and not for money had and received. Carter *v.* Eighth Ward Bank, 33 Misc. 128, 67 N. Y. Supp. 300.

[59] Gordon *v.* Hostetter, 37 N. Y. 99, s. c. 4 Abb. N. S. 263.

It has been held that trover could be brought for money converted, although the same was not specifically "earmarked." Thus where a check signed by the president and treasurer of an insurance company and drawn on a special fund was deposited with the defendant bank, it could not be applied by the defendant to the satisfaction of a claim against the signers of the check without making the bank guilty of conversion. Kelsey *v.* Mansfield Bank, 85 N. Y. App. Div. 334, 83 N. Y. Supp. 281.

A general description of the money converted is sufficient. Hazelton *v.* Locke, 104 Me. 164, 71 Atl. Rep. 661, 20 L. R. A. N. S. 35, 15 Ann. Cas. 1009.

Under a complaint alleging a conversion of "$1850 in cash" the plaintiff may prove the specific items of cash claimed to have been converted. Dunham *v.* Cox, 81 Conn. 268, 70 Atl. Rep. 1033.

[60] Bissell *v.* Drake, 19 Johns. 66; Hays *v.* Riddle, 1 Sandf. 248.

In an action for the conversion of notes, "the defendant is supposed to have them in his possession or under his control, and the action itself is notice to him to be prepared to produce them upon the trial, or to be ready to prove their contents." Hotchkiss *v.* Mosher, 48 N. Y. 478.

[61] Howell *v.* Huyck, 2 Abb. Ct. App. Dec. 423.

things converted were commingled with a larger quantity, without defendant's fault, the burden is on plaintiff to show the part that he was entitled to.[62] The rules applicable to proving quantity, kind, dates, etc., by witnesses and memoranda, or entries, have been already stated.[63] A qualified witness[64] may testify directly to the identity of the thing; but belief or opinion of identity is not competent without statement of the facts on which it is founded.[65]

3. Plaintiff's Title.

Under a general averment of title or ownership, the source of plaintiff's title may be proved.[66] A witness may testify directly, in the first instance, who owned the property,[67] if he can do so positively, and not as mere

[62] Wilson *v.* Wilson, 37 Md. 1.

[63] Chapter XVI, paragraphs 36 to 41 of this vol.; and see Glover *v.* Hunnewell, 6 Pick. 222; Bartlett *v.* Hoyt, 33 N. H. 151.

[64] It requires knowledge of the thing. Rich *v.* Jones, 9 Cush. (Mass.) 329. But not necessarily an expert. Morrissey *v.* People, 11 Mich. 327.

When a witness in an action for the conversion of certain stoves testified that he had prepared and executed a bill of sale therefor; that the defendant's attorney and a constable had broken open a room in which the stoves had been stored subsequent to their sale and had carried them off under his eyes, and that they were the stoves which the plaintiff alleged had been converted, the defendant's objection to this testimony as not sufficiently identifying the property was not well grounded. Fairbanks *v.* Kent, 16 Colo. App. 35, 63 Pac. Rep. 707.

[65] Goodwin *v.* Goodwin, 20 Ga. 600.

But where a witness testified that the plaintiff had told her that she, the plaintiff, had "got rid" of property which the witness thought was that claimed to have been converted, it was not error to exclude this testimony on the ground of not being sufficiently definite. Mosteller *v.* Holborn, 20 S. D. 545, 108 N. W. Rep. 13.

[66] Heine *v.* Anderson, 2 Duer, 318.

The plaintiff may recover upon the strength of his title without proving that he actually had possession. Where it was admitted that title had been in the plaintiff's ancestor, the defendant could defeat a recovery only by showing that title had been divested. Powers *v.* Hatter, 152 Ala. 636, 44 So. Rep. 859.

[67] De Wolfe *v.* Williams, 69 N. Y. 621; Walsh *v.* Kelly, 42 Barb. 98, s. c., 27 How. Pr. 359; Nelson *v.* Iverson, 24 Ala. 9, 18.

opinion.[68] Absolute title need not be shown: A bailee may sue.[69]

4. Possession as Evidence of Title.

The mere facts of lawful possession in plaintiff, and wrongful taking by defendant, are sufficient.[70] Lawful

Where husband and wife entered into a separation agreement which provided for a division of their household effects between them and action was brought by the wife against the husband for conversion, it was held that testimony of the attorney who prepared the agreement to the effect that the husband stated that the household effects or most of them belonged to the wife, was competent. Carpenter *v.* Carpenter, 154 Mich. 100, 117 N. W. Rep. 598.

[68] Wells *v.* Ship, 1 Miss. (Walk.) 353; Maxwell *v.* Harrison, 8 Geo. 61, 66; H. C. Jaquith Co. *v.* Shumway, 80 Vt. 556, 69 Atl. Rep. 1571.

[69] Van Bokkelin *v.* Ingersol, 5 Wend. 315, confi'g 7 Cow. 670; Baker *v.* Hoag, 7 N. Y. 555; Faulkner *v.* Brown, 13 Wend. 63; and see Truslow *v.* Putnam, 4 Abb. Ct. App. Dec. 425; Nesmith *v.* Dyeing, &c. Co., 1 Curt. C. Ct. 130, s. c., 1 Am. Law Reg. 82, and cas. cit.; Oney *v.* Pomfrey, 54 Misc. 171, 105 N. Y. Supp. 860.

A person in possession of a chattel under a conditional sale contract may sue for conversion. Painter *v.* McGaha, 6 Ga. App. 54, 64 S. E. Rep. 129.

[70] Hendricks *v.* Decker, 35 Barb. 298, and cas. cit.; Bowen *v.* Fenner, 40 Id. 383; Paddon *v.* Williams, 1 Robt. 340, s. c., 2 Abb. Pr. N. S. 88; Painter *v.* McGaha, 6 Ga. App. 54, 64 S. E. Rep. 129.

The right to possession may be founded upon a general or special property in the thing converted. Weeks *v.* Hackett, 104 Me. 264, 71 Atl. Rep. 858, 129 Am. St. Rep. 390, 19 L. R. A. N. S. 1201, 15 Ann. Cas. 1156.

The plaintiff must prove at least a right of possession in him at the time of the conversion. Joseph Dixon Crucible Co. *v.* Paul, 167 Fed. Rep. 784, 93 C. C. A. 204; Munier *v.* Zachary, 138 Iowa, 219, 114 N. W. Rep. 525, 18 L. R. A. N. S. 572, 16 Ann. Cas. 526; Raymond *v.* Blancgrass, 36 Mont. 449, 93 Pac. Rep. 648, 15 L. R. A. N. S. 976; Holman *v.* Ketchum, 153 Ala. 360, 45 So. Rep. 206.

Right of possession should be alleged by the plaintiff. Golden *v.* Moore, 126 Mo. App. 518, 104 S. W. Rep. 481; Jones *v.* Winsor, 22 S. D. 480, 118 N. W. Rep. 716.

Possession at the time of the conversion is *prima facie* evidence of ownership and the burden of proof is on the defendant to overcome by proper evidence the legal effect of this possession. Eiseman *v.* Maul, 8 Fed. Cas. No. 4322.

possession is sufficient evidence of title without proving the transfer by which plaintiff acquired title;[71] and possession is presumed lawful unless the contrary appears.

5. Mode of Proving Possession.

A witness may testify directly in the first instance to the fact of possession,[72] if he can do so positively (subject, of course, to cross-examination as to details); but not to inference or opinion.[73]

6. Mode of Proving Source of Title.

If the title was acquired by bill of sale, or other written instrument, it must be produced, or accounted for and secondary evidence of its contents given, in order to prove the transfer.[74] But if title passed by oral sale and delivery,

[71] Beach *v.* Raritan, &c. R. R. Co., 37 N. Y. 457.

Allegations as to the manner of acquiring the property are surplusage. Wigs *v.* Ringemann, 155 Ala. 189, 45 So. Rep. 153.

It has been held that a minor son was the father's agent and that his possession entitled the father, as general owner, to maintain an action for the conversion of property which the defendant had taken in trade from the son's possession. Lantz *v.* Drum, 44 Ill. App. 607.

A plaintiff in replevin established his title to the property alleged to have been converted by showing that his vendor was in possession thereof at the time of the sale. Halsey *v.* Hart, 85 Hun 46, 32 N. Y. Supp. 665.

"A mere wrongdoer is not permitted to question the title of a person in the actual possession and custody of the goods, whose possession he has wrongfully invaded. The naked possession of goods, with claim of right, is sufficient evidence of title against one who shows no better right." 2 Greenl. Ev. (14th Ed.), § 637.

[72] Rand *v.* Freeman, 1 Allen, 517.

The plaintiff may testify as to a settlement made between the parties with respect to the chattel in question, and proof of the payment of the purchase price is evidence of the fact that the chattel belonged to the plaintiff and that he was entitled to its possession. Purcell Cotton Seed Oil Mills *v.* Bell, 7 Ind. T. 717, 104 S. W. Rep. 944.

[73] Perry *v.* Graham, 18 Ala. 822, 825.

[74] Dunn *v.* Hewitt, 2 Den. 637; King *v.* Randlett, 33 Cal. 318. Where the vendee in a bill of sale brings an action of trover for the alleged conversion of the property conveyed therein, and the bill of

a receipt or bill of parcels, though given at the time,[75] or a bill of sale *subsequently* delivered,[76] need not be produced.

An invoice is not alone evidence of a sale.[77] A bill of lading is presumptive evidence of title in the consignee.[78]

The registry is not the exclusive evidence of the title to a vessel.[79]

If plaintiff's right to claim possession is by virtue of his purchase at an execution sale, the execution is sufficient evidence of the judgment, as against the debtor in the execution; but as against a third person other than the officer, he must prove the judgment.[80] If the levy was valid only as to part of the property, plaintiff must identify the part.[81] A return stating that legal notice was given is presumptive, but not conclusive evidence of regularity in the notice.[82] Against one who shows himself a purchaser in good faith, evidence that an execution against the seller's property was in the sheriff's hands very shortly before the purchase, will not raise a presumption of actual levy made before the sale.[83]

Other rules as to the mode of proving sales have been already stated.[84]

sale upon which his right of action is based was executed before an attesting witness, such bill of sale is not admissible in evidence to show title in the plaintiff, unless the attesting witness is introduced to prove the execution of said bill of sale, or his absence is accounted for. Collins *v.* Sherbet, 114 Ala. 480, 21 So. Rep. 997.

After the plaintiff in replevin had proved the execution of a bill of sale by the testimony of the party who had executed it, she was properly allowed to offer the same in evidence in proof of her title. Hall *v.* Moriarty, 57 Mich. 345, 24 N. W. Rep. 96.

[75] Chap. XVI, paragraph 5 of this vol.

[76] Sanders *v.* Stokes, 30 Ala. 432.

[77] Dows *v.* Nat. Exchange Bank of Milwaukee, 91 U. S. (1 Otto) 618.

[78] Id., Halliday *v.* Hamilton, 11 Wall. 560; Rawls *v.* Deshler, 4 Abb. Ct. App. Dec. 12.

[79] United States *v.* Jones, 3 Wash. C. Ct. 209; Sutton *v.* Buck, 2 Taunton, 302.

[80] Yates *v.* St. John, 12 Wend. 74; Dane *v.* Mallory, 16 Barb. 46.

[81] Brown *v.* Pratt, 4 Wis. 513.

[82] Drake *v.* Mooney, 31 Vt. 617.

[83] Millspaugh *v.* Mitchell, 8 Barb. 333; but see Wiliams *v.* Shelley, 37 N. Y. 375; Bond *v.* Willett, 1 Abb. Ct. App. Dec. 165.

[84] Chaper XVI.

For the purpose of proving ownership of crops, timber, etc., the ownership of the soil may be shown by producing the deed to plaintiff, and possession under it without showing title in the grantor.[85] As between the parties to the deed, parol evidence that things not included in its terms were intended to pass by it is incompetent.[86] Declarations of either the owner or the occupant of the land, made in connection with and characterizing the possession and the dominion over the crops, are competent in favor of the other on the question of his ownership of the crops.[87]

[85] Grant *v.* Smith, 26 Mich. 201.

A plaintiff in trover for timber cut, was allowed to show title by proving that he was the successful party in a prior action in ejectment against the defendant. Wilson *v.* Hoffman, 93 Mich. 72, 52 N. W. Rep. 1037, 32 Am. St. Rep. 485.

In an action for the conversion of timber where both parties claimed the trees in question from common vendors, there is no necessity for the plaintiff to prove anything more than a prior purchase from the vendors and notice thereof, actual or constructive, to the defendant prior to the time the latter purchased, and it is not incumbent upon the plaintiff to show that the vendors had good title to the land, especially where the answer does not deny that fact. Johnson *v.* Kelley, 106 S. W. Rep. 864, 32 Ky. L. 701.

Where the plaintiff sued the defendant in conversion for cutting timber, and the defendant did not claim ownership and there was a link missing in the plaintiff's chain of title in that the original owner deeded the land to the plaintiff's grantors who lost the deed, it was held that a deed direct to the plaintiff by the said original owner (the intermediate parties having died) executed after the act of conversion and reciting the conveyance and loss, cured the defect in the plaintiff's title and was admissible in evidence. Dennis *v.* Strunk 108 S. W. Rep. 957, 32 Ky. L. 1230.

A plaintiff, however, in an action for the conversion of logs cut from land formerly "wild land," could not prove his title thereto by offering a deed made to himself without also showing possession or proving that his grantor had a valid title thereto. Solomon *v.* Widner, 117 Mich. 524, 76 N. W. Rep. 5.

[86] Ripley *v.* Paige, 12 Vt. 353. Compare Flynt *v.* Conrad, 1 Phil. L. R. (N. C.) 190; Simpkins *v.* Rogers, 15 Ill. 397.

[87] Woods *v.* Blodgett, 18 N. H. 249; White *v.* Morton, 22 Vt. 15. Compare Ekins *v.* Hamilton, 20 Vt. 627. The declarations of servants removing the products away from the land, as to what lot they were brought from, are not part

The main tests, on a question of fixtures are, permanent character; adaptation to freehold; and intent of parties.[88] On the question of intent, declarations made by the person in possession of the soil, who annexed the fixture, and at the time of so doing, are competent.[89]

7. Title by Mortgage.

If plaintiff is a mortgagee and relies on the mortgage as evidence of his title, he must produce it,[90] with a note or other written obligation, if any, to which it is collateral;[91] or account for non-production, and prove the contents. In either case he must prove execution.[92] A clerk's certified copy of the mortgage is not competent evidence of execution or contents.[93] Unless there is actual change of possession, filing must be proved, as against judgment creditors, etc., but need not against wrongdoers.[94] Oral evidence is not

of the *res gestæ*, nor within the scope of their agency. Woods *v.* Banks, 14 N. H. 101.

[88] Meig's Appeal, 62 Pa. 28, s. c., 1 Am. Rep. 372; Seeger *v.* Pettit, 77 Penn. St. 437, s. c., 18 Am. Rep. 452; and see 13 Am. L. Rev. 45.

Where, by the terms of a lease, the lessee had the privilege of moving a house from the premises at any time before the expiration of the lease it was held in an action for the conversion of the said house by a vendee of the lessor, that the terms of the lease sufficiently showed that the intent of the parties thereto was to consider the house as personalty not passing with the land. Osborn *v.* Potter, 101 Mich. 300, 59 N. W. Rep. 606.

[89] Kelley *v.* Kelley, 20 Wis. 443.

[90] Bissell *v.* Pearce, 28 N. Y. 252.

In an action for the conversion of certain property on which the plaintiff held a chattel mortgage, it was held error to exclude the mortgage and evidence of its execution on the ground that the pleadings were insufficient to allow the production of such evidence, inasmuch as, in an action for trover, the nature of the plaintiff's interest is a matter of evidence which need not be set out in the declaration. Williams *v.* Raper, 67 Mich. 427, 34 N. W. Rep. 890.

[91] Flynn *v.* Hathaway, 65 Ill. 462.

[92] See, for mode of proof, chapter XXVII, paragraphs 1–11 of this vol.

[93] Bissell *v.* Pearce (above); Sunderlin *v.* Wyman, 10 Hun, 493.

[94] Porter *v.* Parmley, 14 Abb. Pr. N. S. 16, s. c., 52 N. Y. 185, rev'g 34 Super. Ct. (J. & S.) 398,

competent to vary the terms of the mortgage.[95] Against a wrongdoer, plaintiff is not bound to account for other property covered by the mortgage, but the burden is on defendant to show plaintiff's interest reduced thereby.[96] A mortgagee who took possession under the danger clause, may testify as a witness whether he deemed himself unsafe.[97] An agreement to allow the mortgagee to sell and use proceeds may be proved by extrinsic evidence.[98]

8. Equitable Title; Lien.

Plaintiff may prove an equitable title to meet a common-law defense impeaching the legal title.[99]

Under allegations showing a pledge or other lien, the evidence may be confined to the debt alleged and admitted.[1] Evidence that the thing was pledged to defendant or held by him under a lien, throws on plaintiff the burden of prov-

s. c., 43 How. Pr. 445; Moses *v.* Walker, 2 Hilt. 536.

[95] Baltes *v.* Ripp, 1 Abb. Ct. App. Dec. 78; Clark *v.* Houghton, 12 Gray, 38; Magill *v.* Brown, 20 Tex. Civ. A. 662, 50 S. W. Rep. 143, 642. See also Bernardy *v.* Colonial, etc., Mortg. Co., 20 S. D. 193, 105 N. W. Rep. 737; New England L. & T. Co. *v.* Workman, 71 Mo. App. 275; Snyder *v.* Ash, 30 N. Y. App. Div. 183, 51 N. Y. Supp. 772.

Parol evidence is inadmissible to show that the defendant was not the owner of the property in controversy at the time he executed a chattel mortgage when the chattel mortgage itself recites "that the defendant had bargained and sold the property and that he will forever warrant and defend the right, title and interest of the plaintiff in the property thus sold." Beadleston *v.* Furrer, 102 N. Y. App. Div. 544, 92 N. Y. Supp. 879.

The parol testimony of a party as to the amount due cannot control the statements of the written instrument. O'Neal *v.* McLeod (Miss.), 28 So. Rep. 23.

[96] Bailey *v.* Godfrey, 54 Ill. 507, s. c., 5 Am. Rep. 157. Compare chapter XXI, paragraphs 106–108 of this vol.

[97] Huggans *v.* Fryer, 1 Lans. 276.

But such would not seem to be the case where no offer is made to show that the mortgageee had ever taken possession of the mortgaged property or in any way exercised any control over it. Cate *v.* Tife, 80 Vt. 404, 68 Atl. Rep. 1.

[98] Southard *v.* Pinckney, 5 Abb. New Cas. 184, and cas. cit.

[99] Woodworth *v.* Sweet, 51 N. Y. 8, affi'g 44 Barb. 268.

[1] Luckey *v.* Gannon, 6 Abb. Pr.

ing an extinguishment of the lien,[2] or other right of possession, unless actual conversion, in violation of the lienor's duty, is shown.[3] For this purpose, evidence of payment of the debt, and a demand for a return of the thing pledged, is sufficient.

9. Plaintiff Owner, Notwithstanding Void Sale.

Delivery on a sale is presumed absolute, and the burden is on the seller reclaiming the goods, to show the condition or the fraud on which he relies.[4] Where fraud is not imputed, the buyer's intent not to pay is irrelevant on the question of breach of condition.[5]

The buyer's undisclosed knowledge that he was insolvent is competent on the question of fraud,[6] without evidence of

N. S. 209, s. c., 37 How. Pr. 134, 1 Sweeny, 12.

[2] Bush *v.* Lyon, 9 Cow. 52.

[3] Mulliner *v.* Florence, 38 L. T. R. N. S. 167, and cas. cit.; Luckey *v.* Gannon, 37 How. Pr. 134, s. c., 6 Abb. Pr. N. S. 209, and cas. cit.

[4] Nelson, J. Furniss *v.* Hone, 8 Wend. 256.

Where the plaintiff sued in conversion and the defendant alleged an absolute bill of sale of the property in dispute, but the case as presented by the plaintiff set up a new contract for a valuable consideration made subsequently to the date of the bill of sale, by which the transaction was in fact a pledge, it was held that evidence of what took place at the time the bill of sale was executed, was competent as bearing on the subsequent agreement. Puzis *v.* Temko, 33 Pa. Super. Ct. 526.

[5] Jessop *v.* Miller, 2 Abb. Ct. App. Dec. 449.

Where the evidence shows that the defendant bought the property in question, it is immaterial whether he has paid the purchase price only in part or in full, as trover will not lie to enforce the payment of the purchase price of property sold on credit. Sutton *v.* McCoy, 2 Ga. App. 758, 59 S. E. Rep. 21.

[6] Johnson *v.* Monell, 2 Abb. Ct. App. Dec. 470.

The plaintiff in trover delivered property to its vendee on credit, relying on the latter's alleged fraudulent representations as to its financial status. The defendant bank, which held notes of the vendee guaranteed by one of its directors, claimed a sale of the property in question to itself and applied the same towards the payment of the said notes. The plaintiff sought to prove, by the testimony of the vendee's manager, that the vendee was in a bad financial condition at the time of the transaction, and that the bank had knowledge of this fact. The

direct representation; but is not conclusive—nor necessarily sufficient.[7] If the buyer gave his notes, it is enough to tender them in return at the trial.[8] Other similar fraudulent transactions by the same buyer, at about the same time, are competent on the question of scienter and intent.[9]

10. The Conversion.

Conversion may be proved under an allegation that defendant took and carried away.[10] An allegation of con-

court said: "It was certainly competent for the jury to take into account, in determining the question whether the goods were purchased with intent not to pay for them, the knowledge which the manager had of the situation of the company and its ability to meet its obligations." Whitaker Iron Co. *v.* Preston Nat. Bank, 101 Mich. 146, 59 N. W. Rep. 395.

[7] Byrd *v.* Hall, 1 Abb. Ct. App. Dec. 285; Biggs *v.* Barry, 2 Curt. C. Ct. 259. For other rules, see Chapter XXXIV, on actions for DECEIT OR FRAUD.

[8] King *v.* Fitch, 2 Abb. Ct. App. Dec 508.

[9] Allison *v.* Matthieu, 3 Johns. 235; Van Kirk *v.* Wilds, 11 Barb. 520. Compare Booth *v.* Powers, 56 N. Y. 22, rev'g Flint *v.* Craig, 59 Barb. 319. On the question of a fraudulent combination between several to buy in the name of one for the benefit of another. the declarations of either forming part of the *res gestæ*, and evidence of the means of the pretended buyer at the time when the confederate represented him to the seller to be wealthy, are competent. Rea *v.* Missouri, 17 Wall. 544. Compare Moore *v.* Meacham, 10 N. Y. 207.

Where the plaintiff claimed that his vendee had transferred flour with intent to defraud, it was "competent to show similar fraudulent acts committed at or about the same time upon others." Starr *v.* Stevenson, 91 Iowa, 684, 60 N. W. Rep. 217.

The defendants who were sued for conversion because of a seizure of property which the plaintiff claimed under a chattel mortgage were allowed to offer in evidence the records of several attachment suits to show that the plaintiff's chattel mortgage was void and fraudulent and that the mortgagor had creditors at the time the plaintiff's mortgage was executed. Eureka Iron, etc., Works *v.* Bresnahan, 66 Mich. 489, 33 N. W. Rep. 834.

[10] Hutchings *v.* Castle, 48 Cal. 152. Compare Eldridge *v.* Adams, 54 Barb. 417; Van Valkenburgh *v.* Thayer, 57 Barb. 196; Read *v.* Lambert, 10 Abb. Pr. N. S. 428.

The burden of proving the conversion is on the plaintiff. Berman *v.* Kling, 81 Conn. 403, 71 Atl. Rep. 507.

version is not sustained by mere proof of a contract and breach.[11] It is not necessary to show a manual taking of the thing, nor that defendant has applied it to his own use;[12] but it must be shown that the defendant either did some positive wrongful act with the intention to appropriate the

Where the parties agreed that the defendant was to have possession and use of a chattel until he was repaid a sum advanced at the request of the plaintiff, it was held that the defendant by virtue of his lien was entitled to retain possession of the chattel until the amount due was paid and therefore the defendant was not guilty of conversion in refusing to deliver the same to the plaintiff. Jackson *v.* Fuller, 97 N. Y. Supp. 975.

[11] Walter *v.* Bennett, 16 N. Y. 250; Whitcomb *v.* Hungerford, 42 Barb. 177. Compare Frost *v.* McCargar, 29 Barb. 617, and paragraph 1.

Where a former tenant made an arrangement to store his machinery on the defendant's premises with the proviso that he should have two days' notice to remove the same therefrom, he did not have a cause of action in conversion against the landlord when a new tenant deposited his machinery on the street, since whatever claim he may have had against the landlord was for a breach of his promise to give the two days' notice. Huntington *v.* Herrman, 111 N. Y. App. Div. 875, 98 N. Y. Supp. 48, affirmed 188 N. Y. 622, 81 N. E. Rep. 1166.

[12] Bristol *v.* Burt, 7 Johns. 254, and cases cited; Murray *v.* Burling, 10 Id. 172; Reynolds *v.* Schuler, 5 Cow. 323; Connah *v.* Hale, 23 Wend. 462.

But mere words will not constitute a conversion of money where the speaker has no right to possession of the money or any dominion over it. Bishop *v.* Hendrick, 82 Hun 323, 336, 31 N. Y. Supp. 502.

"Mere words are evidence of a conversion when they import a denial of the right of the owner to take or resume the possession of his property, if the situation of the person using the words is such in respect to it as to enable him to interrupt the owner in taking possession of or reclaiming his property." Richards *v.* Pitts Agricultural Works, 37 Hun (N. Y.), 1.

"Actual, manual possession of property is not absolutely essential to justify a suit for its conversion." Thus where one who had been engaged by the plaintiff to select furniture, cancelled shipping orders and directed the vendor of the goods to hold them, he exercised a dominion over them contrary to the plaintiff's right which had been established by making payment for a large part of the furniture. McDonald *v.* Bayha, 93 Minn. 139, 100 N. W. Rep. 679.

property to himself, or to deprive the rightful owner of it, or destroyed the property.[13] Evidence that plaintiff was the true owner, and that the thing was wrongfully taken from his possession by a third person, and was afterwards in defendant's possession, throws on defendant the burden of accounting for the possession.[14]

A refusal to deliver may be with such circumstances of defiance of plaintiff's title, or of appropriation, as in itself to be a conversion. Where this is not the case, a demand and refusal, if unqualified and unexplained, is usually conclusive evidence of conversion,[15] if ability to comply is

[13] Spooner *v.* Holmes, 102 Mass. 503, s. c., 3 Am. Rep. 491 and cases cited; McMorris *v.* Simpson, 21 Wend. 610, and cases cited. When the question of conversion depends on the question of assent by plaintiff, the plaintiff cannot be asked on his own behalf, "did you ever assent?" The question is whether his acts manifested assent, or justified the defendant in believing he assented. Stanton *v.* Crispell, 9 Hun, 502.

Where a landlord asserted that he would sell his tenant's hay and put the money in his pocket and assumed the control of the property, thus denying the tenant his right to dispose of it, it was held that such assertion and act amounted to a conversion. Gaw *v.* Bingham (Tex. Civ. App.), 107 S. W. Rep. 931.

[14] Paragraph 15. Edw. on Bailm., § 109.

In an action for conversion in hauling away logs, evidence of acts of the defendant subsequent to the commencement of the action in appropriating to his use certain of the logs in question, was held admissible as giving color to such prior acts. Taylor *v.* Tigerton Lumber Co., 134 Wis. 24, 114 N. W. Rep. 122.

[15] Holbrook *v.* Wight, 24 Wend. 169, 178. Compare Huntington *v.* Douglas, 1 Robt. 204, and cases cited; Hill *v.* Govell, 1 N. Y. 522; Mount *v.* Derrick, 5 Hill, 455; Storm *v.* Livingston, 6 Johns. 44; Jackson *v.* Pixley, 9 Cush. 490; Roberts *v.* Berdell, 15 Abb. Pr. N. S. 177. The refusal to surrender possession in response to a demand, is not, of itself, conclusive. It is only evidence of an act, and, like other inconclusive acts, is open to explanation. Walley *v.* Deseret Nat. Bank, 14 Utah, 305, 47 Pac. Rep. 147.

But where the taking of the property is of such a nature as to amount to a conversion, no demand is necessary. Meyer *v.* Doherty, 133 Wis. 398, 113 N. W. Rep. 671, 126 Am. St. Rep. 967, 13 L. R. A. 247.

"A demand and refusal do not of themselves constitute a con-

shown; otherwise not.[16] If accompanied by a reasonable and truthful qualification, it is not evidence of conversion.[17]

version, but are only evidence of conversion, and they are only presumptive evidence capable of being rebutted by proof of any facts which constitute a legal justification or excuse for non-delivery." Sprague's Collecting Agency *v.* Spiegel, 107 Ill. App. 508, 510.

The gist of the conversion is the usurpation of the owner's right of property and not the actual damages inflicted. It is not necessary that the act be wilful or intentional to render it a conversion. Ferrera *v.* Parke, 19 Oreg. 141, 23 Pac. Rep. 883.

"'Conversion is based upon the idea of an assumption by the defendant of a right of property or a right of dominion over the thing converted, which casts upon him all the risks of an owner; and it is therefore, not every wrongful intermeddling with, or wrongful asportation or wrongful detention of, personal property that amounts to a conversion. Acts which themselves imply an assertion of title or of a right of dominion over personal property such as a sale, letting, or destruction of it, amount to a conversion even although the defendant may have honestly mistaken his rights; but acts which do not in themselves imply an assertion of title, or of a right of dominion over such property, will not sustain an action of trover unless done with the intention to deprive the owner of it permanently to temporarily, or unless there has been a demand for the property and a neglect or refusal to deliver it, which are evidence of a conversion, because they are evidence that the defendant, in withholding it, claims the right to withhold it, which is a claim of a right of dominion over it.' Spooner *v.* Manchester, 133 Mass. 270, 43 Am. Rep. 514." Ferrera *v.* Parke, 19 Oreg. 141, 23 Pac. Rep. 833.

[16] Bowman *v.* Eaton, 24 Barb. 528, and cases cited.

But where a demand for a certificate of stock is refused because the party on whom the demand was made believed the certificate had been burned, no cause of action for conversion arises. A refusal after the certificate had been found will however amount to a conversion. McDonald *v.* McKinnon, 104 Mich. 428, 62 N. W. Rep. 560.

[17] Holbrook *v.* Wight (above); Hager *v.* Randall, 62 Me. 439.

"While the law is, that a demand and refusal are generally *prima facie* evidence of a conversion, a qualified, reasonable and justifiable refusal is no evidence of a conversion. . . . It is well settled that the possessor of goods may refuse to deliver them up until the claimant makes some proper and reasonable show of ownership, which necessarily includes the fact of identification." Butler *v.* Jones, 80 Ala. 436, 2 So. Rep. 300.

Where mere words are relied on as evidence of conversion, the circumstances must show a defiance of plaintiff's right. Mere refusal to act when plaintiff might take possession, without act of defendant, is not enough.[18] In the absence of proof as to the date of the conversion the presumption is that it was as of the date of taking the property into possession.[19]

Proof of intent is not necessary.[20]

Where the defendants as a condition precedent to compliance with the demand asked the plaintiffs to first furnish a list of the articles which they claimed in order to expedite the sorting of the defendant's stock, they did not by the refusal to give up the stock before receiving the list thereby convert the same. Galvin *v.* Galvin Brass, etc., Works, 81 Mich. 16, 45 N. W. Rep. 654.

[18] Gillet *v.* Roberts, 57 N. Y. 33.

After the plaintiff's attorney had paid for certain machinery, the defendants told him it was in the warehouse, but failed to say anything when the attorney thereupon made verbal demand for the same. It was held that the silence of the defendants did not show such dominion over the property as to constitute conversion. Richards *v.* Pitts Agricultural Works, 37 Hun (N. Y.), 1.

A landlord was not guilty of conversion where, after the lessee had moved away most of his property he entered and stored the remainder of the lessee's goods as a necessary act of taking possession, but did not deny the lessee the right to come and take away the rest of his possessions. Mattice *v.* Brinkman, 74 Mich. 705, 42 N. W. Rep. 172.

[19] Parker *v.* Harden, 121, N. C. 57, 28 S. E. Rep. 20.

But it has been held that where the declaration alleged the time of conversion and a different time was proved, this was a fatal variance. Williams *v.* McKissick, 125 Ala. 544, 27 So. Rep. 922.

[20] Laverty *v.* Snethen, 68 N. Y. 522; Dudley *v.* Hawley, 40 Barb. 397, affi'd as Spraights *v.* Hawley, 39 N. Y. 441; Boyce *v.* Brockway, 31 N. Y. 490, and cases cited. A plaintiff, in order to recover the proceeds of property stolen by the defendant, is not required to prove the guilt of the latter beyond a reasonable doubt. It is sufficient if he establish the allegations of the petition by a preponderance of the evidence. Nebraska Nat. Bank *v.* Johnson, 51 Neb. 546, 71 N. W. Rep. 294.

"The intention with which the wrongful act is done by which a party is deprived of his property, except when malicious, is of little consequence, provided the act is done. It is the effect of the act which constitutes the conversion." Gibbons *v.* Farwell, 63 Mich. 344,

11. Demand.

Demand before suit if necessary may be proved, though not alleged.[21] An oral demand, if sufficient in itself, may be proved without producing a demand in writing made at the same time.[22]

12. Value.

Plaintiff must give some evidence of value, though his allegation of value be not denied.[23] The mode of proving

349, 29 N. W. Rep. 855, 6 Am. St. Rep. 301.

It is no defense to show that the taking was in good faith and by mistake. Crawford *v.* Thomason, 53 Tex. Civ. A. 561, 117 S. W. Rep. 181. Good faith is material only as the basis of an affirmative defense of set-off for improvements to the article converted. Milltown Lumber Co. *v.* Carter, 5 Ga. App. 344, 63 S. E. Rep. 270.

[21] Simser *v.* Cowan, 56 Barb. 395, and see Fullerton *v.* Dalton, 58 Barb. 236. The purpose in an action of trover of proving a demand and refusal is to show a conversion of the property, and it is wholly unnecessary to prove a demand where the conversion is otherwise shown. Anderson *v.* Agnew, 38 Fla. 30, 20 So. Rep. 766; Adams *v.* Castle, 64 Minn. 505, 67 N. W. Rep. 637.

"The demand is not a matter of pleading, but of evidence. A wrongful conversion being alleged, it can be made out by proof of demand and refusal when such demand is necessary to prove the defendant's wrongfulness." Carter *v.* Eighth Ward Bank, 33 Misc. 128, 130, 67 N. Y. Supp. 300. See also Bernstein *v.* Warland, 33 Misc. 280, 67 N. Y. Supp. 444.

The general rule is that where the defendant came lawfully into possession of the property, it is necessary to make a demand for the property before commencing the action. Gaw *v.* Bingham (Tex. Civ. App.), 107 S. W. Rep. 931.

[22] Smith *v.* Young, 1 Campb. 439.

"The action of trover proceeded upon the fiction that the defendant found the property and thereafter converted it to his own use, and generally was brought where defendant came into possession of the property rightfully. A demand was necessary therefor before suit was brought in order that the action would lie." Bever *v.* Swecker, 138 Iowa, 721, 116 N. W. Rep. 704.

[23] Hollenbeck *v.* Green, 120 N. Y. App. Div. 671, 105 N. Y. Supp. 915; Connors *v.* Meir, 2 E. D. Smith, 314.

In an action for the conversion of cattle where there was no proof as to how many were steers and

the value of chattels has been already stated.[24] As to the value of a thing in action—such as a promissory note—opinions of witnesses are not competent. The proper inquiry is as to the solvency of the debtor.[25] Evidence of the neglect or refusal of the debtor, being a business man, to pay it according to its terms, is competent, as tending to show inability to pay.[26] The market price of the property is ordinarily the measure of its value.[27] But defendant may show

how many were cows, evidence that the market value of the steers at the time of conversion was $30 and that of the cows $20 was held insufficient proof as to value to entitle the plaintiff to a verdict. Sigel-Campion Live Stock Co. *v.* Holly, 44 Colo. 580, 101 Pac. Rep. 68.

[24] Chap. XVI, paragraphs 19–23 of this vol.

[25] Potter *v.* Merchants Bank, 28 N. Y. 641. Compare Outhouse *v.* Outhouse, 13 Hun, 130, 132.

"Among the facts which were competent to show the value of said certificates of deposit, was the fact that the maker thereof was at the time of the alleged conversion insolvent." Los Angeles First Nat. Bank *v.* Dickson, 5 Dak. 286, 289, 40 N. W. Rep. 351.

A defendant who was sued for the conversion of certain notes, had the burden of proving their worthlessness by reason of the bankruptcy of the makers or for any other cause. Burrows *v.* Keays, 37 Mich. 430.

[26] Booth *v.* Powers, 56 N. Y. 22, rev'g Flint *v.* Craig, 59 Barb. 319.

Evidence that certificates of deposit issued by a bank had been protested prior to a conversion of the same by the defendant was competent to show the insolvent condition of the bank where the question of value was under consideration. Los Angeles First Nat. Bank *v.* Dickson, 5 Dak. 286, 40 N. W. Rep. 351.

[27] Parmenter *v.* Fitzpatrick, 135 N. Y. 190, 31 N. E. Rep. 1032. See Pennington *v.* Redman Van, etc., Co., 34 Utah, 223, 97 Pac. Rep. 115.

"In trover it is a general rule . . . that when property has a fixed value the measure of damages is that value at the time of the conversion, with interest; but if the value has risen after the conversion the jury may at discretion take the higher value as it may be shown to exist at any time between the conversion and the trial." Boutwell *v.* Parker. 124 Ala. 341, 27 So. Rep. 309.

"In actions for the conversion of instruments for the payment of money . . . the amount appearing to be due thereon, of principal and interest, at the time of the conversion, and the interest upon that aggregate from thence to the trial, is *prima facie* the measure of damages." Los Angeles First Nat. Bank *v.* Dickson, 5 Dak. 286,

the true value, though he has not denied plaintiff's allegation of value.[28]

Where there is ground for presuming fraud, defendant may be held liable in the highest amount, if he will not produce the article or disclose its actual value.[29]

40 N. W. Rep. 351, and cases cited.

Where the only evidence as to the value of the articles converted was the gross amount which they had brought at an auction sale, the evidence was held sufficient in the absence of anything to show that unusual prices were received. Swartz *v.* Gottlieb-Bauernschmidt-Strauss Brewing Co., 109 Md. 393 71 Atl. Rep. 854, 16 Ann. Cas. 1156.

The measure of damages of converted stock is the fair market value at the time of the conversion. Hager *v.* Norton, 188 Mass. 47, 52, 73 N. E. Rep. 1073. See also Lorain Steel Co. *v.* Norfolk, etc., R. Co., 187 Mass. 500, 73 N. E. Rep. 646.

But evidence tending to show the par value of stock converted without any proof of facts relative to its value, entitles a plaintiff to nominal damages only. Rosenthal *v.* Rudnick, 84 N. Y. App. Div. 611, 82 N. Y. Supp. 1004.

[28] Chicago, &c. R. R. Co. *v.* Northwestern Union Packet Co., 38 Iowa, 377, 382.

So, too, where in an action for the conversion of the plaintiff's ring, the defendant agreed by stipulation that the plaintiff could testify as an expert as to the value of the ring, he did not thereby surrender his right to cross-examine the plaintiff and ask—"how do you fix the value of the property?" Chankalian *v.* Powers, 89 N. Y. App. Div. 395, 85 N. Y. Supp. 753.

If the trial court is satisfied that the article has no market value or price, from which its actual value may be ascertained it may authorize evidence of its cost to establish its value and in such a case it is not necessary that an issue be made by showing that it has no market value. Pennington *v.* Redman Van, etc., Co., 34 Utah, 223, 97 Pac. Rep. 115.

[29] Burne *v.* Weidenfeld, 113 N. Y. App. Div. 451, 99 N. Y. Supp. 412; Armory *v.* Delamire, 1 Smith L. Cas. 153, and see 10 H. L. Cas. 589, and Preston *v.* Leighton, 6 Md. 88.

If the article converted has been enhanced in value by either the original wrongdoer or his vendee the plaintiff may recover the highest proven value unless the defendant pleads as a set-off the improvements he has placed upon it and successfully carries the burden of proof as to this plea. Milltown Lumber Co. *v.* Carter, 5 Ga. App. 344, 63 S. E. Rep. 270.

Under a general denial the defendant may prove title in a third person. Simar *v.* Shea, 89 N. Y.

13. Declarations of Former Owner.

The competency of evidence of the declarations and admissions of a former owner of the property is stated in the chapter on actions by and against assignees.[30]

14. Title in Defense.

When title and right of possession in plaintiff are in issue, defendant may show them to have been in a third person.[31] Otherwise, in an action for forcible and wrongful taking from plaintiff's possession.[32] The burden is on defendant to show such title in the person through whom he claims, as will sustain his defense.[33] A general denial admits any evidence going to controvert the facts which plaintiff is bound to establish.[34] A subsequently derived title, if relied on as a bar,[35] must be specially pleaded.[36]

App. Div. 84, 85 N. Y. Supp. 457, aff'd 180 N. Y. 558, 73 N. E. Rep. 1132.

[30] Chap. I, paragraphs 27–30 of this vol.

[31] Davis *v.* Hoppock, 6 Duer, 254; Jackson *v.* Pixley, 9 Cush. 490.

[32] Kissam *v.* Roberts, 6 Bosw. 154.

[33] Brower *v.* Peabody, 13 N. Y. 121, s. c., 2 Abb. Pr. 211, 11 How. Pr. 492.

[34] Andrews *v.* Bond, 16 Barb. 633, 642. But waiver of the conversion being a matter in avoidance must be alleged affirmatively. Wood *v.* Proudman, 122 N. Y. App. Div. 826, 107 N. Y. Supp. 757. In an action of trover, the plea of not guilty raises no issue as to the plaintiff's property in the goods. Such plea operates only as a denial that the defendant committed the wrong alleged, *i. e.*, that he took and converted the goods to his own use. Anderson *v.* Agnew, 38 Fla. 30, 20 So. Rep. 766.

When a defendant was sued for the conversion of a mare which he had received from the plaintiff's minor son in a trade, relying on the possession of the son as evi-

[35] Jacobs *v.* Remsen, 12 Abb. Pr. 390, s. c., 35 Barb. 384.

A defendant, for a first defense to the allegations of conversion, pleaded a general denial. For a second defense he set up title to the goods in another person. It was held that under the general denial the defendant could put in issue the ownership of the property, and therefore the second defense was mere surplusage. Hopkins *v.* Dipert, 11 Okl. 630, 69 Pac. Rep. 883.

[36] Wehle *v.* Butler, 12 Abb. Pr. N. S. 139. And see Bryant *v.* Bryant, 2 Robt. 612.

15. Title Derived Through Wrongdoer.

If the true owner, by his own act and consent, has given to another the written evidence or indicia [37] of ownership, and the apparent right of disposal of the property, a *bona fide* purchaser from the apparent owner, or one who advances money, or incurs responsibility on the faith of the title, will be protected.[38] But if the party dealing with the apparent owner, had actual notice of the rights of the true owner, he acquires no better title than the transferor or apparent owner could lawfully convey.[39] In the case of securities, the word "trustee" or its equivalent, on the face of the paper, is notice of the trust.[40] Evidence of oral

dence of his title, he had the burden of proving the son's ownership thereto by gift from his father. Lantz *v.* Drum, 44 Ill. App. 607.

Under the terms of a lease, certain machinery of a mining company was claimed by the plaintiff. Thereafter the receiver of the company took this property away, for which act the plaintiff brought action for conversion. The defendant pleaded a general denial, whereby it was held that he "put in issue the ownership of the property in dispute at the time of the alleged wrongful conversion." Kirk *v.* Kane, 87 Mo. App. 274, 281.

Where the plaintiff alleged title in himself without showing how he acquired it, it was held that the defendant could, under a general denial, show that the plaintiff acquired title through a fraudulent sale to himself. Johnson *v.* Oswald, 38 Minn. 550, 38 N. W. Rep. 630, 8 Am. St. Rep. 698.

[37] Mere possession is not enough. Penfield *v.* Dunbar, 64 Barb. 239.

[38] Bay *v.* Coddington, 5 Johns. Ch. 54; Porter *v.* Parks, 49 N. Y. 564, and cas. cit.

Where a consignor sent goods to one whom he described in his consular declarations as the purchaser, and in the invoices accompanying the shipments thereof indicated that the goods were sold to the consignee in whose name they were entered in the custom house, he could not subsequently set up his title, in an action for conversion, against one who bought the goods from the consignee after seeing the consular declarations and the letter with the invoices accompanying the goods. Simar *v.* Shea, 89 N. Y. App. Div. 84, 85 N. Y. Supp. 457, aff'd 180 N. Y. 558, 73 N. E. Rep. 1132.

[39] Porter *v.* Parks (above).

[40] Shaw *v.* Spencer, 100 Mass. 382, 1 Am. Rep. 115; Duncan *v.* Jaudon, 15 Wall. 175. One who purchases public stocks from an agent, under a mere general power to do and transact all manner of business, must prove, as against the principal, that he bought in

notice to the defendant, that the wrongdoer was acting as agent, lets in evidence of his actual authority.[41] When plaintiff's title and an original tortious taking is shown, the burden is on the purchaser to show that he is free from fault, and lawfully came to the possession in good faith.[42]

16. Illegality.

Evidence that defendant received possession from plaintiff under an illegal contract, does not necessarily defeat the action, for it is not founded on the contract.[43] Illegality in the contract set up by defendant as a justification of his detention, may be proved by plaintiff in rebuttal, though not alleged in pleading,[44] unless the contract is pleaded as a counterclaim.

17. Mitigation of Damages.

The burden is upon the defendant to establish facts in mitigation of damages.[45] A general denial admits any matter

good faith and paid a fair consideration. Hodge *v.* Combs, 1 Black, 192.

[41] Merchants Bank *v.* Livingston, 74 N. Y. 223.

[42] Cormier *v.* Batty, 41 Super. Ct. (J. & S.) 79; except in case of negotiable paper, 2 Pars. on Pr. N. 264.

[43] Frost *v.* Plumb, 40 Conn. 111, s. c., 16 Am. Rep. 18; Woodman *v.* Hubbard, 25 N. H. 67; Hall *v.* Corcoran, 107 Mass. 251, s. c., 9 Am. Rep. 30. *Contra*, Smith *v.* Rollins, 11 R. I. 464, s. c., 23 Am. Rep. 509, 510, 515, and cases cited; and 60 Me. 528, s. c., 11 Am. Rep. 210.

Thus a defendant who was sued for the conversion of a hired horse could not set up as a defense the illegality of a Sunday contract of hiring. Doolittle *v.* Shaw, 92 Iowa, 348, 60 N. W. Rep. 621, 54 Am. St. Rep. 562, 26 L. R. A. 366.

Similarly where a vendee of a warehouse receipt for ten barrels of whiskey was charged with the conversion thereof, he could not, for a defense, show that the sale was illegal because his vendors had no license. Elder *v.* Corr, 9 Pa. Super. Ct. 228.

[44] Williams *v.* Tilt, 36 N. Y. 319.

But where the defendant was sued for conversion of a note which he had negotiated, contrary to an agreement with the plaintiff, before delivering to the plaintiff certain certificates of stock, he could not show that the note had been procured on an illegal contract without pleading illegality in his defense. Boyer *v.* Fenn, 19 Misc. 128, 43 N. Y. Supp. 533.

[45] Stone *v.* Chicago, &c. Ry. Co.,

competent in reduction of damages.[46] An agreement giving defendant a lien, if proved without objection may avail, though not alleged.[47]

8 S. D. 1, 65 N. W. Rep. 29.

Where converted property has been returned to and accepted by the plaintiff, this fact is to be considered in mitigation of damages, and in some cases it has been held that the court had power to permit the defendant to return the chattel in mitigation of damages. Aylesbury Mercantile Co. *v.* Fitch, 22 Okl. 475, 99 Pac. Rep. 1089, 23 L. R. A. N. S. 573.

"After the conversion of property has become complete the wrongdoer cannot escape liability, nor lessen the actual damage recoverable, by a tender back of the property." Munier *v.* Zachary, 138 Iowa, 219, 114 N. W. Rep. 525, 18 L. R. A. N. S. 572, 16 Ann. Cas. 526.

[46] Booth *v.* Powers, 56 N. Y. 22, rev'g Flint *v.* Craig, 59 Barb. 319. In trover against an attaching officer, the fact that, before the commencement of suit, the goods had been returned to the person who was in lawful possession of the same at the time of seizure, may be shown in mitigation of damages. McGraw *v.* Sampliner, 107 Mich. 141, 64 N. W. Rep. 1060.

Under a general denial a defendant in conversion was allowed to offer testimony as to the value of the property in question at the time of the taking, though he was not allowed to show that its value had decreased, between the time of the alleged conversion and the trial. Thew *v.* Miller, 73 Iowa, 742, 36 N. W. Rep. 771.

[47] Townsend *v.* Bargy, 57 N. Y. 666.

A defendant in trover, who, as mortgagee, held a valid lien on the property in question and who afterwards took possession under a fraudulently secured bill of sale, but before the said sale had been repudiated, was permitted to show the extent of his lien in mitigation of damages. Rall *v.* Cook, 77 Mich. 681, 43 N. W. Rep. 1069.

CHAPTER XXXVI

ACTIONS FOR TRESPASS TO PERSONAL PROPERTY

1. Plaintiff's title or possession.
2. The act of trespass.
3. Value and damages.
4. Admissions and declarations.
5. Character.
6. Action for wrongful levy.
7. — defendant's sanction.
8. — justification.
9. —exemption from execution.
10. Justification by tax collector.

1. Plaintiff's Title or Possession.

If plaintiff shows that he had actual possession, and defendant's forcible taking, plaintiff need not prove his title,[48]

[48] Norton *v.* Young, 6 Colo. App. 187, 40 Pac. Rep. 156; Hoyt *v.* Van Alstyne, 15 Barb. 568; Hurd *v.* West, 7 Cow. 752. A court of trespass *de bonis asportatis*, for the taking and detaining of personal property, can only be supported on the theory that plaintiff was either its owner, or entitled of right to its possession at the time of the trespass complained of. Wilson *v.* Haley Live Stock Co., 153 U. S. 39. In an action of trespass *de bonis asportatis* the plaintiff cannot recover as upon a count for money had and received, at least without an amendment of the complaint. Id.

Actual possession though adverse to the real owner is sufficient as against a wrongdoer who can show no better title. Louisville & Nashville R. R. Co. *v.* Higginbottam (Ala.), 44 So. Rep. 872.

"The general doctrine is well settled, . . . that the plaintiff, in such cases, must show that, at the time when the injury was committed, he had an actual or constructive possession of the property and also a general or qualified title therein; but it is equally well settled that actual possession, though without the consent, or even adverse to the real owner, will be sufficient as against a wrong-doer, or one who can show no better title." Miller *v.* Kirby, 74 Ill. 242.

Possession by an expressman, of goods given to him for delivery, is sufficient to allow him to sue in trespass. Matthews *v.* Smith's Express Co., 1 Misc. 238, 23 N. Y. Supp. 132.

A husband in possession of his wife's cow can bring trespass for injury to the cow. Taylor *v.* Hayes, 63 Vt. 475, 21 Atl. Rep. 610.

When the plaintiff leaves his goods in the case of his clerk, the temporary absence of the latter

even though it be in issue.[49] If he does not prove possession, actual or constructive, he must prove title.[50] If he relies on title under an execution sale, he must give *prima facie* evidence of the validity of the sale.[51] The mode

does not constitute a surrender of possession by the plaintiff. Cook *v.* Thornton, 109 Ala. 523, 20 So. Rep. 14.

[49] Kissam *v.* Roberts, 6 Bosw. 124, and cases cited.

"In actions concerning personal property, a party is not obliged to put the question of ownership in issue, but he may do so if he elects, and if he does put it in issue the judgment is conclusive upon that question." Branson *v.* Studebaker, 133 Ind. 147, 53 N. E. Rep. 98. See also Smith *v.* Mosby, 98 Ind. 445; McFadden *v.* Fritz, 110 Ind. 1, 10 N. E. Rep. 120.

[50] Carter *v.* Simpson, 7 Johns. 535. Compare Bas *v.* Steele, 3 Wash. C. Ct. 381.

The plaintiff must prove either the actual possession of the property or the immediate right thereto. Holman *v.* Ketcham, 153 Ala. 360. 45 S. Rep. 206.

And where one is not in actual possession and according to the allegations in his pleadings does not have the right to immediate possession, he cannot maintain an action in trespass. Joseph *v.* Henderson, 95 Ala. 213, 10 So. Rep. 843.

The plaintiff may offer in evidence as proof of her title to goods which were levied on, a certified copy of a bill of sale which she had received from the former owners. Polykranas *v.* Krausz, 73 N. Y. App. Div. 583, 77 N. Y. Supp. 46.

The vendor of personal property sold on the installment plan, title being reserved till the final payment, may maintain trespass against a person who levies thereon by virtue of an execution against the purchaser who has failed to make the required payments within the time stipulated. Fields *v.* Williams, 91 Ala. 502, 8 So. Rep. 808.

When a wife proves that she has title to the property which was taken under an execution against her husband, she will prevail in an action for trespass against one who incited the sheriff to make the levy and sell the goods to him, and promised to indemnify the sheriff for any liability which he might incur. Morrison *v.* Nipple, 39 Pa. Super. Ct. 184.

Where the plaintiff resided with his father on a leased farm as a member of the family, making no claim to certain animals located thereon inconsistent with that of his father, he could not assert such possession of or apparent right to the said animals as would establish his claim for trespass against the defendants who made an appropriation under a chattel mortgage executed by the father. Saenz *v.* Mumme (Tex. Civ. App.), 85 S. W. Rep. 59.

[51] Id.

of proof of title or possession is stated in the last chapter.

2. The Act of Trespass.

Evidence of any unlawful interference with plaintiff's personal property, or exercise of dominion over it, by which plaintiff is damnified—such as a wrongful levy—though without sale or removal, is enough.[52] Evidence of mere nonfeasance does not make a trespasser *ab initio*. There must be a positive act, such as if done without authority would be a trespass.[53]

[52] Stewart *v.* Wells, 6 Barb. 79, and cases cited.

Although the plaintiff-lessee had given up the key of the premises to his landlord, the fact that he was still on the property and had put a new lock on the door was held sufficient to show that the breaking in and the forcible carrying out of the plaintiff's goods was an "unlawful invasion by force of his possession of them." Griffin *v.* Martel, 77 Vt. 19, 58 Atl. Rep. 788.

One who takes property under the mistaken idea that he has a right to do so, is liable in trespass even though he offers to and does return the property to the true owner on discovering his mistake. Cernahan *v.* Chrisler, 107 Wis. 645, 83 N. W. Rep. 778.

One who enters premises under a contract for the sale of the realty is liable in trespass for interfering with the personalty of another which is stored on the premises under a lease executed by the vendor. Temple *v.* Duran, 121 S. W. Rep. 253.

If a constable with an execution against property, allows the defendant in execution to remove the property to another precinct and sell the same to the plaintiff in trespass, and if thereafter he returns the execution and receives an order of sale from a justice of the peace not having legal authority to issue the same, he is guilty of trespass in acting under the order of sale. Chaney *v.* Burford Lumber Co., 132 Ala. 315, 31 So. Rep. 369.

[53] Averell *v.* Smith, 17 Wall. 82; Spencer's Case, 1 Smith's L. Cas. 137, 221; Brock *v.* Berry, Demonville & Co., 132 Ala. 95, 31 So. Rep. 517, 90 Am. St. Rep. 896. See also Grunberg *v.* Grant, 3 Misc. 230, 22 N. Y. Supp. 747. Whether a criminal act requires proof beyond a reasonable doubt, is not fully settled. See chapter XXVI, paragraph 31 and notes thereto of this vol., and Thayer *v.* Boyle, 30 Me. 475; Paul *v.* Currier, 53 Id. 526 (deemed overruled in Ellis *v.* Buzzell, 60 Id. 209); Wells *v.* Head, 17 Ill. 204.

Fraudulent use of an order to

3. Value and Damages.

The value of the property destroyed need not be proven in order to sustain the action;[54] but must be, to sustain a verdict for substantial damages for the destruction.[55] De-

show cause whereby one turns over property to a United States marshal is a positive act establishing grounds for trespass. Chicago Title & Trust Co. *v.* Core, 223 Ill. 58, 79 N. E. Rep. 108, affirming 126 Ill. App. 272, and cases cited.

"It has never been doubted that if an officer has legal process to execute, and voluntarily abuses and converts it to other purposes, he is not only a trespasser in that act, but becomes one *ab initio*, and is thus liable for all he has done under the process." In this case it was held that the sheriff became a trespasser *ab initio* by selling property at a place other than that designated in the advertisement of sale. Ryan *v.* Young, 147 Ala. 660, 41 So. Rep. 954.

A sheriff becomes a trespasser *ab initio* when he seizes under a writ of attachment goods which he is not authorized to take. Grunberg *v.* Grant, 3 Misc. 230, 22 N. Y. Supp. 747.

[54] Brent *v.* Kimball, 60 Ill. 35, s. c., 14 Am. Rep. 35; Cernahan *v.* Chrisler, 107 Wis. 645, 83 N. W. Rep. 778. See also Richardson *v.* Brewer, 81 Ind. 107.

Where no damage is proved, nominal damage only will be allowed. Ross *v.* New Home Sewing Mach. Co., 24 Mo. App. 353.

One cannot attach a governor to a gas meter, owned by the plaintiff, and against its consent without invading a property right for which the plaintiff is entitled to nominal damages at least, irrespective of the question of whether or not the act was injurious to the meter. Blondell *v.* Consolidated Gas Co., 89 Md. 732, 745, 43 Atl. Rep. 817, 46 L. R. A. 187.

When agents of the defendant humane society cause two horses, suffering from disease and injury, to be killed without any notice to or consent of the owner, they are invading the rights of the plaintiff who is entitled to at least nominal damages which are implied by law in every case of illegal invasion of the right of property of another. Polar Wave I. & F. Co. *v.* Ill. Humane Soc., 155 Ill. App. 310.

[55] Kenny *v.* Planer, 3 Daly, 131.

When, however, there has been an offer to return property taken, only nominal damages will be allowed in the absence of evidence to show special damage. Cernahan *v.* Chrisler, 107 Wis. 645, 83 N. W. Rep. 778.

When no damages are shown, the court is not justified in allowing the jury to conjecture as to the amount. Ross *v.* New Home Sewing Machine Co., 24 Mo. A. 353.

A complaint which charges the defendant with cutting down and removing from the plaintiff's land

fendant may controvert the value although he has not denied it in pleading.[56] The mode of proving value and damage has already been stated.[57]

Wilful wrong or malice may be shown as a ground for exemplary damages,[58] even though actual damage was nomi-

"all the valuable timber of every kind and description including oak, poplar, pine, walnut, etc., of the value of at least $3,000," is sufficient on demurrer in spite of the fact that it does not give the number of the different kinds of trees and the value of each kind. Newlon *v.* Reitz, 31 W. Va. 483, 7 S. E. Rep. 411.

In an action for taking away a quantity of poultry consisting of turkeys, geese, ducks and hens, it was held unnecessary to state how many there were of each where the collective value of the whole was stated. See Jesse French Piano, etc., Co. *v.* Phelps, 47 Tex. Civ. A. 385, 105 S. W. Rep. 225, citing Donaghe *v.* Roudeboush, 4 Munf. (18 Va.) 251.

But it has also been held that when a petition describes goods levied on as a "stock of millinery goods, consisting of hats, bonnets, laces, ribbons, flowers, braids, hairpins, trimmings of all kinds, being a complete stock of millinery goods of all kinds, of the value of $3000," the allegation was not sufficiently specific to admit proof of the value of the separate articles when no excuse was offered for not giving a more perfect description. Beck *v.* Avondino, 82 Tex. 314, 18 S. W. Rep. 690.

[56] Dunlap *v.* Snyder, 17 Barb. 561.

Injury to credit is not an element of the actual damage occasioned by the closing of the plaintiff's flower shop on the day before Easter, by the sheriff acting under an unauthorized execution. Nor can the fees charged by an attorney for suing out a writ of injunction against the sheriff be allowed as compensatory damage. Nees *v.* Radford, 83 Tex. 585, 19 S. W. Rep. 141.

[57] Chapter XVI, paragraphs 20 and 85 and chapter XXXI, paragraph 40 of this vol.; Nellis *v.* McCarn, 35 Barb. 115, 118.

Where the damages are such as would necessarily and naturally result from the injury complained of, it is not necessary that the damages should be specially averred in order to authorize a recovery. Argotsinger *v.* Vines, 82 N. Y. 308.

It was held in Gwaltney *v.* Scottish Timber, etc., Co., 115 N. C. 502, 20 S. E. Rep. 465, that the damage done to the plaintiff's fish trap must be measured by his interest therein, and that if he was owner in fee simple the damage allowed should be greater than if he showed possession only.

[58] See Lewis *v.* Bulkley, 4 Daly, 156; Razzo *v.* Varni (Cal.), 21 Pac. Rep. 762.

"In an action of trespass a party may give in evidence for the purpose of increasing the damages,

nal.[59] Express or actual malice may be inferred from a mischievous intent, or inexcusable recklessness.[60] But malicious intent is not conclusively inferred from the act.[61] It is only a presumption that one intends the ordinary and probable consequences of his act, and this presumption may be rebutted by competent evidence.[62] When competent to show malice in an officer's act, a witness may testify that it was done in an offensive and insulting manner.[63] Proof or

the circumstances which accompanied and gave character to the wrong. In such an action the motives from which the unlawful act springs are always to be considered by the jury. If property be taken under a *bona fide* claim of title, the value of the property, as a general rule, is the true measure of the dmaage, but if on the contrary, the claim is but a mere pretence for the purpose of perpetuating a wrong, the jury may give exemplary damages." Zimmerman *v.* Helser, 32 Md. 274.

It appears to be "tolerably well settled that exemplary damages may be recovered if the injury was wantonly inflicted." Polykransas *v.* Krauzs, 73 App. Div. 583, 77 N. Y. Supp. 46, and cases cited.

"Evidence of the *quo animo* with which the trespass was committed is admissible to enhance the damages." Tobin *v.* Deal, 60 Wis. 87, 89, 18 N. W. Rep. 634, 50 Am. Rep. 345.

In Washington, treble damages may be allowed for trespasses which are not casual or involuntary or for which the defendant did not have probable cause. In such cases the court is not disposed to give the plaintiff the benefit of the highest valuation, based upon the highest estimate made but will consider from the evidence adduced what is a fair value upon which to compute the damages. Nethery *v.* Nelson, 51 Wash. 624, 99 Pac. Rep. 879.

[59] Allabach *v.* Ult, 51 N. Y. 651.

[60] Etchberry *v.* Levielle, 2 Hilt. 40, and cas. cit.; State *v.* Hessencamp, 17 Iowa, 25.

It is not necessary that the petition should use the word "malice" if other words descriptive of oppression and wrongful compulsion are incorporated therein. Gensburg *v.* Field, 104 Iowa, 599, 605, 74 N. W. Rep. 3.

[61] Filkins *v.* People, &c. of N. Y., 69 N. Y. 106, rev'g 1 Buffalo Super. Ct. (Sheldon) 504.

[62] Id.

[63] Raisler *v.* Springer, 38 Ala. 703. Compare cases cited in note 3, chapter XXXI, paragraph 45 of this vol.

A declaration that unless a judgment was satisfied in whole or in part, the business of the plaintiff would be ruined, coupled with the act of closing the plaintiff's store, was found by a jury to be malicious, and the court allowed punitive damages assessed by the

admission that defendant acted without malice, precludes exemplary damages; and evidence, in the nature of a justification, is admissible in mitigation.[64]

4. Admissions and Declarations.

In corroboration of circumstantial evidence that defendant or his agent did the act, evidence of his previous declarations

jury to stand. Schuler *v.* Roberts et al., 21 N. Y. Supp. 27.

Though the plaintiff distinctly stated that certain goods on the premises belonged to her and not to her husband, the sheriff under an execution against her husband threw the goods into the roadside where the plaintiff remained with them all night while an assistant to the officer marched before her with a gun on his shoulder, occasionally discharging it and frequently ordering her to keep away from the property. Evidence of such conduct on the part of the assistant was held admissible to show malice. Fults *v.* Munro, 202 N. Y. 34, 95 N. E. Rep. 23, 37 L. R. A. N. S. 600, Ann. Cas. 1912, D. 870.

[64] Gelston *v.* Hoyt, 13 Johns. 561, affi'g Id. 141.

When the defendant showed that he had been cutting trees from land for a period of years in good faith, supposing the land was his, he cannot be held for wilful trespass. Hateley *v.* State, 118 Ga. 79, 44 S. E. Rep. 852.

Evidence of the motive which controlled the party committing the trespass, may be shown in mitigation when exemplary damages are claimed. Cernahan *v.* Chrisler, 107 Wis. 645, 83 N. W. Rep. 778.

But in an action for conversion, a defendant cannot mitigate his damages or defeat the plaintiff's action by a return of the property without the plaintiff's consent. Kelly *v.* Meiser, 21 N. Y. App. Div. 253, 47 N. Y. Supp. 675.

When an insolvent transferred property to the plaintiff, even though in fraud of his creditors, still the plaintiff may maintain trespass and the defendant may prove the fraudulent transfer only in mitigation of damages. La Page *v.* Hill, 87 Me. 158, 32 Atl. Rep. 801. See also Dahill *v.* Brooker, 140 Mass. 308, 5 N. E. Rep. 496, 54 Am. Rep. 465.

In trespass for the wrongful entry of the dwelling house of the plaintiff and carrying away personal effects exempt from execution, the defendant may introduce in mitigation, papers in an attachment suit brought by the defendant against the plaintiffs and testify that the seizure was made thereunder. Boggan *v.* Bennett, 102 Ala. 400, 14 So. Rep. 742.

The wrongdoer is not liable for an aggravation of the damages caused by the gross carelessness of the injured party who cannot recover such part of his loss as is

of intent to do it is competent.[65] A proposal from defendant for settlement is competent, leaving it to the jury, if ambiguous, to determine whether it was an admission of trespass, or a proposition to buy peace.[66] The party against whom an admission is proved may prove, on his part, the whole of the conversation at that time, so far as it qualifies the admission, but no further. His declarations at the time, upon the general merits of the case, cannot be proved in his favor.[67] Where a combination of design is shown, the acts and declarations of either of those engaged in it are competent against the others, within limits already stated.[68]

5. Character.

Though wilful injury be alleged, character is not in issue.[69]

occasioned by his own fault. Lord *v.* Carbon Iron Mfg. Co., 42 N. Y. Eq. 157, 6 Atl. Rep. 812.

[65] See Dodge *v.* Bache, 57 Penn. St. 421; Smith *v.* Causey, 28 Ala. 655.

To show that an agent acted under authority of the officers of a corporation, it was permissible to offer in evidence a telephone communication from the general manager to the agent directing the latter to perform the act which resulted in the trespass. Jesse French Piano, etc., Co. *v.* Phelps, 47 Tex. Civ. App. 385, 105 S. W. Rep. 1007.

[66] Prussel *v.* Knowles, 5 Miss. (4 How.) 90.

[67] Garey *v.* Nicholson, 24 Wend. 350; Rouse *v.* Whited, 25 N. Y. 170.

When a defendant on cross examination of the plaintiff introduces testimony which tends to deny the good faith of the plaintiff, the defendant may on direct examination testify that he made a purchase of the chattels in question, offering in evidence his note therefor which he subsequently took up and replaced with a new note. Mears *v.* Cornwall, 73 Mich. 78, 40 N. W. Rep. 931.

[68] Chap. VII, paragraph 9 of this vol.; Colt *v.* Eves, 12 Conn. 243.

When one has been charged with trespass for taking the plaintiff's mules, a statement which he had made at the time another defendant, a United States officer, had taken the mules, to the effect that he had examined one of the mules and could find no markings indicating the ownership of the United States was held admissible as part of the *res gestæ* of the act of taking. Carter *v.* Fulghan, 134 Ala. 238, 32 So. Rep. 684.

[69] Thayer *v.* Boyle, 30 Me. 475.

6. Action for Wrongful Levy.[70]

In an action for a wrongful levy, the plaintiff proves the act of taking, etc., and the damage, and rests. Defendant then proves his allegations[71] that he, or one of several defendants, was a public officer,[72] and that he acted under process,[73] or under process and judgment.[74] Plaintiff may then prove whatever new matter he relies on in avoidance—such as exemption—although not pleaded.[75]

It seems that the courts quite generally exclude such evidence as being liable to abuse, and easily manufactured. See Wright *v.* McKee, 37 Vt. 161.

[70] Justification must be alleged. Graham *v.* Hanover, 18 How. Pr. 144; Root *v.* Chandler, 10 Wend. 110.

The plaintiff has the burden of proving ownership of the goods, their seizure and conversion, and their value. But where the jury finds that the legal title vests in the plaintiff by virtue of a bill of sale, then the burden shifts to the defendant to show that the plaintiff was divested of the legal title by some act of his previous to the seizure and conversion. Willis *v.* Hudson, 72 Tex. 598, 10 S. W. Rep. 713.

[71] See also Chap. VIII, paragraph 1 of this vol.

Where the defendants showed that they were creditors, that they had sued out separate writs of attachment at different times against a common debtor, and that levies were made at different times although by the same officer, the same attorney having been employed by all, the plaintiff improperly brought his action for a joint trespass. Sparkman *v.* Swift, 81 Ala. 231, 8 So. Rep. 160.

[72] Chap. VIII, paragraph 13.

[73] Chap. VIII, paragraph 19; Werner *v.* Waters, 55 Barb. 591.

A process regular in form and issued by a court of competent jurisdiction will protect the sheriff who executes it. O'Briant *v.* Wilkerson, 122 N. C. 304, 30 S. E. Rep. 126.

[74] Chapter XXIX.

"It has been held by a long line of authorities that the acts of a sheriff, constable or marshal in seizing and selling property of another under process issued by a court of competent jurisdiction in an action are not the acts of the person in whose favor such process is issued for which he is responsible. Quattrone *v.* Simon, 82 Misc. 610, 617, 144 N. Y. Supp. 1094.

[75] Dennis *v.* Snell, 54 Barb. 415. In an action of trespass for the alleged wrongful taking of property under a writ of attachment, where the plaintiffs claim title under a bill of sale executed by their debtor, which was assailed as fraudulent by the attaching creditor, the statement of accounts by the plaintiff against their said

7. — Defendant's Sanction.

For the purpose of charging the creditor in process against a third person, with trespass by its wrongful levy on plaintiff's property, there is no presumption that he authorized such levy [76] and evidence that his attorney did so is not alone enough against him.[77] But evidence that he referred the

debtor, are inadmissible; said accounts not being of themselves distinct, independent evidence of the indebtedness to plaintiff. Nelms *v.* Steiner Bros., 113 Ala. 562, 22 So. Rep. 435.

One who was not present at a sale and who gave the sheriff no directions as to the levy, sale or acts for which the officer becomes liable as a trespasser is not liable with the sheriff. Brock *v.* Berry, 132 Ala. 95, 31 So. Rep. 517, 90 Am. St. Rep. 896.

[76] The law will not presume any one to be a wrongdoer. Averill *v.* Williams, 1 Den. 501. *Contra*, Newberry *v.* Lee, 3 Hill, 523; compare Copley *v.* Rose, 2 N. Y. 115.

An action in trespass for the seizure and sale of goods was originally brought against the sheriff, but the indemnitors made application to take the sheriff's place and answer the complaint.

It was held that the plaintiff only needed to prove his action against the sheriff to hold the indemnitors liable. Neither the fact of receiving the proceeds of the goods sold, nor the fact that the execution contained a direction to the sheriff to levy and sell was sufficient to hold the defendants liable, but where the record itself showed they had indemnified the sheriff for the purpose of making the levy there was a presumption that they thereby made themselves parties to the trespass. Pool *v.* Ellison, 56 Hun, 108, 9 N. Y. Supp. 171.

[77] Averill *v.* Williams, 4 Den. 295. Compare Judson *v.* Cook, 11 Barb. 642.

Placing a claim in the hands of an attorney for collection, authorizes the attorney to make use of the usual proceedings only, and unless proof of special authority is shown, a direction by the attorney to a marshal is in excess of his general powers and will not subject the client to an action in trespass. Fisher *v.* Hetherington, 11 Misc. 575, 32 N. Y. Supp. 795.

But when an attorney improperly entered judgment in an action although the summons had not been served, issued an execution thereon and caused the marshal to make a levy on the plaintiff's property, the attorney was liable for the damage occasioned. Citing Fisher *v.* Langbein, 103 N. Y. 84, 8 N. E. Rep. 251. The court said further: "And, when the attorney conducts the suit in such a way as to be liable himself in an action for trespass, his client is

officer to his attorney for instructions, and the latter sanctioned the levy, to the knowledge of defendant;[78] or that after the taking he induced the officer to detain and sell the property;[79] or evidence that he received the proceeds, together with evidence that he admitted he had attached the goods,[80] or that on learning the facts he affirmed his claim,[81] or even omitted to repudiate the trespass,[82] is enough. Evidence that one partner directed a levy of an execution for a partnership debt, raises a presumption that the other

also liable." Main Electric Co. *v.* Cohen, 72 Misc. 30, 129 N. Y. Supp. 66.

Similarly, where it is shown that the plaintiff's property was seized by a constable and sold pursuant to directions of the defendant's attorney under a distress warrant against persons other that the plaintiff, a conversion by the defendants is proved. Allen *v.* Tyson-Jones Buggy Co. (Tex. Civ. App.), 40 S. W. Rep. 740.

[78] Armstrong *v.* Dubois, 1 Abb. Ct. App. Dec. 8.

Where the attorney himself takes an active part in the proceedings, directing and superintending the levy of the execution, and as assignee of a mortgage on part of the goods, disposes of the mortgaged chattels which the sheriff making the levy turns over to him, he becomes a joint trespasser. Bowman *v.* Davis, 13 Col. 297, 22 Pac. Rep. 507.

[79] Root *v.* Chandler, 10 Wend. 110. See Morrison *v.* Nipple, 39 Pa. Super. Ct. 184.

A bond of indemnity may be given in evidence to show the participation of the signers thereof in an unlawful levy. Meyer *v.* Phœnix Ins. Co., 95 Mo. App. 721, 69 S. W. Rep. 639.

[80] Halliday *v.* Hamilton, 11 Wall. 560, 566.

It is to be noted that liability for an original trespass committed by a sheriff in taking goods was presumptively established by the approval of the act as shown by the execution of an indemnity bond. Dyett *v.* Hyman, 129 N. Y. 351, 29 N. E. Rep. 261, 26 Am. St. Rep. 533.

[81] Herrman *v.* Gilbert, 8 Hun, 253.

When an agent commits a trespass *de bonis asportavit*, the principal, on being informed of the tortious act may ratify it so as to hold himself to the same civil liabilities as if he had originally authorized it. Burns *v.* Campbell, 71 Ala. 271, 289.

[82] Murray *v.* Binninger, 3 Abb. Ct. App. Dec. 336.

If a jury can find that the evidence showed that a defendant meant to insist on the validity and rightfulness of the levy and to claim an interest in a sale made under it, he is a co-trespasser with a marshal making the levy. Fischer *v.* Hetherington, 11 Misc. 575, 32 N. Y. Supp. 795.

partners assented.[83] Corporate authority is not presumed.[84] If defendant's instructions are relied on, and they were exclusively in writing, they should be produced or accounted for as the best evidence.[85]

Defendant's responsibility for the officer's act being thus shown, the officer's declarations in following the instructions are competent against him.[86]

8. — Justification.

Justification is not admissible under a general denial,[87] except by a public officer, or one acting under statute, in a case within the Revised Statutes.[88] Justification by proof of ownership in a third person cannot be proved unless the answer not only alleges such property in the third person, but also connects defendant with such owner by averring that the taking was by his authority, or by virtue of process or right against such owner.[89] If defendant acted under authority of a court, the record appointing him is competent though

[83] Chambers *v.* Clearwater, 1 Abb. Ct. App. Dec. 341, affi'g Schoonmaker *v.* Clearwater, 41 Barb. 200.

The direction of one partner in making the levy presumes that the other partner countenanced the acts done. Polykransas *v.* Krausz, 73 N. Y. App. Div. 583, 77 N. Y. Supp. 46.

[84] Watson *v.* Bennett, 12 Barb. 196.

[85] Stebbins *v.* Cooper, 4 Den. 191.

[86] Raisler *v.* Springer, 38 Ala. 703.

Where it can be shown that the president and the general manager both gave directions by telephone to their agent to perform the act which was held to be a trespass, the corporation is held liable even though the president can prove that he gave his orders through a misunderstanding of a message telephoned to him by one who had no privity in the matter. Jesse French Piano, etc., Co. *v.* Phelps, 47 Tex. Civ. App. 385, 105 S. W. Rep. 225.

[87] Root *v.* Chandler, 10 Wend. 110; Butterworth *v.* Soper, 13 Johns. 443.

Under a plea of not guilty in trespass which is simply a general denial of the allegations which the plaintiff must prove, matters of justification or excuse cannot be shown. See Chicago Title, etc., Co. *v.* Core, 223 Ill. 58, 79 N. E. Rep. 108, aff'd 126 Ill. App. 272, and cases cited.

[88] 2 N. Y. R. S. 353 (3 Id. 6th ed. 614), §§ 16, 17, which was repealed and superseded by the Code of Civil Procedure.

[89] Kissam *v.* Roberts, 6 Bosw. 154.

made in a proceeding in which the parties were not the same.[90] The general rules as to official justification have been already stated.[91] Evidence that defendant professed at the time of the alleged trespass to act under warrant, does not raise a presumption of authority.[92]

An officer sued for executing regular process is not bound to prove the judgment,[93] except, perhaps, where it is a judgment of a justice's court or like inferior jurisdiction,[94] or unless he relies on facts established by it, as, for instance, to

When the defendant, a sheriff, by virtue of process, took chattels of which the plaintiff had actual possession under an assignment of a chattel mortgage, possession was held to be sufficient *prima facie* to show title in the plaintiff; and the defendant must prove a connection with the owner and show the latter's authority for the seizure or a right to do so acquired by some legal action. Wheeler *v.* Lawson, 103 N. Y. 40, 8 N. E. Rep. 360, 2 St. Rep. 791. See also Adelberg *v.* Horowitz, 32 N. Y. App. Div. 408, 52 N. Y. Supp. 1125.

[90] State *v.* Hyde, 29 Conn. 564; and see Plummer *v.* Harbut, 5 Iowa, 308; O'Neill Mfg. Co. *v.* Harris, 127 Ga. 640, 56 S. E. Rep. 739; Strong *v.* Walton, 47 N. Y. App. Div. 114, 62 N. Y. Supp. 353.

[91] Chapter VIII, paragraphs 13 et seq. of this vol.

[92] Woodbridge *v.* Conner, 49 Me. 353, 77 Am. D. 263; Brachett *v.* Hayden, 15 Me. 347, and see Chap. VIII, paragraphs 13–19 of this vol.

[93] Sheldon *v.* Van Buskirk, 2 N. Y. 473; Shaw *v.* Davis, 55 Barb. 389; Holmes *v.* Nuncaster, 12 Johns. 395. *Contra*, Underhill *v.* Reinor, 2 Hilt. 319.

Where, after an execution and levy, an action was brought to replevy the goods and on the trial thereof judgment was rendered against the plaintiff-claimant dismissing his claim and ordering the execution to proceed, that disposition of the claimant's case was held to be an adjudication that the property was subject to execution. O'Neill Mfg. Co. *v.* Harris, 127 Ga. 640, 56 S. E. Rep. 739.

Where a plaintiff brings an action against a constable for unlawfully arresting him because of his refusal to point out goods on which the constable might make a levy, the return of the warrant to the effect that the constable had "made diligent search for and was unable to find goods and chattels whereof to make distress, is *prima facie* evidence in favor of the defendant though not conclusive." Kerr *v.* Atwood, 188 Mass. 506, 74 N. E. Rep. 917.

[94] Cleveland *v.* Rogers, 6 Wend. 438.

Although the constable who made a levy returned the property to one from whom the plaintiff in

negative a claim of exemption,[95] or as a foundation for impeaching a transfer as fraudulent.[96] But a party to the process must prove not only the execution, but also the judgment on which it issued;[97] and jurisdiction must affirmatively appear,[98] if not presumable.[99] If the levy was under attachment, judgment in the attachment suit, though recovered after the present action had been brought, is conclusive evidence of the debt.[1]

trover claimed to have purchased when he found that the writ of attachment was void because of a defective supporting affidavit, the court held that in the absence of fraud on the part of the plaintiff in making his purchase, the constable would not be protected. Mears *v.* Cornwall, 73 Mich. 78, 40 N. W. Rep. 931.

[95] Dennis *v.* Snell, 54 Barb. 411.

Referring to the Bankruptcy Act under which a liability for unlawful or malicious injuries to property is not discharged, the court in an Iowa case held that a judgment obtained against a bankrupt could be examined and if found to have been secured for trespass, the trespass could be presumed to have been wilful thus preventing the bankrupt from claiming exemption to a levy. Bever *v.* Swecker, 138 Iowa, 721, 116 N. W. Rep. 704.

[96] Sheldon *v.* Van Buskirk, 2 N. Y. 473.

And when the plaintiff claims to have purchased in good faith, the defendant may adduce on his cross-examination testimony to the effect that the plaintiff knew of the pending attachment proceedings at the time that he made the purchase. Similarly the defendant may introduce the writ of attachment as part of the *res gestæ* of the transaction. Mears *v.* Cornwall, 73 Mich. 78, 40 N. W. Rep. 931.

[97] Newberry *v.* Lee, 3 Hill, 523, S. P., Simpson *v.* Watrus, Id. 619; Gelhaar *v.* Ross, 1 Hilt. 117.

[98] See Walker *v.* Mosely, 5 Den. 102.

The defendant Hetherington began an action to recover a sum of money and entered judgment by default. It appears that he named Patrick Fitzgerald in the summons, but service was made upon James Fitzgerald. Meanwhile James had assigned his goods to the plaintiff in trespass. Subsequently the marshal by virtue of execution issued on the judgment recovered in the action wherein Patrick Fitzgerald had been named as defendant, levied on the plaintiff's goods. The court held that the marshal became a trespasser for the reason that the evidence failed to show any jurisdiction over James Fitzgerald. Fischer *v.* Hetherington, 11 Misc. 575, 32 N. Y. Supp. 795.

[99] See chapter XXIX, paragraph 22 of this vol.

[1] Rinchey *v.* Stryker, 28 N. Y. 45, S. C., 26 How. Pr. 75; and less

Return of the execution need not be shown; and the want of an indorsement on the execution, of the time it was received by the officer, does not affect its competency; and the time of receiving it may be shown by parol.[2] The want of a return may be explained by parol.[3] Formal evidence of absolute vacatur, proves the party, but not the officer, to be a trespasser *ab initio*.[4]

Evidence of plaintiff's oral admission of the validity of the process, etc., is not competent,[5] unless acted on so as to raise an estoppel.[6]

If the thing was levied on while in the possession of a third person, the burden of proof as to title is upon the officer.[7] The inquisition of a sheriff's jury against the plaintiff, on his claim to the property levied on, is not competent evidence in the plaintiff's favor and against the officer.[8] Even though

fully, 31 N. Y. 140. In an action of trespass against a sheriff and others for the alleged wrongful taking and carrying away of personal property where the taking is justified under a writ of attachment, the writ itself, with the indorsements thereon, showing the levy upon and sale of the goods by the sheriff, are admissible in evidence, without the introduction of the entire record in the attachment suit. Nelms *v.* Steiner Bros., 113 Ala., 562, So. Rep. 435.

But where, subsequent to the attachment, judgment is rendered in favor of the defendant in the attachment proceedings, and the sheriff allows the goods which were stored in a warehouse, pending a decision, to be sold for storage, he is guilty of a tortious act. Algetinger *v.* Whelan, 133 Cal. 110, 65 Pac. Rep. 125.

[2] Bealls *v.* Guernsey, 8 Johns. 52.

[3] Bealls *v.* Guernsey, 8 Johns. 52; Frost *v.* Shapleigh, 7 Greenl. 236. Compare Gault *v.* Woodbridge, 4 McLean, 329.

[4] Kerr *v.* Mount, 28 N. Y. 659. Compare Newberry *v.* Lee, 3 Hill, 523.

[5] Bush *v.* Hewett, 4 N. Y. Leg. Obs. 384; Moore *v.* Hitchcock, 4 Wend. 292. Compare Smith *v.* Hill, 22 Barb. 656.

[6] Price *v.* Harwood, 3 Campb. 108.

[7] Merritt *v.* Lyon, 3 Barb. 110. For the distinction in this respect between process against property of a debtor, generally, and that against specific things, see Foster *v.* Pettibone, 20 Barb. 350; Buck *v.* Colbath, 3 Wall. 343.

[8] Townsend *v.* Phillips, 10 Johns. 98; Sheldon *v.* Loomis, 28 Cal. 122.

In Cohen *v.* Climax Cycle Co., 19 N. Y. App. Div. 158, 46 N. Y. Supp. 4, it was stated that the only effect of a verdict found by a sheriff's jury in favor of one claiming

the levy was under attachment before judgment, defendant may show that plaintiff's claim of title was fraudulent as against the attacking creditors; [9] and this he may show under an issue as to ownership, without express allegation of fraud.[10] Where the defendant sets up an agreement or license in justification, the burden of proving the agreement or license rests upon him.[11]

9. — Exemption From Execution.

Plaintiff may prove his property exempt from execution, under a general allegation of wrongful taking.[12] One claiming an exemption must show the facts making it out; [13] the neces-

goods in the hands of the sheriff was to allow the latter to require of the execution or attachment creditor a bond of indemnity to protect him against the person who lays claim to the goods. The findings by a sheriff's jury are not a judicial determination of the facts in controversy.

[9] Rinchey *v.* Stryker, 28 N. Y. 45, s. c., 26 How. Pr. 75; Hall *v.* Stryker, 27 N. Y. 596, rev'g 29 Barb. 105, s. c., 9 Abb. Pr. 342; Pierce *v.* Hill, 35 Mich. 194.

Likewise in a replevin suit for goods attached, the testimony of a witness as to what statements the execution debtor had made regarding his indebtedness, were admissible to show that a sale which had been made just prior to the levy by the defendant, a sheriff, was fraudulent. Goldstein *v.* Morgan, 122 Iowa, 27, 96 N. W. Rep. 897.

[10] Deitsch *v.* Wiggins, 15 Wall. 539; Adler *v.* Cole, 12 Wis. 188; Chamberlain *v.* Stern, 11 Neb. 268. *Contra*, see Dimick *v.* Chapman, 11 Johns. 132.

[11] Collier *v.* Jenks, 19 R. I. 493, 34 Atl. Rep. 998, Northern Trust Co. *v.* Palmer, 171 Ill. 383, 49 N. E. Rep. 553.

[12] Stevens *v.* Somerindyke, 4 E. D. Smith, 418.

Where a complaint averred that the "defendants waived all homestead exemptions as against this debt, . . . there could be no judgment declaration of a waiver of exemption of personalty." Reed Lumber Co. *v.* Lewis, 94 Ala. 626, 628, 10 So. Rep. 333.

But where the intention to waive all exemptions of personal property is clearly expressed in a note sued on, a judgment of the court authorizing such waiver to stand will be granted. Neff *v.* Edwards, 81 Ala. 246, 2 So. Rep. 88.

[13] Griffin *v.* Sutherland, 14 Barb. 456; Carnrick *v.* Myers, Id. 9; Clapp *v.* Thomas, 5 Allen, 158.

Where property is exempt by reason of a mortgage placed upon it, exemption must be claimed at the time of the levy or it will be deemed to have been waived. Green *v.*

sity of the articles; [14] and the value, in its relation to the statute limit.[15] The fact of being a householder cannot be proved by general reputation; [16] but a witness may testify directly to the fact in the first instance, subject to cross-examination as to details; but cannot testify to his opinion on

Blunt, 59 Iowa, 79, 12 N. W. Rep. 762.

But one who has an unfilled chattel mortgage on certain property, the mortgagor being in possession, cannot prevent an attachment by existing creditors; nor can he invoke the aid of the statute of exemption as to a part of the chattels, since exemption is a personal right which can be claimed only by the debtor. Field *v.* Ingreham, 15 Misc. 529, 37 N. Y. Supp. 1135.

If a party is asked by an assignee to make a selection of one of two wagons which he had pointed out as his property, his refusal to do so precludes him from thereafter claiming the article as exempt, and estops him from invoking the statute of exemption. McKenzie *v.* Redman, 87 Me. 322, 32 Atl. Rep. 962.

[14] Van Sickler *v.* Jacobs, 14 Johns. 434.

The plaintiffs must affirmatively show that their property is exempt. But where it has been admitted by stipulation that they were householders, that they owned one wagon only, that it was necessary to the conduct of their business, that it was so used and that its value was $100, the plaintiffs may then claim exemption of the wagon. Brown *v.* Davis, 9 Hun, 43.

A sheriff who attached the plaintiff's hay became a trespasser when he did not leave sufficient to support such stock as the plaintiff could prove exempt under the statute. Wentworth *v.* Sawyer, 76 Me. 434.

[15] Chambers *v.* Halstead, Hill & D. Supp. 384.

Where a plaintiff, suing for the return of a wagon taken under an execution issued against him, showed that he was a married man supporting a family, that he was engaged in business as an expressman requiring the use of a wagon and horses, that the earnings derived from the use thereof were applied to taking care of his family, and that the value of his household goods, wagon and horses was under $250, he thereby gave facts sufficient to establish his claim to exemption from levy. Wolf *v.* Farley, 16 N. Y. Supp. 168.

[16] Eastman *v.* Caswell, 8 How. Pr. 75.

It has been held that although pension money in the hands of the government, its officers or in the course of transmission is exempt under a statute, nevertheless when the money is in the pensioner's hands the protection of the statute is ended. Friend *v.* Garcelon, 77 Me. 25, 27, 52 Am. Rep. 739.

that question;[17] nor on the necessity of the articles.[18] The evidence of necessity must be directed to the character of the property in its relation to the vocation, not to the sufficiency or insufficiency of plaintiff's other property.[19]

10. Justification by Tax Collector.

A collector of taxes sued for a levy has the burden of showing that the tax was exacted by authority of law;[20] but proving a warrant and assessment roll which are regular on their face, is *prima facie* enough,[21] without proving the proceedings by which the tax was laid.[22]

[17] See Chap. V, paragraphs 51 et seq. of this vol.

[18] Whitmarsh *v.* Angle, 3 Code R. 53, s. c., 3 Mo. Law R. N. S. 595.

[19] Wilcox *v.* Hawley, 31 N. Y. 648; Smith *v.* Slade, 57 Barb. 637; Whitmarsh *v.* Angle, 3 Code R. 53, s. c., 3 Mo. Law R. N. S. 595. As to what shows professional vocation, see Sutton *v.* Facey, 1 Mich. 243, 247.

[20] Wilkinson *v.* Greely, 1 Curt. C. Ct. 439.

It seems that a tax collector cannot show that his warrant authorized him to seize and sell property of a rooming house mistress where as a matter of fact the tax debtor was simply a roomer in her house. Denton *v.* Carroll, 4 N. Y. App. Div. 532, 40 N. Y. Supp. 19.

When no evidence was offered that one who seized the plaintiff's property was ever chosen a tax collector or what taxes were assessed or what warrant was issued for the collection of the tax, the plaintiff was allowed to maintain trespass. Woodbridge *v.* Conner, 49 Me. 353, 77 Am. Dec. 263.

[21] Johnson *v.* Learn, 30 Barb. 616.

Where a collector is sued for damages for the seizure and sale of certain personal property, he may offer in defense an assessment roll and warrant, regular on their face. Bennett *v.* Robinson, 42 N. Y. App. Div. 412, 59 N. Y. Supp. 197.

Where a warrant given to a tax collector is regular on its face, issued by authorities having jurisdiction thereto, and directed against a plaintiff and his property, the tax collector is protected by the warrant if he properly executes it. It has been said that where there are jurisdictional defects not apparent on the face of the warrant, which render the tax void, the plaintiff's remedy is by a proceeding to vacate the assessment or tax. Strong *v.* Walton,

[22] Sheldon *v.* Va. Buskirk, 2 N. Y. 473.

47 N. Y. App. Div. 114, 62 N. Y. Supp. 353.

It seems that where there has been a sale of property for taxes of several years standing, and it is shown that the taxes for one year were void by reason of the fact that the collector's warrant was delivered to him without the sums which he was ordered to collect being specified in the assessment roll, the proceedings of the collector are void. Peo. *v.* Hagadorn, 104 N. Y. 516, 10 N. E. Rep. 891.

CHAPTER XXXVII

ACTIONS FOR TRESPASS TO REAL PROPERTY

1. Plaintiff's title.
2. Possession.
3. Acts of trespass.
4. The purpose of an act.
5. Damages.
6. *Defenses;* Disproof of the trespass.
7. Justification.
8. Defendant's title and possession.
9. Easements, ways, &c.
10. License.

1. Plaintiff's Title.

The usual mode of proving plaintiff's title is to produce and prove the deed [23] or will,[24] or other instrument under

[23] See Chapter XXVII. A breach of condition in plaintiff's deed does not avail a defendant who is a stranger to the title. Robie *v.* Sedgwick, 4 Abb. Ct. App. Dec. 73.

The plaintiff must recover on the strength of his own title and not on the weakness of his adversary's. Thurman *v.* Leach (Ky.), 116 S. W. Rep. 300.

A deed under which both parties claim, was held to be admissible in evidence without proof of its execution. Helton *v.* Belcher, 114 Ky. 172, 70 S. W. Rep. 295, 24 Ky. L. 927.

It was held that the variance was fatal where the plaintiff alleged title by grant or record but offered to prove title by virtue of possession for more than ten years prior to the trespass. Mendes *v.* de Cova, 22 Hawaii, 636.

It appeared that the plaintiff's title was defective by reason of the break in the chain of title caused by the absence of a deed from

[24] See Chapter V.

Where under a statute, land passed, in case of intestacy, to the heir immediately on the death of the ancestor, the heirs were proper plaintiffs in an action to recover a statutory penalty for cutting trees and the widow could not authorize any one to destroy any timber on the land or do any permanent injury to the inheritance. Louisville, etc., R. Co. *v.* Hill et al., 115 Ala. 334, 22 So. Rep. 163.

To be admissible the copy must be properly certified. Phillips *v.* Babcock Bros. Lumber Co., 5 Ga. App. 634, 63 S. E. Rep. 808.

which plaintiff holds (or that under which his ancestor held, coupled with proof of inheritance), and to give oral evidence of his possession under it. It is enough for either party to

the original owner to the subsequent grantee. It was held that this defect was cured by the execution of a deed from the said original owner to the plaintiff even though made after the acts of trespass had been committed. Dennis Bros. *v.* Strunk, 108 S. W. Rep. 957, 32 Ky. L. 1230.

A United States land office certificate is admissible to show a sufficient title in the plaintiff to maintain trespass. Johnson *v.* Davis, 91 Miss. 708, 45 So. Rep. 979.

To prove a paper title to the lands involved in an action for trespass, it was held that a United States marshal's deed was not inadmissible because of an error in describing the lands as being located in another county where the description otherwise warranted the finding that the lands conveyed were the same as the lands on which the trespass was committed. Silliman *v.* Whitmer & Sons, 11 Pa. Super. Ct. 243, aff'd in 196 Pa. St. 363, 46 Atl. Rep. 489.

A deed made in accordance with a decree of the Orphans' Court is admissible. Arnold *v.* Pfoutz, 117 Pa. St. 103, 11 Am. Rep. 871.

Where the plaintiff claimed possession to a certain disputed strip of land under a deed which was in his hands, the court held, that the deed was evidence to show the extent of his possession. Wahl *v.* Laubersheimer, 174 Ill. 338, 57 N. E. Rep. 860.

The action was for trespass in cutting down certain trees. The plaintiff offered a surveyor's bill made, as it appeared, in 1815 for one of the plaintiff's grantors surveying the line in controversy. It was held to be properly admissible as an ancient document which proved itself. Moore *v.* Cooley, 88 Hun, 66, 34 N. Y. Supp. 624.

It may be shown that the signature to a deed was procured by fraud. Shelby Iron Co. *v.* Ridley, 135 Ala. 513, 33 So. Rep. 331.

"Having alleged and proved title by prescription, the trees (the cutting of which occasioned the trespass) were plaintiff's property and it was entitled to maintain either detinue or trespass, as it saw proper." Taylor *v.* Burt, etc., Lumber Co., 33 Ky. 191, 109 S. W. Rep. 348.

On the issue as to who was in actual adverse possession of land at the time of the alleged trespass, it was held that a tax deed from the State Auditor to the plaintiff's ancestor was admissible as tending to establish a claim or color of title in them. Taylor *v.* Corley, 113 Ala. 580, 21 So. Rep. 404.

The "certificate of probate of a deed" offered in evidence in support of title, named the grantees as "Noah and William King" instead of Noah and William Hinton. It was held that an ob-

show title to that part where the trespass was committed.[25] Paper title is not enough, without any evidence that plaintiff, or those under whom he derives such title, have ever had possession.[26] Possession in fact,[27] or legal right to immediate possession,[28] must be shown, or else a right in reversion or

jection based thereon was without merit as the error was merely clerical. Mitchell *v.* Bridgers, 113 N. C. 63, 18 S. E. Rep. 91.

[25] King *v.* Dunn, 21 Wend. 253; Rich *v.* Rich, 16 Id. 663.

[26] Gardner *v.* Heartt, 1 N. Y. 528, rev'g 2 Barb. 165.

"In trespass the defendant need not show title in himself when the plaintiff has never been in possession and his action depends solely on his title; the defendant succeeds whenever he shows that the true title was not in the plaintiff at the time of bringing suit." Leverett *v.* Tift, 6 Ga. App. 90, 97, 64 S. E. Rep. 317.

A plaintiff who claimed a tax title to the land but who never entered into possession thereof, could not maintain trespass against the owner and tax debtor who had remained in possession for a number of years after the sale of the premises. South Louisiana Land Co. *v.* Norgress, 120 La. 168, 45 So. Rep. 49.

[27] Frost *v.* Duncan, 19 Barb. 560, and cases cited.

"Possession will support the action against any person other than the real owner or someone in privity with him." New Windsor *v.* Stocksdale, 95 Md. 196, 52 Atl. Rep. 596.

"Though the complaint alleges title it is not necessary to show it by record evidence—if actual possession is shown." Coburn Cattle Co. *v.* Henson, 52 Mont. 252, 157 Pac. Rep. 177.

Where the owner of land is disseized and later recovers possession by re-entry, he may, after such re-entry, maintain trespass *qu. cl. fr.* against his disseizor and recover all the damages done to the premises between the disseizen and the re-entry; but he cannot maintain such action against anyone else who has trespassed upon the premises during the period of his disseizin. Pac. Live Stock Co. *v.* Isaacs, 52 Or. 54, 96 Pac. Rep. 460.

A mere tort-feasor cannot put the plaintiff to his proof of title, where plaintiff is in possession at the time of the trespass. Blunck *v.* Chicago, etc., Ry. Co. (Iowa), 115 N. W. Rep. 1013.

[28] Adams *v.* Farr, 2 Hun, 473, s. c., 5 Supm. Ct. (T. & C.) 59, and see Starr *v.* Jackson, 11 Mass. 574, and cases cited.

As against a mere trespasser, the plaintiff who formerly had possession may rely on such former possession and maintain an action of trespass, even though he is not now in possession. Beauchamp *v.* Williams (Tex. Civ. App.), 115 S. W. Rep. 130.

It was held that a lessor, during the continuance of the lease had

remainder,[29] coupled with injury to the inheritance.[30] A title alleged, which the answer does not deny,[31] or expressly admits

no right to the possession or use of the premises leased such as entitled him to maintain an action for trespass by a third person, where the acts complained of did not injure the freehold. Southern R. R. Co. *v.* State, 116 Ga. 276, 48 S. E. Rep. 508.

[29] For this purpose bare possession by the tenant is not enough. Wickham *v.* Freeman, 12 Johns. 183.

See N. Y. Code of Civil Procedure, sec. 1665. See also Thompson *v.* Manhattan R. Co. et al., 130 N. Y. 360, 29 N. E. Rep. 264; Howe's Cave Lime, etc., Co. *v.* Howe's Cave Ass'n., 88 Hun, 554, 34 N. Y. Supp. 848.

A life tenant may maintain trespass *quare clausum fregit*, where timber has been cut from the land, though he cannot maintain trespass *de bonis asportatis*. Daffin *v.* C. W. Zimmerman Mfg. Co., 158 Ala. 637, 48 So. Rep. 109.

Constructive possession of realty is sufficient to support an action for trespass. Wilson *v.* Phœnix Powder Mfg. Co., 40 W. Va. 413, 419, 2 S. E. Rep. 1035, 52 Am. St. Rep. 890.

[30] N. Y. Code Civ. Pro., § 1665; Van Deusen *v.* Young, 29 N. Y. 9, 29 Barb. 9; Wood *v.* City of Williamsburg, 46 Id. 601.

One who paints the wall of a building, though with the consent of tenants in possession, does an injury to the reversion, subjecting himself to an action by the owner. Devlin *v.* Snellenburg, 132 Pa. St. 186, 18 Atl. Rep. 1119.

[31] O'Reilly *v.* Davies, 4 Sandf. 722.

Where the plaintiff and defendant claim land under a common grantor, the defendant's holding under such claim is an admission that title once reposed in the common grantor and this admission is sufficient to make a *prima facie* case in behalf of the plaintiff, in an action of trespass, and throws upon the defendant the burden of proving that the plaintiff is not the owner. Leverett *v.* Tift, 6 Ga. App. 90, 64 S. E. Rep. 317. But see Caskins *v.* Gray Lumber Co., 6 Ga. App. 167, holding that the above rule does not obtain where the defendant claims a grant of a timber right and the plaintiff a grant of the land and timber not included in the defendant's grant, both tracing their claims to a common grantor.

Where an answer failed to put in issue the plaintiff's allegation of title, it was held that title be sufficient to maintain trespass as thereby admitted. Norton *v.* Young, 6 Col. App. 187, 40 Pac. Rep. 156.

It has been held in Texas that in an action of trespass *quare clausum fregit* a plea of not guilty did not put in issue the plaintiff's title and that a denial of the plaintiff's possession or right of possession must be specially set up.

and claims under,[32] plaintiff need not prove, even though the possession be vacant.[33] Evidence of usage is competent in aid of the interpretation of a deed, if it be ambiguous;[34] but not if it be unambiguous.[35] Bare possession, if exclusive and peaceable, is enough to show title,[36] if no paramount

Nafe *v.* Hudson, 19 Tex. Civ. App. 381, 47 S. W. Rep. 675.

The fact that a deed offered in evidence by the defendant conveyed all of certain lands to himself except one parcel which the plaintiff claimed was regarded as an admission of the plaintiff's title to that particular plot when not attacked on the trial. Humes *v.* Proctor, 151 N. Y. 520, 45 N. E. Rep. 948.

[32] McBurney *v.* Cutler, 18 Barb. 203.

Possession under color of title "recognized and acknowledged by the actions of the defendant himself" is sufficient to maintain trespass. Carpenter *v.* Savage, 93 Miss. 233, 46 So. Rep. 537.

[33] O'Reilly *v.* Davies (above).

[34] Livingston *v.* Ten Broeck, 16 Johns. 14.

"While a party is bound by the recitals contained in his deed, and cannot acquire by deed other title than his grantor had, yet the language of a deed may be so inconsistent with itself as to constitute an ambiguity admitting other evidence as to its meaning and intent." Thurman *v.* Leach, 116 S. W. Rep. (Ky.) 300.

Where it appeared that in a survey made fifty years prior to the plaintiff's suit the engineer had omitted the minutes and had given the degrees only, a civil engineer as a witness was not allowed to state the significance of the omission, though a custom among surveyors of the former day might have been proved to explain the omissions. Harris *v.* Ansonia, 73 Conn. 359, 47 Atl. Rep. 672.

[35] Parsons *v.* Miller, 15 Wend. 561. On this subject, see Chap. XVI, paragraph 8 of this vol.

[36] 1 Sedgw. on Dam. 7th ed. 270; Palmer *v.* Aldredge, 16 Barb. 131; Bogert *v.* Haight, 20 Barb. 251, and see Jones *v.* Williams, 2 Mees. & W. 326; Corporation of Hastings *v.* Ivall, L. R. 19 Eq. Cas. 558, s. c., 13 Moak's Eng. R. 501. Proof that the wife put her husband in possession, and that he built and occupied with her, is sufficient evidence of possession in him as against a third person. Alexander *v.* Hard, 64 N. Y. 228. Compare Chapter VI.

See New Windsor *v.* Stocksdale 95 Md. 196, 52 Atl. Rep. 596; see Wilson *v.* Phœnix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. Rep. 1035, 52 Am. St. Rep. 890.

"Proof of possession of the premises and the entry thereon by the defendants, in the absence of evidence showing a right to enter, established a case against the defendants, and plaintiff was entitled to a verdict for at least nominal damages." Steenburgh

possession or other right appears.[37] Even if it appear that plaintiff holds under a written instrument, such as a lease, the instrument need not be produced as against a stranger and wrongdoer.[38] If objected to, a witness should not be allowed to testify that one person was a tenant of another; but should state the facts.[39] Oral evidence is competent to

v. McRorie, 60 Misc. 510, 113 N. Y. Supp. 1118.

"In order to recover in trespass, the plaintiff must show possession of the land, actual or constructive, when the alleged trespass was committed," though possession at the commencement of the suit has been held unessential. Buck *v.* Louisville, etc., R. Co., 159 Ala. 305, 48 So. Rep. 699.

One who has constructive possession of land at the time of a trespass may maintain an action therefor. Hobart-Lee Tie Co. *v.* Stone, 135 Mo. App. 438, 117 S. W. Rep. 604.

One in possession of land may maintain an action for trespass committed by "boxing" pine trees on such land for turpentine. Harrison Naval Stores Co. *v.* Johnson, 91 Miss. 747, 45 So. Rep. 465.

Where "the evidence shows *bona fide* possession of the invaded premises under claim and color of right, possession is itself evidence of title . . . and a party may rely upon his possession as against a mere trespasser." Kellogg *v.* King, 114 Cal. 378, 46 Pac. Rep. 66, 55 Am. St. Rep. 74.

[37] Kellogg *v.* Vollentine, 21 How. Pr. 226.

[38] Walker *v.* Wilson, 8 Bosw. 586; Althouse *v.* Rice, 4 E. D. Smith, 347. But a bald allegation that plaintiff, by virtue of a contract with one A., was entitled to the exclusive possession of the premises without any facts to support the conclusion, is not enough. Garner *v.* McCullough, 48 Mo. 318.

"Where material, one may prove the fact of his occupancy of real estate by parol, even though it is made to appear in some other way that the contract of lease had been reduced to writing. 'The fact of appellant's tenancy or occupancy of the real estate was a fact which existed independently of any written lease which he might hold, and as such, might be shown by parol evidence.' Hammon *v.* Sexton, 69 Ind. 37." Blunck *v.* Chicago, etc., Ry. Co. (Iowa), 115 N. W. Rep. 1013.

[39] Parker *v.* Haggerty, 1 Ala. 632, 634.

See, however, Blunck *v.* Chicago, etc., Ry. Co. (Iowa), 115 N. W. Rep. 1013, where the Iowa court held that the trial judge properly overruled an objection to the question put to a son of the plaintiff as to whether his father was not occupying the premises in question under a lease from a third party, even though the objector contended that the question called for a conclusion, and was hearsay.

show whether certain parts are or are not parcel of the premises ambiguously described in the instrument.[40]

2. Possession.

Possession may be shown by acts of ownership;[41] and evidence of these is not ordinarily confined to the precise spot on which the alleged trespass may have been committed; acts done on other parts of the same holding or inclosure, may be shown if the common character of locality raises a reasonable inference that the place in dispute belonged to the plaintiff if the other parts did.[42] A witness having testified

[40] Cary *v.* Thompson, 1 Daly, 35; Crawford *v.* Morris, 5 Gratt. 90, and see chapter XXVIII, paragraph 9 of this vol.

[41] Such as paying rents. Arden *v.* Kermit, Anth. N. P. 112, cutting wood, Stanley *v.* White, 14 East, 332, or giving leave to cut wood, Hager *v.* Hager, 38 Barb. 92.

The plaintiff's possession of land sufficient to maintain trespass was presumed where occupancy by another is shown never to have existed, and it appeared that the plaintiff had legal title. Stone *v.* Perkins, 217 Mo. 586, 117 S. W. Rep. 717.

Payment of taxes and cutting timber were held to be evidence of a claim of ownership. Stone *v.* Perkins (above).

"Pointing out the boundaries of his (plaintiff's) land indicates an act of ownership." Quillen *v.* Betts, 17 Del. (1 Penn.) 53, 39 Atl. Rep. 595.

However, the fact that the possession of one tenant in common is the possession of all is not available as a defense to an action for trespass where the tenant in actual possession claims the entire property in his sole right and disputes the title of his co-tenant. Brown *v.* Floyd, 163 Ala. 317, 50 So. Rep. 995.

[42] Jones *v.* Williams, 2 Mees. & W. 326, 1 Tayl. Ev., § 303, 1 Whart. Ev. 59, § 45. The making of payments of taxes, rents, and the like, as acts of ownership, may be proved by parol, without producing or accounting for the payee's receipts. Hinchman *v.* Whetstone, 23 Ill. 185, 187; Dennett *v.* Crocker, 8 Me. 239.

"It is not necessary that a party should have his land enclosed with a fence before he can be said to be in actual possession. Any class of improvements or acts of dominion that indicates to persons residing in the immediate neighborhood who has the exclusive control of the land, will be deemed to constitute possession to the extent of the paper title under which such party entered, so as to enable him to maintain trespass for any injury to the estate." Eddy *v.* Gage, 147

to acts of ownership on the part of one party, may be asked if the other directed him to do them.[43] A witness may testify directly to the fact of possession, if he can do so positively and not as matter of opinion or inference; but subject, of course, to cross-examination as to details.[44]

If plaintiff does not show title, and relies on a possession which is constructive as to a part of the premises, he should prove that he claimed title to the whole lot under a written

Ill. 162, 170, 35 N. E. Rep. 347, with approval in Wahl *v.* Laubersheimer, 174 Ill. 338, 342, 51 N. E. Rep. 860. See also Mitchell *v.* Bridgers, 113 N. C. 63, 18 S. E. Rep. 91.

"If a party makes entry upon and goes into possession of a part of a tract of land with color of title to the whole, he is, in law, in possession constructively, to the extent of the bounds of his title." Schlossnagle *v.* Kolb, 97 Md. 285, 291, 54 Atl. Rep. 1006.

The plaintiff proved actual possession of part of the land covered by his paper title. It was held that he thereby established possession of the whole of the tract including the part on which the trespass occurred. Parker *v.* Wallis, 60 Md. 15, 45 Am. Rep. 703.

An objection that the plaintiff did not tender record evidence of title to the lands owned or held by it except to a small part on which the trespass did not occur, was held invalid. Coburn Cattle Co. *v.* Hensen, 52 Mont. 252, 157 Pac. Rep. 177.

[43] Houghtaling *v.* Houghtaling, 56 Barb. 194.

[44] Hardenburgh *v.* Crary, 50 Barb. 32; and see chapter XXXV, paragraphs 3–6 of this vol. Compare Jones *v.* Merrimack River Lumber Co., 31 N. H. 381, 385.

The question of possession of a certain tract of land is one of fact and it was held error to exclude an answer of the plaintiff to an inquiry as to who was in possession of the land from a certain time to the present. Diamond *v.* Lawyer, 117 N. Y. Supp. 94. See also, Firth *v.* Veeder, 58 Hun, 605, 12 N. Y. Supp. 579, in which the plaintiff was allowed to testify that he had possession of the premises on which the trespass occurred.

It appeared that a witness who was president of a railroad company directed the location of the right of way in controversy over land which he had once owned; but as it did not appear that he was owner of the land at the time he had given the direction, his testimony to the fact of giving such direction was held inadmissible when offered in behalf of the defendant which had succeeded to the rights of the said railroad company. Farrow *v.* Nashville, etc., R. Co., 109 Ala. 448, 20 So. Rep. 303.

instrument purporting to give him title to the whole, and hence sufficient to give color of title to the whole, and that he was in actual possession of a part.[45]

3. Acts of Trespass.

The allegation of unlawful entry on the premises, and of unlawful removal or injury of property there, are to be distinguished; and an allegation of one of these facts only, will not admit evidence of the other.[46] If both are alleged, taking issue as to one only, admits the other; [47] but if both are

[45] Edwards *v.* Noyes, 65 N. Y. 125. Compare Bynum *v.* Thompson, 3 Ired. N. C. Law 578, 581.

"A claimant entering upon land under a deed describing a boundary, intending to take possession of the entire tract, no part of which is at the time of his entry actually possessed by any other claimant holding adversely to him, is by construction and intendment of law in actual possession of all the land included within the boundary of his deed." Taylor *v.* Burt, etc., Lumber Co., 109 S. W. Rep. 348, 33 Ky. L. 191.

Where there is no evidence of the plaintiff's title to the realty in question and he is not in constructive possession under color of title nor in actual possession of the part upon which the trespass was committed, he cannot maintain trespass. Phillips *v.* Babcock Bros. Lumber Co., 5 Ga. App. 634, 63 S. E. Rep. 808.

But where the plaintiff had never gone into actual possession of a strip of land embraced in his deed to the tract, though he did show occupancy of another part of the tract, the court held that he did not thereby obtain constructive possession of the unoccupied part, since it appeared that the strip in question was in the actual possession of another. Buck *v.* Louisville, etc., R. Co., 159 Ala. 305, 48 So. Rep. 699.

[46] Kenney *v.* Planer, 3 Daly, 131; Turner *v.* McCarthy, 4 E. D. Smith, 247.

But every unauthorized entry into the close of another is unlawful and a trespass from which some damage is inferred. Brame *v.* Clark, 148 N. C. 364, 62 N. E. Rep. 364, 62 S. E. Rep. 418, 19 L. R. A. N. S. 1033, 16 Ann. Cas. 73.

Where a defendant enters upon the plaintiff's premises, cuts trees and carries the logs away, the plaintiff landowner has the right to set up in different counts, trespass to the realty, trespass to personalty, but "the obtaining satisfaction by any one of these remedies precludes further proceedings upon the cause of action." Milltown Lumber Co. *v.* Carter, 5 Ga. App. 344, 63 S. E. Rep. 270.

[47] Knapp *v.* Slocom, 9 Gray, 73.

in issue, failure to prove either is a variance,[48] though not necessarily fatal.[49]

Plaintiff is not obliged to prove trespass on the whole of the close alleged, but he may prove one on any part.[50] Evidence of a wrongful intrusion, however slight, is evidence of a trespass.[51]

Under an allegation of a trespass on a day named, and on divers other times between it and another day, plaintiff may prove any number of trespasses committed between the times specified;[52] and he may properly be allowed to prove another

[48] Howe *v.* Willson, 1 Den. 181.

[49] Colton *v.* Jones, 7 Robt. 164. As to trespass for forcible disseizin, 2 N. Y. R. S. 338 (3 Id. 6th ed. 602), § 4; see Willard *v.* Warren, 17 Wend. 257.

[50] Rich *v.* Rich, 16 Wend. 674; Stewart *v.* Wallis, 30 Barb. 344.

A declaration in trespass which does not particularly describe the real estate invaded, but refers to the plaintiff's close in the County of K, etc., sufficiently describes the *locus in quo*. Prussner *v.* Brady, 136 Ill. App. 395.

[51] Ellis *v.* Loftus Iron Co., L. R. 10 C. P. 10, s. c., 11 Moak's Eng. 214. In determining the question of trespass or no trespass, the court cannot measure the amount of the alleged trespass; if the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law a trespass as much as if he had walked half a mile on it. In an action against a corporation for malicious trespass, declarations made by a servant of the defendant indicating his own reckless indifference to consequences regarding the trespass are inadmissible in evidence. But other declarations of such servant in regard to the trespass complained of, made before its completion, and concerning a matter within the scope of his authority, are admissible, as tending to show the animus of the defendant. International, &c. R. Co. *v.* Telephone, &c. Co., 69 Tex. 277, 5 Am. St. Rep. 45, 5 S. W. Rep. 517.

An instruction that if the defendant's barn "came over to the plaintiff's land no more than a fence of ordinary width" would, it would not be a trespass, was held to be erroneous. Smith *v.* Smith, 110 Mass. 302. Similarly the projection of irregular stones of a foundation wall across the dividing line interfering materially with the construction of the plaintiff's building was held to be a continuing trespass. Milton *v.* Puffer, 207 Mass. 416, 93 N. E. Rep. 634, 32 L. R. A. N. S. 110.

[52] Richardson *v.* Northrup, 66 Barb. 85.

Where the plaintiff in her complaint "claimed only for a trespass committed on a certain day, without a *continuando*, she

act anterior to the earlier day, if it does not appear that defendant is misled.[53]

Against a co-tenant in common, it is necessary to prove a case of ouster.[54]

is confined to a recovery for a trespass on some one day, and may be required to elect some day in which the acts of the trespass are to be proven." Snedecor *v.* Pope, 143 Ala. 275, 289, 39 So. Rep. 318. But the former doctrine that proof "could not be admitted when the complaint contained no *continuando*, nor any allegation of trespass on divers other days . . . is not consistent with the liberal rule required under our practice." Burnham *v.* Call, 2 Utah, 433, 436.

[53] Dubois *v.* Beaver, 25 N. Y. 123, affi'g Relyea *v.* Beaver, 34 Barb. 547. Compare United States *v.* Kennedy, 3 McLean, 175; Joralimon *v.* Pierpont, Anth. N. P. 59.

"Under the present system evidence offered to prove more than one act of trespass anterior to the alleged time would be treated as nothing more than a variance." Critelli *v.* Rodgers, 87 Hun. 530, 34 N. Y. Supp. 479, aff. 151 N. Y. 675, 46 N. E. Rep. 1146. The action was for negligence.

[54] Dubois *v.* Beaver (above); Jacobs *v.* Seward, L. R. H. of Cases, 464, s. c., 2 Moak's Eng. 496, Compare Wood *v.* Phillips, 43 N. Y. 152, overruling King *v.* Phillips, 1 Lans. 421.

An owner of land contracting another party to raise particular crops thereon, retaining in himself an undivided share in said crops was held to be a tenant in common, and when he compelled the plaintiff to vacate the premises and cultivated the land himself, he was guilty of an ouster which entitled the plaintiff to bring an action for her share of the crops. Tignor *v.* Toney, 13 Tex. Civ. App. 518, 25 S. W. Rep. 881.

And where one tenant in common obtained title to the whole property held in common through the practice of fraud and undue influence on his co-tenant, it was held that there had been an ouster sufficient to enable the ousted tenant to bring an action in ejectment. Zapp *v.* Miller, 109 N. Y. 51, 15 N. E. Rep. 889.

One tenant in common claiming sole ownership and having exclusive possession, adverse to his co-tenant, was held to have ousted the latter who could maintain an action for waste and use, where the former had cut down trees growing on the land in controversy. Dodge *v.* Davis, 85 Iowa, 77, 52 N. W. Rep. 2.

In an action in ejectment to recover an undivided part of certain lands it was held that a claim of title and possession set up in the answer was sufficient to constitute an ouster. Peterson *v.* De Baun, 36 N. Y. App. Div. 259, 55 N. Y. Supp. 249.

4. The Purpose of an Act.[55]

The purpose of an act, if relevant, may be shown by proving declarations characterizing the act,[56] if made at the time.[57] A question calling for mere intention uncommunicated may be objectionable, when a question as to the act accomplished, the manner, etc., would be proper.[58]

5. Damages.

To entitle to nominal damages, it is enough to prove an unlawful entry.[59] Plaintiff may recover on proving his right to single damages, although his complaint be framed

[55] See, on this question, chapter XXXIV, paragraph 8, of this vol. Where a trespass is admitted or proven, the presumption, in the absence of evidence to the contrary, is that it was wilful, and the burden is on the trespasser to show that it was not.. Mississippi River Logging Co. *v.* Page, 68 Minn. 269, 71 N. W. Rep. 4.

[56] Stephens *v.* McCloy, 36 Iowa, 659; Welch *v.* Louis, 31 Ill. 446; Sears *v.* Hoyt, 37 Conn. 406.

Similarly, testimony of several witnesses that the defendants tore down a fence in order to get out timbers which had been cut on the plaintiff's land was held admissible to show that the trespass was committed wilfully and knowingly. Louisville, etc., R. Co. *v.* Hill, 115 Ala. 334, 22 So. Rep. 163.

In an action to recover a statutory penalty for cutting down trees, the plaintiff had the burden of proving the acts of the defendant were knowingly and wilfully done without his consent. Shelby Iron Co. *v.* Ridley, 135 Ala. 513, 33 So. Rep. 331.

The burden was held to be on the defendant to show that trees were cut through mistake, and not as the result of his negligence or misconduct. There is no presumption of mistake. Davis *v.* Cotey, 70 Vt. 120, 39 Atl. Rep. 628.

[57] See Noyes *v.* Ward, 19 Conn. 250; and chapter XXXI, paragraph 14–19 and chapter XL, paragraph 6 of this vol.

[58] Niles *v.* Patch, 13 Gray, 254, 258.

[59] Dixon *v.* Clow, 24 Wend. 190; 1 Sedgw. on Dam. 7th ed. 266.

The trial judge should have instructed the jury to award nominal damages only where no proof was offered which would enable them to make a fair and reasonable estimate of the damage actually sustained. Swift *v.* Broyles, 115 Ga. 885, 42 S. E. Rep. 277, 58 L. R. A. 390. See also Brame *v.* Clark, 148 N. C. 364, 62 S. E. Rep. 418, 19 L. R. A. N. S. 1033, 16 Ann. Cas. 73, holding that every unauthorized entry into the close of another is unlawful, from which "the law infers some damage."

by reference to the statute giving treble damages.[60] In an action by the reversioner or remainder-man, injury to the inheritance sustains the action, although an allegation of disturbance in enjoyment be unproved.[61] Distinct and unconnected acts of some of several joint defendants are not competent, in aggravation, as against the others.[62] On questions of value and damage, the opinions of witnesses are competent, within limits already stated.[63] It is not ordinarily allowable to prove the amount of damage by the direct statement of a witness, for this would be to substitute his conclusion for that of the jury;[64] but a qualified witness may state the value of property before the injury and after it,[65] and, if he states the facts, his conclusion as to the pe-

[60] Starkweather *v.* Quigley, 7 Hun, 26.

Where the owner of land sells the standing timber to one who fails to remove it within a reasonable time, such purchaser does not thereby lose his title to the timber but merely his right of way, and hence when he enters upon the premises and removes the timber, while he is a trespasser, yet the removal of the timber is not an element of the recoverable damage. Goodson *v.* Stewart, 154 Ala. 660, 46 So. Rep. 239.

[61] Eno *v.* Del Veechio, 6 Duer, 17.

[62] Higby *v.* Williams, 16 Johns. 521.

[63] Honsee *v.* Hammond, 39 Barb. 89. Chapter XVI, paragraphs 20–23 of this vol.

Witnesses for the plaintiff testified that the defendant's bridges and culverts were insufficient in flood times to carry off the water, the backing up of which on plaintiff's lands occasioned the trespass. It was held that objections on the ground that the questions eliciting this testimony called for conclusions from witnesses not proved competent were properly overruled, since the general course of the examination plainly indicated that the testimony was based upon conditions coming within the observation of the witnesses and bearing on the improper construction of the defendant's works. Blunk *v.* Chicago, etc., Ry. Co. (Iowa), 115 N. W. Rep. 1013.

When a plaintiff, as a witness in his own behalf, has given his estimate of the damage, it was held competent to ask him, on cross examination, for the purpose of impeaching this estimate, whether at the time of the trespass, another had owned one of the tracts making up the parcel covered by his testimony. Gay *v.* Roanoke R., etc., 148 N. C. 336, 62 S. E. Rep. 436.

[64] Richardson *v.* Northrup, 66 Barb. 85; Dolittle *v.* Eddy, 7 Barb. 74.

[65] In an action by an abutting

cuniary injury to a specific thing having a market value is competent,[66] and is not made incompetent by the circumstance that, assuming the truth of his conclusion, it is the sum for which the jury should give a verdict.[67] A qualified witness may state how much the land would have produced but for the injury, and how much less in conse-

owner against an elevated railroad company operating its road in a city street expert testimony is competent as to the value of the plaintiff's property before the railroad was built and its present value; but the opinion of a witness as to what would have been the value of the property if the railroad had not been built is incompetent. Kernochan *v.* New York El. Ry. Co., 130 N. Y. 651, 29 N. E. Rep. 245; Roberts *v.* New York El. R. Co., 128 N. Y. 455, 28 N. E. Rep. 486; Doyle *v.* Manhattan Ry. Co., 128 N. Y. 488, 28 N. E. Rep. 495; Sixth Ave. R. Co. *v.* Metropolitan El. Ry. Co., 138 N. Y. 548, 34 N. E. Rep. 400; Jefferson *v.* New York El. R. Co., 132 N. Y. 483, 486, 30 N. E. Rep. 981. And it is improper to ask a witness what effect the construction of the elevated railroad had upon the value of the premises. Schmidt *v.* New York El. R. Co., 2 N. Y. App. Div. 481. It is also improper to show the value and rentals of other pieces of property in the neighborhood before the road was built and thereafter. Jamieson *v.* Kings County El. Ry. Co., 147 N. Y. 322, 325, 41 N. E. Rep. 693; Witmarsh *v.* New York El. R. Co., 149 N. Y. 393, 44 N. E. Rep. 78. But evidence is admissible to show the general effects caused by the maintenance and operation of the elevated roads upon abutting and neighboring properties. Hunter *v.* Manhattan Ry. Co., 141 N. Y. 281, 287, 36 N. E. Rep. 400.

"The damage done to real estate . . . is generally the difference between the value of the property immediately prior to the trespass, and its value after the trespass has been committed." Manda *v.* Orange, 77 N. J. Law, 285, 72 Atl. Rep. 42. See also Buck *v.* Louisville, etc., R. Co., 159 Ala. 305, 48 So. Rep. 699.

While the general rule as to the measure of damages in trespass to realty is the difference in value of the land before and after the trespass, yet, "'if the thing destroyed, although it is part of the realty, has a value which can be accurately measured and ascertained, without reference to the soil in which it stands, or out of which it grows, the recovery must be for the value of the thing thus destroyed, not the difference in the value of the land before and after such destruction.'" Atlantic, etc., Air Line Ry. *v.* Brown, 158 Ala. 607, 48 So. Rep. 73.

[66] Id.

[67] Chap. XVI, paragraphs 20 *et seq.* of this vol.

quence of the injury, and the like; and the market value of the crops had they not been injured.[68] So far as his opinion depends on an ordinary computation which a jury may as well make as the witness, he cannot substitute the results of his estimate for theirs.[69]

6. Defense; Disproof of Trespass.

Under a denial, the defendant's evidence in disproof of trespass need only be directed to the part of the close to which plaintiff's evidence of trespass was directed.[70]

7. Justification.

Defendant may prove title to a part of the alleged close, and show that the alleged trespass was committed there. He need not disprove trespass on the other part. The burden, then, is thrown on plaintiff to show that trespass was committed on the part not covered by the justification.[71] A defendant who relies on necessity as a justification must

[68] Armstrong *v.* Smith, 44 Barb. 120, and cases cited. Compare Seamans *v.* Smith, 46 Id. 320. Where the trespass complained of is the cutting and removing of timber, evidence is admissible as to the value of the farm with the timber, and its value after the timber was cut; and this difference furnishes a proper measure of damages. Argotsinger *v.* Vines, 82 N. Y. 308.

In an action for cutting and taking away ice, it was held that error had been committed in allowing witnesses to state the market value of the ice which had been cut and stored for sale, as much of the elements of expenses attending, the harvesting, the capital involved in the purchase of the land, the erection of suitable buildings for storage and profits entered into the computation and therefore did not accurately measure the value of the ice before it was cut. Van Rensselaer *v.* Mould, 48 Hun, 396, 1 N. Y. Supp. 28.

[69] Hollis *v.* Wagar, 1 Lans. 4.

[70] Rich *v.* Rich, 16 Wend. 674.

[71] Rich *v.* Rich, 16 Wend. 674. In other words the plaintiff must always locate the trespass, in order to show it wrongful (Cowen, J.). Id.

Where it appeared that four tracts had been reserved within the boundaries set out in the plaintiff's deed to a large parcel of land, the burden of proving that the trees in question were not upon one of these four tracts, rested upon the plaintiff. Buck *v.* Newberry, 55 W. Va. 681, 47 S. E. Rep. 889.

show it clearly.[72] Witnesses having no special or peculiar experience or knowledge of the subject are not ordinarily competent to express an opinion on the necessity.[73]

8. Defendant's Title and Possession.

Under an allegation of title in, and license from, a third person, evidence of title in defendant is not admissible.[74] If plaintiff relies on evidence of possession in himself, defendant may, under a denial, prove possession, even in a stranger with whom defendant shows no connection.[75]

[72] Hicks *v.* Dorn, 42 N. Y. 47, s. c., 9 Abb. Pr. N. S. 47, affi'g 1 Lans. 81, s. c., 54 Barb. 174.

The defendant must plead specially any justification relied upon. U. S. Pipe Line Co. *v.* Delaware, etc., R. Co., 62 N. J. Law, 254, 41 Atl. Rep. 759, 42 L. R. A. 572.

"It is the well settled rule in our courts that justification as a defense must be pleaded before evidence of that character is admissible." In this case the defendants justified the removal of the plaintiff's fence along the highway on the ground that the fence was on public property and a nuisance. Hudson *v.* Miller, 97 Ill. App. 74.

Where the plaintiff conceded that the defendant had a right of way of necessity across the premises where the trespass was committed, the court held the defendant did not need to plead or prove it. Jenne *v.* Piper, 69 Vt. 497, 38 Atl. Rep. 147.

[73] See Mayor, &c., of N. Y. *v.* Pentz, 24 Wend. 668; and chap. VI, paragraph 23, and chap. XVI, paragraph 23 of this vol.

The defendant in rebuilding a line fence cut limbs from trees upon the plaintiff's land, and pleaded necessity as a defense. The court held that witnesses could be asked whether it was necessary to cut away the trees and brush where their answers indicated that they understood the question to mean whether a person could sight along the line without cutting away the branches. Newberry *v.* Bunda, 137 Mich. 69, 100 N. W. Rep. 277.

[74] Coan *v.* Osgood, 15 Barb. 583.

[75] Miller *v.* Decker, 40 Barb. 228, and cases cited.

"Under a plea of not guilty it was competent for the defendant to show title to the *locus in quo* in itself and the right of immediate possession." New Winsdor *v.* Stockdale, 95 Md. 196, 52 Atl. Rep. 596.

In an action for trespass *quare clausum fregit* a plea of the general issue puts in issue the plaintiff's possession only, and does not require the plaintiff to prove his title. Prussner *v.* Brady, 136 Ill. App. 395.

Where the plaintiff claimed to have leased the premises from one who was shown to have no auth-

As to the mode of proving defendant's title and possession, the same rules apply as in proving those of plaintiff.[76] Defendant may put in evidence deeds, to show possession under *bona fide* claim of title.[77] A prescriptive right, if relied on, should be pleaded to be admissible in evidence.[78] The

ority from the owner to execute the lease, and entered and put locks on the doors which the defendant, agent of the owner, peaceably removed later, it was held that he did not have such possession as would entitle him to maintain an action for trespass. Ryan *v.* Sun Sing Chow Poy, 164 Ill. 259, 45 E. E. Rep. 497.

[76] Paragraphs 1 and 2.

One whose title to property rests upon an invalid tax deed cannot maintain trespass against one who is in actual possession of the premises. Kraus *v.* Congdon, 161 Fed. Rep. 18, 88 C. C. A. 182.

[77] Wood *v.* Lafayette, 68 N. Y. 181, 190.

But see Moore *v.* Cooley, 88 Hun, 66, 34 N. Y. Supp. 624, "where the defendant offered in evidence a record of the laying out of a public highway between the lands of the plaintiff and the defendant. A survey of the said highway purported to indicate the center line of the road. The defendant offered the evidence to show that the trees in question were in a public road, but the court held that the record was inadmissible in that it failed to locate the trees on the defendant's side of the center line of the highway.

The plaintiff and defendant both claimed to hold leases on the same property by different lessors. In an action for trespass it was proved that the plaintiff's lessor had given a security deed to the defendant's lessor and the court held that under the Georgia Code legal title had thereby passed to the latter, thus defeating the plaintiff's right of action. Flowers Lumber Co. *v.* Bush, 18 Ga. App. 269, 89 S. E. Rep. 344.

In an action for trespass in cutting down trees, it was held error for the trial court to exclude the deed offered by the defendant granting to it "all timber, standing, growing or being on" the lands in question, where the defendant set up ownership of the trees cut and removed. Wilmer Lumber Co. *v.* Eisley, 163 Ala. 290, 50 So. Rep. 225.

Where the plaintiff proved title to the fee over which the defendant company claimed a right of way, the burden was upon it to show title to the right of way; and for this purpose it was held that a certified transcript of the record of a deed showing title was inadmissible where it appeared that the original deed was self-proving and in the hands of the party offering the transcript. Farrow *v.* Nashville, etc., R. Co., 109 Ala. 448, 20 So. Rep. 303.

[78] Sale *v.* Pratt, 19 Pick. 191; and see Cortelyou *v.* Van Brundt,

designation of land taken by a railway company, filed by the company under the statute, is conclusive evidence of the land taken, and cannot be controlled by extrinsic evience.[79]

9. Easements.

The rules for proving the existence of an easement in justification, are the same as those stated in the next chapter for proving it in an action for obstructing its enjoyment.

10. License.

License must be pleaded; it is not admissible under a general denial.[80] An oral license, acted out before revocation, may be proved notwithstanding the statute of frauds,[81] and notwithstanding a written agreement of the

2 Johns. 357; Kent *v.* Waite, 10 Pick. 138.

Existence for sixty years, with nothing to show commencement, is admissible under an allegation of existence from time immemorial. Odiorne *v.* Wade, 5 Pick. 421.

[79] 1 Redf. on Ry. 260 (6, 7).

"It is a sound proposition of law that when a corporation of a public character, and with the authority to exercise the right of eminent domain, pursues the statute in the taking and to the condemnation of land, and pays the owner the assessed compensation therefor, the land or easement as the case may be, vests in the corporation freed from all inchoate liens and interests existing at the time in third persons. Farrow *v.* Nashville, etc., R. Co., 109 Ala. 448, 20 So. Rep. 303.

[80] Haight *v.* Badgeley, 15 Barb. 499. Except where the action is not for an ordinary trespass, but for a special wrong—such as injury to the highway adjoining plaintiff—when a highway surveyor's license is admissible under the general issue. Munson *v.* Mallory, 36 Conn. 165. See Pipe Line Co. *v.* Delaware, etc., R. Co., 62 N. J. Law, 254, 41 Atl. Rep. 759.

If one relies upon a license to justify his acts of trespass, he has the burden of proving the license. Northern Trust Co. *v.* Palmer, 171 Ill. 383, 390, 49 N. E. Rep. 553. See also Milton *v.* Puffer, 207 Mass. 416, 93 N. E. Rep. 634, 32 L. R. A. N. S. 1010.

Permission to haul logs over the plaintiff's property does not carry with it the right to cut down trees for the purpose of making a road and consequently where such permission was pleaded in an action for cutting trees, the court said that the plea "should have been demurred to." Jernigan *v.* Clark, 134 Ala. 313, 32 So. Rep. 686.

[81] See Babcock *v.* Utter, 1 Abb. Ct. App. Dec. 27.

A verbal license is a good de-

parties requiring a writing.[82] License by an agent cannot be proved by evidence of the subsequent admissions of the agent.[83] A license may be inferred from the acts of the parties in connection with the silent acquiescence of the plaintiff; and such acquiescence may inure as a license[84] by estoppel, when the other requisites to create an estoppel *in pais* concur.[85] A license to enter plaintiff's premises, is not necessarily implied from the fact that defendant's goods, to which he had legal right of immediate possession, were there.[86]

If a writing is apparently a mere license, the burden is on defendant to show that it was part of a contract, and, therefore, not revocable, if he relies on that fact.[87] An intent to exclude the grantor, though not expressed in the body of a license, may be implied from the nature and extent of the

fense to an action of trespass. Hicks *v.* Miss. Lumber Co. (Miss.), 48 So. Rep. 624.

[82] Pierrepont *v.* Barnard, 6 N. Y. 279, rev'g 5 Barb. 364.

[83] Hubbard *v.* Elmer, 7 Wend. 446, 448, s. p., 2 Wheat. 360. For the principle applicable on this point, see Chap. III, paragraph 50 of this vol.

[84] Martin *v.* Houghton, 1 Abb. Pr. N. S. 339, s. c., 45 Barb. 258, and 31 How. Pr. 82. Compare Babcock *v.* Utter (above).

So, also, "it is a general rule that a license to do particular thing carries with it by implication, the right to do those things necessary to be done in order to avail the licensee of his rights under the license." Newberry *v.* Bunda, 137 Mich. 69, 100 N. W. Rep. 277.

But where the defendant in his pleadings and proof relied upon continued acquiescence on the part of the plaintiff, it was held that the latter could properly offer evidence in rebuttal by showing that poverty had prevented her from sooner taking action. Harris *v.* Ansonia, 73 Comn. 359, 47 Atl. Rep. 672.

It has been held that where under a contract of employment for a fixed period one has been furnished with a house in which to live, he is not a tenant of his employer but occupies the premises as a mere licensee and upon his discharge becomes a trespasser if he remains upon the premises. Mackenzie *v.* Minis, 132 Ga. 323, 63 S. E. Rep. 900, 23 L. R. A. N. S. 1003, 16 Ann. Cas. 723.

[85] Walter *v.* Post, 6 Duer, 363, s. c., 4 Abb. Pr. 382.

[86] McLeod *v.* Jones, 105 Mass. 403.

[87] Tillotson *v.* Preston, 7 Johns. 285.

consideration.[88] Oral evidence to explain a license is competent within general limits already stated.[89]

[88] Massot *v.* Moses, 3 C. S. 168, s. c., 16 Am. Rep. 697. WILLARD, J., says: The proper conclusion from the cases would seem to be, that grants of a right to enter the lands of the grantor, and sever therefrom and appropriate its products or mineral contents, are subject to a presumption, not applicable to the case of a sale of personalty, that the grantor did not intend to exclude his own proprietary right to a concurrent enjoyment with the licensee of the power granted. If this view is correct, any words evidencing an intent on the part of the greater to part with his proprietary rights over the subject-matter to which the grant relates, would tend to rebut such presumption. To words tending to evidence an intent on the part of the grantor to exclude himself from the enjoyment concurrently with the grantee of the right conferred, the same force in respect to such presumption should be given that would be given had the subject-matter been other than realty. The presumption, indeed, demands some positive evidence of an exclusive intent, but does not influence the force of the evidence of such intent. Id.

[89] Chapter XVI, paragraph 8; chapter XXVI, paragraph 11, chapter XXVII, paragraph 12, and chapter XXVIII, paragraphs 4–6 of this vol. And see Goodrich *v.* Longley, 4 Gray, 379, 383. Thus, under a license to defendants to take "all the stone of whatever description they may require in the enlargement of the Old Compensation Reservoir," extrinsic evidence is competent to show what particular scheme of enlargement was contemplated by the parties at the date of the contract, but not to limit the quantity which might be taken for that purpose. Chadwick *v.* Burnley, 12 W. R. 1077.

CHAPTER XXXVIII

ACTIONS FOR NUISANCE

1. Plaintiff's title and possession.
2. Easements.
3. Highway.
4. Defendant's title.
5. The nuisance.
6. The injury.
7. Cause and effect.
8. Notice and request to abate.
9. Damages.
10. Former adjudication.
11. *Defendant's* right or title.
12. Reasonable care, &c.

1. Plaintiff's Title and Possession.

The mode of proving title and possession of land have been stated in the last chapter.[90] Although possession may be *prima facie* evidence of title, plaintiff cannot recover if his own evidence shows the paramount title to be in another.[91]

2. Easements.

An allegation of prescriptive right is not sustained by proof of a conventional right,[92] but is sustained by proof of adverse user for sufficient length of time.[93] where there is no evidence of a license or agreement.[94]

[90] Paragraphs 1, 2, and 8. See also Wilson *v.* Hinsley, 13 Md. 64; Brown *v.* Bowen, 30 N. Y. 519.

Where it appeared from the testimony of the owner himself that the property in question had been rented to his sons at a nominal rental only they were nevertheless tenants at will and he consequently had no right to maintain an action to abate a nuisance occurring during the tenancy which did no injury to the reversion. Van Siclen *v.* New York, 64 N. Y. App. Div. 437, 72 N. Y. Supp. 209.

[91] Morris *v.* McCarney, 9 Geo. 160.

But in an action for nuisance the defendant has no right to inquire into the good faith of the plaintiff's possession. Eberhard *v.* Tuolumne Water Co., 4 Cal. 308.

[92] Rudd *v.* Williams, 43 Ill. 385. But the word "ancient" is not alone enough to exclude all but prescriptive right. Ward *v.* Neal, 35 Ala. 602.

[93] Kent *v.* Waite, 10 Pick. 138.

The doctrine of acquiescence does not apply to a nuisance unless

[94] Steffy *v.* Carpenter, 37 Penn. St. 41.

The grant of an easement with real property, or the reservation of one in real property conveyed, is not implied from its existence at the time of the conveyance, and the silence of the parties, unless it is necessary to the enjoyment, so that the grant or reservation may be presumed to have been intended by the parties.[95]

To establish an easement by presumption of a grant on the ground of necessity, the claimant must show that without it he will be subjected to an expense excessive and disproportioned to the value of his estate, or that his estate clearly depends on it for appropriate enjoyment, or that some conclusive indication of his grantor's intention exists in circumstances of his estate.[96]

Evidence of user for a sufficient period,[97] if continuous, ad-

it has continued for twenty years. Merchants' Mutual Telephone Co. *v.* Hirschman, 43 Ind. 283, 87 N. E. Rep. 238.

[95] See the conflicting authorities in 4 Am. L. Rev. 40, Keats *v.* Hugo, 115 Mass. 205, s. c., 15 Am. Rep. 80; Shipman *v.* Beers, 2 Abb. New Cas. 435. See Kennedy *v.* Burnap, 120 Cal. 488, 52 Pac. Rep. 843, 40 L. R. A. 476.

[96] O'Rorke *v.* Smith, 11 R. I. 259, s. c., 23 Am. Rep. 440; Powell *v.* Sims, 5 W. Va. 1, s. c., 13 Am. Rep. 629.

[97] Varying in different jurisdictions. In New York, twenty years. In Missouri, ten years. Bunton *v.* The Chicago, etc., R. Co., 50 Mo. App. 414, 426. In Pennsylvania, twenty-one years. Woodbury *v.* Allen, 215 Pa. St. 390, 64 Atl. Rep. 590.

"It has been held that a right to maintain a strictly private nuisance upon the land of another may be acquired by prescription." Paragon Paper Co. *v.* The State, 19 Ind. App. 314, 319, 49 N. E. Rep. 600.

Where the defendant railroad company constructed an embankment for their tracks in a public highway without providing sufficient culverts to carry away the surface water, the action by a property owner for damage caused by an overflow on his land could not be defeated, the court held, by a defense based upon the prescriptive rights which the defendant claimed to have acquired by having maintained the embankment for twenty years. Kelly *v.* Pittsburgh, etc., R. Co., 28 Ind. App. 457, 63 N. E. Rep. 233, 91 Am. St. Rep. 134.

Where it appeared that during a spring freshet, water had backed upon the plaintiff's land because of a railroad bridge over a stream running through the plaintiff's property, the court held that the defendant company had acquired

verse, and uninterrupted raises a presumption of a lost grant from some one authorized to make it.[98] An isolated instance of an unsuccessful attempt at interruption is not enough to prevent a finding of such grant.[99] In the absence of other evidence, the adverse character of the enjoyment,[1] and the fact that it was under a claim of right,[2] may be inferred from evidence that it was exclusive and uninterrupted. The acts and declarations of an occupant or tenant are not competent to affect the title of the owner; but on the question whether the right has been lost or abandoned, the demand of it by plaintiff, and the yielding of it by the occupant, may be shown.[3]

no prescriptive right to have this condition of affairs exist merely by showing a maintenance of the bridge for more than the statutory period of twenty years, but that it was necessary to show that the overflow had occurred for the past twenty years. Sherlock *v.* The Louisville, etc., R. Co. 115 Ind. 22, 17 N. E. Rep. 171.

[98] Tyler *v.* Wilkinson, 4 Mass. 397; compare Connor *v.* Sullivan, 40 Conn. 26, s. c., 16 Am. Rep. 10; Vooght *v.* Winch, 2 B. & A. 662. Continuous use however does not necessarily mean constant use. See Bunten *v.* The Chicago, etc., R. Co., 50 Mo. App. 414.

"What is acquired by prescription is the right to some benefit, privilege or property which has been enjoyed so long as to raise a presumption that its enjoyment began in consequence of a grant now lost. . . . The occasional exercise of a power over the lands of another during a period of twenty-one years is not enough to make title by prescription or limitation. The exercise of the power must be continuous, uniform and adverse." Hughesville Water Co. *v.* Person, 182 Pa. St. 450, 453, 38 A. Rep. 584.

[99] Connor *v.* Sullivan (above). Nor is evidence that no such grant was ever made, if the owner were capable of making such a grant. Angus *v.* Dalton, 27 Weekly R. 623 (Brett, J., dissented). Nor that there was a public way nearer and more convenient. Blake *v.* Everett, 1 Allen, 248.

[1] Hart *v.* Vose, 19 Wend. 365.

The plaintiff sought to restrain the defendant from building over an alley in which he claimed an easement by prescription. The court said: "Where one uses an easement whenever he sees fit, without asking leave and without objection, it is adverse, and an uninterrupted enjoyment for twenty-one years is a title which cannot afterward be disputed." Godino *v.* Kane, 26 Pa. Super. 596.

[2] Hammond *v.* Zehner, 23 Barb. 473; Polly *v.* McCall, 37 Ala. 20.

[3] Lindeman *v.* Lindsey, 69 Penn. St. 93, s. c., 8 Am. Rep. 219.

The easement or use must be shown to have continued substantially the same; [4] but slight variation will not defeat it.[5] Evidence of a private way does not support an allegation of a highway.[6]

3. Highway.

To prove a public way, plaintiff must establish: A legal dedication, as provided by statute, if any; or condemnation by some public authority competent for the purpose; or a dedication implied from acts of the owner, not amounting to a statutory dedication, but indicating the purpose to make a public way; or, a continuous and adverse possession and user on the part of the public for a sufficient period.[7]

[4] Ball *v.* Ray, L. R. 8 Ch. App. 467, s. c., 6 Moak's Eng. 435.

"To establish a prescriptive right to maintain a nuisance it must be shown that the user has continued in substantially the same way and with equally injurious results for the entire statutory period." Consequently a city acquired no prescriptive right to deposit sewage in a creek flowing through the plaintiff's farm where the amount of sewage increased during the statutory period claimed. Fansler *v.* Sedalia, 189 Mo. App. 454, 176 S. W. Rep. 1102.

It was held that although waste from a small still had been dumped into a stream for nearly forty years, those who recently replaced this still with a large brewery acquired no prescriptive right to throw the refuse therefrom into the stream, since the waste from the still had been in so small a quantity as not to pollute the water to the same extent as did the refuse from the distillery. Schumacher *v.* Shawhan, 93 Mo. App. 573.

[5] Harvey *v.* Walters, L. R. 8 C. P. 162, s. c., 4 Moak's Eng. 392.

[6] Satchell *v.* Doram, 4 Ohio St. 542.

[7] Satchell *v.* Doram, 4 Ohio St. 542. For the details of the mode of proving these facts, see Grinnell *v.* Kirtland, 2 Abb. New Cas. 386, 400 n.

In an action to restrain the defendants from obstructing a road there was evidence that it had been fenced off and used by the public at will for some sixty-five years. It further appeared that one of the deeds in the chain of title of one of the defendants contained the statement that the way in question was "not hereby intended to be conveyed." There was also evidence of a dedication of land essentially forming part of the way. On these facts, it was held that the dedication by the owners of the land and the public use thereof warranted

Evidence of the fact of highway at a given time raises a presumption, that it continued and still exists.[8] Special damage must be proved;[9] otherwise of a private way.[10]

4. Defendant's Title.

Evidence that defendant was in possession,[11] or that he leased the premises to others,[12] raises a presumption against him that he was owner.

5. The Nuisance.

A substantial variance between the evidence and the allegation of the facts constituting the nusiance is material, and may be fatal.[13] A nuisance is presumed created by the owner of the premises whence it proceeded.[14] An allegation that defendant constructed the nuisance, admits evidence that he merely continued it.[15] The determination of a board of health that a nuisance exists, made without no-

a presumption of acceptance by the public. Schmidt *v.* Lieberum, 54 Pa. Sup. Ct. 500.

[8] Satchell *v.* Doram, 4 Ohio St. 542.

[9] Lansing *v.* Wiswall, 5 Den. 213; Winterbottom *v.* Lord Derby, Law Rep. 2 Ex. 316.

[10] Lansing *v.* Wiswall (above).

[11] Blunt *v.* Aikin, 15 Wend. 533, 30 Am. Dec. 72, and see Waggoner *v.* Jermaine, 3 Den. 306, 45 Am. Dec. 474.

It has been held that evidence that the defendant had procured and paid for the shingling of a house was admissible as tending to establish his ownership or control over the premises of which it was a part. Com. *v.* Mead, 153 Mass. 284, 26 N. E. Rep. 855.

[12] Conhocton Stone Road Co. *v.* Buffalo, etc., R. Co., 3 Hun, 523.

[13] Hill *v.* Stonecreek Tp., 10 Oh. St. 621; Dickinson *v.* Worcester, 7 Allen (Mass.), 19; Pickett *v.* Congdon, 18 Md. 412, Brown *v.* Woodworth, 5 Barb. 550.

"While plaintiff as a person whose property has been injuriously affected, and whose personal enjoyment of the same has been lessened, by the maintenance, of a nuisance, has the right to enjoin or abate the same by action, and to recover damages, the proof must be such as to afford a basis on which to assess the damages, and to support the amount awarded, if any." Friburk *v.* Standard Oil Co., 66 Minn. 277, 68 N. W. Rep. 1090.

[14] Francis *v.* Schoellkopf, 53 N. Y. 152.

[15] Conhocton Stone Road Co. *v.* Buffalo, etc., R. Co., 3 Hun, 523; compare Lansing *v.* Smith, 4 Wend. 9, 21 Am. Dec. 89.

tice to or hearing of the person on whose premises it is alleged, is not competent evidence.[16] Evidence of negligence is not usually necessary.[17] Evidence of malice is not necessary, even if alleged.[18] Malice may be inferred from acts; and the law presumes it from acts designed to injure the plaintiff.[19]

[16] Hutton *v.* Camden, 39 N. J. L. 122, 23 Am. Rep. 203.

Where two riparian owners sued a city for diverting the course of a stream, in which action the city set up as a defense the statutory right to divert a stream when necessary for the public health, the court held that the statute did not purport to declare the existence of a public nuisance and as it did not appear that the plaintiffs had had any notice or any opportunity to be heard in the matter, their property rights could not be thus taken away. Stevens *v.* Worcester, 219 Mass. 128, 106 N. E. Rep. 587.

The commonwealth offered to prove that the state board of health on complaint, had, after an examination of the defendant's premises, found the existence of a nuisance thereon and had served him with a notice to abate and remove the same. The trial court refused to admit the proof on the ground that the notice signed by the secretary of the board of health was not a notice of the body itself, but the appellate court held that the exclusion of the evidence offered was error. Com. *v.* Yost, 11 Pa. Super. Ct. 323.

[17] Cahill *v.* Eastman, 18 Minn. 324, 10 Am. Rep. 184.

"Negligence of the defendant is not ordinarily an essential element in an action for damages sustained by reason of a nuisance. The action is founded on the wrongful act in creating or maintaining it, and the negligence of the defendant, unless in exceptional cases, is not material." Lamming *v.* Galusha, 135 N. Y. 239, 242, 31 N. E. Rep. 1024. Contributory negligence is not a defense. Linzey *v.* American Ice Co., 131 App. Div. 333, 115 N. Y. Supp. 1129.

In an action for damages caused by an explosion of the defendant's powder magazine, the declaration which alleged that the magazine had been maintained dangerously near the plaintiff's property was held sufficient without an allegation of want of care. Laflin, etc., Powder Co. *v.* Tearney, 131 Ill. 322, 23 N. E. Rep. 389. See also Sullivan *v.* Dunham, 161 N. Y. 290, 23 N. E. Rep. 389, 19 Am. St. Rep. 34, 7 L. R. A. 262; Bohan *v.* Port Jervis Gas-Light Co., 122 N. Y. 18, 25 N. E. Rep. 246, 9 L. R. A. 711; Gavigan *v.* Atlantic Refining Co., 186 Pa. 604, 40 Atl. Rep. 834.

[18] Panton *v.* Holland, 17 Johns. N. Y. 92, 8 Am. Dec. 369; Timm *v.* Bear, 29 Wis. 254.

[19] McCord *v.* High, 24 Iowa,

6. The Injury.

The evidence as to the nature of the injury should substantially correspond with the allegation.[20] But if the cause is truly alleged, details of the mode may be proved, though not alleged.[21] Evidence of like injury to other persons not

336, 347. See, further, chapter XXXVI of this volume.

[20] Ellicott *v.* Lamborne, 2 Md. 131; Peo. *v.* Townsend, 3 Hill N. Y., 479; Wilson *v.* Hinsley, 13 Md. 64.

Where the complainants seek to restrain the building and operation of a brewery, and admit that a brewery is not a nuisance *per se*, no injunction will be granted. O'Reilly *v.* Perkins, 22 R. I. 364, 48 Atl. Rep. 6.

[21] Thus, under an allegation that the defendant had diverted the water, and prevented it from flowing to the plaintiff's mill, evidence that the trough by which the defendant conveyed the water from the flume to his mill was leaky, and wasted the water; and that his water-wheel was out of repair, and required more water than it would if in order, is admissible. Wier *v.* Covell, 29 Conn. 197. So, under an allegation that plaintiff's house had been rendered unhealthy and incommodious by defendant's horses constantly standing by his door, evidence of the bad smells from the stalling of the horses is admissible. Benjamin *v.* Storr, L. R. 9 Com. Pl. 400, s. c., 10 Moak's Eng. R. 231. As to mode of proving injury by noise, see Gaunt *v.* Fynney, L. R. 8 Ch. App. 8, s. c., 4 Moak's Eng. 718; Wesson *v.* Washburn Iron Co., 13 Allen (Mass.), 95, 90 Am. Dec. 181,—by obstruction of light, see London Brewery Co., City, *v.* Tennant, L. R. 9 Ch. App. 212, s. c., 8 Moak's Eng. 827; Aynsley *v.* Glover, L. R. 18 Eq. Cas. 544, 3 E. R. C. 19, s. c., 11 Moak's Eng. 521. Whether the annoyance may be proved by evidence of declarations made by persons when suffering therefrom, compare Kearney *v.* Farrell, 28 Conn. 317; Wesson *v.* Washburn Iron Co., 13 Allen, 95.

The petition must allege such facts as show with cogency, clearness and reasonable certainty that the acts threatened, if done, will bring into existence a nuisance and that the complainants will suffer irreparable injury thereby. But it is not necessary that the complainants allege facts showing that a nuisance will "inevitably" result from the establishment of the thing complained against. Elliott *v.* Ferguson, 37 Tex. Civ. A. 40, 83 S. W. Rep. 56.

In an action of nuisance it is enough for the plaintiff to state facts showing that the defendant had created and was maintaining a nuisance and by so doing he establishes a cause of action regardless of whether the nuisance is due to the negligence of the defendant or to the nature of the work. Schaub *v.* Perkinson Bros.

connected with plaintiff is not competent,[22] unless for the purpose of showing the relation of cause and effect, under the same conditions,[23] but for this purpose general similarity of the conditions is not enough.[24]

Constr. Co., 108 Mo. App. 122, 82 S. W. Rep. 1094.

Where a complaint alleged "that the defendant can so arrange and operate his said cupola in a manner that said sparks, smoke, etc., will not be carried on plaintiff's house," it was held that while no particular precautions which ought to have been taken were pointed out, an inference that a more careful method of operation would have prevented the matters of which complaint was made could be reasonably drawn. Over *v.* Dehne, 38 Ind. App. 427, 75 N. E. Rep. 664, 76 N. E. Rep. 883.

[22] Emerson *v.* Lowell Gas-Light Co., 6 Allen, 146; Tyler *v.* Mather, 9 Gray, 177; Pettingill *v.* Porter, 3 Allen, 349, S. P., Concord R. R. Co. *v.* Greely, 3 Fost. 237.

"A nuisance the effect of which extends to the dwellings of other persons to such an extent as to render their occupancy materially uncomfortable, is a private nuisance as to each of them, for which each one thus injured may have a private action, though there are many persons thus affected." Meek *v.* DeLatour, 2 Cal. App. 261, 83 Pac. Rep. 300.

In an action to recover damages caused to the plaintiff's house by a nuisance, evidence as to the effect of the nuisance on the houses of others is inadmissible. Hughes *v.* General Electric Light, etc., Co., 107 Ky. 485, 54 S. W. Rep. 723.

[23] Evidence showing or tending to show that trees in the immediate vicinity upon the same street, although beyond the plaintiff's premises, were similarly and simultane-

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[24] Hawks *v.* Inhabitants of Charlemont, 110 Mass. 110.

But "expert testimony is not admissible upon a question which the Court or jury can themselves decide upon the facts; or stated in other words, if the relation of facts and their probable results can be determined without special skill or study, the facts themselves must be given in evidence, and the conclusions or inferences must be drawn by the jury." Metropolitan Sav. Bank *v.* Manion, 87 Md. 68, 81, 39 A. Rep. 90.

"*Prima facie*, any practicing physician is, by virtue of his profession, an expert of the methods by which diseases are communicated." Hence it is competent for a doctor to give testimony strongly indicating that the plaintiff and his family had suffered from attacks of malarial fever produced by the bite of mosquitoes which had bred in the stagnent pools maintained by the defendant. Towaliga Falls Power Co. *v.* Sims, 6 Ga. App. 749, 758, 65 S. E. Rep. 844.

7. Cause and Effect.

If the subject is one not familiar to men in general, and the jurors cannot be presumed familiar with it,[25] the fact that the injury complained of resulted from the conduct of defendant, or the condition of his property, may be shown by the opinions of witnesses shown to be sufficiently skilled in the subject in question,[26] not by those of others.[27] The mode of calling for the opinion of skilled witnesses has been already stated.[28]

8. Notice and Request to Abate.

As against the mere continuer of a private nuisance created by a previous owner before conveyance to defendant, it must be shown that before the commencement of the action he had notice or knowledge of the existence of the

ously affected, is competent upon the issue of whether escaping gas would account for the injury to the plaintiff's trees. Evans *v.* Keystone Gas Co., 148 N. Y. 112, 42 N. E. Rep. 513.

Testimony tending to show that others were injured and annoyed by the smoke and cinders of which the plaintiff complained was admissible as "tending to prove that the nuisance objected to was capable of inflicting the injury complained of." Crane Co. *v.* Stammers, 83 Ill. App. 329. See also N. K. Fairbank Co. *v.* Bahre, 112 Ill. App. 290.

For the purpose of showing the extent and character of the injury caused to the plaintiff by the maintenance of a coal shed in the neighborhood, and also for the purpose of proving that the nuisance complained of was capable of inflicting the injury alleged, it was held proper to admit the testimony of owners and occupants in the vicinity to the effect that they, too, were disturbed by the noises and dust coming from the coal shed. Wylie *v.* Elwood, 134 Ill. 281, 25 N. E. Rep. 570, 23 Am. St. Rep. 673, 9 L. R. A. 726.

[25] Clinton *v.* Howard, 42 Conn. 294; Concord R. R. Co. *v.* Greely, 23 N. H. 237, Chapter XVI, paragraph 23 of this volume.

[26] Clark *v.* Willett, 35 Cal. 534.

[27] Emerson *v.* Lowell Gas Light Co., 6 Allen, 146. See, also, on this subject, chapter XXXI, paragraphs 13 and 24 of this volume. Benkard *v.* Babcock, 2 Robt. 175, s. c., 17 Abb. Pr. 421, 27 How. Pr. 391.

[28] Chapter V paragraph 64 of this volume; Luning *v.* State, 1 Chandl. (Wis.) 178; Hunt *v.* Lowell Gas-Light Co., 8 Allen, 169, 172.

nuisance, but a request to abate it need not be proved.[29] If no question arises on the terms of the notice, oral evidence is competent to prove notice given, in writing, without producing or accounting for the writing.[30]

9. Damages.

If unlawful injury to plaintiff's private property be shown, special damage need not be shown.[31] Otherwise, if it be to his enjoyment of a public or common right. In either case, evidence of special damage not alleged may be excluded.[32]

[29] Conhocton Stone Road *v.* B., N. Y. & E. R. R. Co., 5 N. Y. 573, rev'g 52 Barb. 390; Nicket *v.* St. Louis, Memphis & Southern R. Co., 135 Mo. App. 661, 116 S. W. Rep. 477.

But see Gleason *v.* City of Kirksville, 136 Mo. App. 521, 118 S. W. Rep. 120, where it is said that there must be allegation and proof of a notice or request to abate the nuisance, and Buck *v.* McIntosh, 140 Ill. App. 9, where the court quotes with approval the following: "Where a party comes into possession of land as grantee or lessee with an existing nuisance upon such land, and he merely permits the nuisance to remain or continue, he cannot be held liable in an action for damages until he has been first notified or requested to remove the nuisance."

[30] Polly *v.* McCall, 37 Ala. 20, s. c., 1 Ala. Sel. Cas. 246.

[31] Plumleigh *v.* Dawson, 6 Ill. 544; Blanchard *v.* Baker, 8 Me. 253; Chatfield *v.* Wilson, 27 Vt. 670; Bungenstock *v.* Nishnabota Drainage District, 163 Mo. 198.

In an action for nuisance the plaintiff is entitled to recover for the discomforts suffered by him and his family in addition to the actual value of the damage done to his property, and in fact he is entitled to recover for such discomforts even though his property sustained no actual damage. Mahan *v.* Doggett (Ky.), 84 S. W. Rep. 525, 27 Ky. L. 103.

[32] So held of private right. McTavish *v.* Carroll, 13 Md. 429; Solms *v.* Lias, 16 Abb. Pr. 311; Hallock *v.* Belcher, 42 Barb. 199. So held of public right. See Wetmore *v.* Story, 22 Barb. 414, s. c., 3 Abb. Pr. 262.

A public nuisance is one which damages all persons which come within the sphere of its operations, though it may vary in its effects upon individuals, and if a public nuisance causes special damages to an individual in which the public does not participate such special damages give a right of action. Savannah, etc., R. Co. *v.* Parish, 117 Ga. 893, 45 S. E. Rep. 280.

A private person may maintain an action to abate a public nuisance, when it is specially injurious to him. Farmer *v.* Behmer, 9 Cal. A. 773, 100 Pac. Rep. 901.

Evidence of rental value is competent under allegations that the injury interfered with the letting.[33]

"A private individual may not enjoin a nuisance of a public character unless he can show that he suffers damage or injury which is special to himself or his interests." Seifert *v.* Dillon, 83 Neb. 322, 119 N. W. Rep. 686, 131 Am. St. Rep. 642, 19 L. R. A. N. S. 1018, 17 Ann. Cas. 1126.

"To authorize a private person to bring an action to abate a public nuisance, the plaintiff must allege and show that he will be specially injured in a different way from the public generally or deprived of the free use of his own property." Stricker *v.* Hillis, 15 Idaho, 709, 99 Pac. Rep. 831.

[33] Jutte *v.* Hughes, 67 N. Y. 267, rev'g 40 Super. Ct. (J. & S.) 126, and see Cropsey *v.* Murphy, 1 Hilt. 126.

"Where the injury or nuisance complained of is permanent, the measure of damage is the depreciation in the market value of the property. . . . If, however, the nuisance is temporary in its character, and such a thing that it may be readily remedied, removed, or abated, the measure of damage is the depreciation in the rental value of the property, if it be rented out, or, if it is occupied by the owner, the damage, to its use and occupation." Madisonville *v.* Hardman (Ky.), 92 S. W. Rep. 930.

Where the injury complained of is permanent in character, the measure of recovery is the diminution, if any, in the fair market value of the property. Central Consumers' Co. *v.* Pinkert, 122 Ky. 720, 92 S. W. Rep. 957, 13 Ann. Cas. 105.

"As to a nuisance capable of abatement, the depreciation of the value of the property can have no applicability. The settled rule of damages in such cases is the difference in the rental value with and without the nuisance." City of San Antonio *v.* Mackey's Estate (Tex. Civ. App.), 54 S. W. Rep. 33.

If the fact of nuisance is established, plaintiff is entitled to have it abated and defendants cannot be permitted to maintain it because it would be expensive to them to remove it. Faulkenbury *v.* Wells, 28 Tex. Civ. App. 621, S. W. Rep. 327.

A nuisance which destroys or seriously impairs the desirability of a place as a residence necessarily affects its actual value as well as its rental value, and hence the injury is not entirely personal to the occupant of the premises, but reaches to and harms the owner. Id.

Even a tenant at will may recover as damages the diminution in the rental value of premises occasioned by the maintenance on the defendant's property of stagnant pools in which malarial mosquitoes breed. Towaliga Falls Power Co. *v.* Sims, 6 Ga. App. 749, 65 S. E. Rep. 844.

The rules as to the mode of proving damages have been already stated.[34]

Where the nuisance complained of was occasioned by the defendant's sewage system, the measure of damages was the difference between the rental value of plaintiff's property prior to the erection and maintenance of the sewage system and its value thereafter. Gerow *v.* Liberty, 106 App. Div. 357, 94 N. Y. Supp. 949.

Where the nuisance complained of consisted of the maintenance of an electric light plant which discharged great quantities of soot, ashes, odors, etc., upon plaintiff's hotel injuring the same and the furniture therein, evidence showing the depreciation in the rentals of the rooms in the hotel from year to year was competent as bearing upon the question as to whether there was a diminution in the rental value of the whole premises. Pritchard *v.* Edison Electric Illum. Co., 179 N. Y. 364, 72 N. E. Rep. 243.

Where smoke and dust were carried into the plaintiff's house from an embankment of slack maintained by the defendant to such an extent as to injure furniture and apparel therein and produce great physical discomfort to the plaintiff and his family, the damages are not to be measured by the rental value of the house. No fixed rule or measure can be stated and the amount allowed must be left to the sound judgment and discretion of the jury in view of the facts of the particular case. Chicago-Virden Coal Co. *v.* Wilson, 67 Ill. App. 443.

"When the injury is to physical comfort, and results in the deprivation of the wholesome and comfortable enjoyment of a home, the measure of damages is compensation for such physical discomfort and deprivation. . . . The amount necessary to compensate the plaintiff must be left to the sound judgment, experience and discretion of the jury, in view of the facts of the particular case." Cleveland, etc., Ry. Co. *v.* Pattison, 67 Ill. App. 351.

The law does not regard trifling and small inconveniences but only regards injuries which sensibly diminish the comfort, enjoyment, or value of the property which is affected. McCleery *v.* Highland Boy Gold Min. Co., 140 Fed. Rep. 951.

[34] Chapter XXXVII, paragraph 5, of this volume. As to opinions of witnesses, see also Fish *v.* Dodge, 4 Den. 311, 318; Sinclair *v.* Rorish, 14 Ind. 450. *Contra*, Rochester & Syracuse R. R. Co. *v.* Budlong, 10 How. Pr. 289, s. c., 12 N. Y. Leg. Obs. 46; Vaudine *v.* Burpee, 13 Metc. 288, Sedgw. on Dam. 591.

A purchaser of premises injured by a nuisance erected previous to his purchase, has no remedy for the injury caused by such nuisance previous to his acquisition of the property. Hughes *v.* General Electric Light, etc., Co., 107

The fact that part of the injury results fron the acts of one not a defendant, is available to defendant on the question of damages,[35] but not otherwise.[36]

Ky. 485, 54 S. W. Rep. 723, 21 Ky. L. 1202.

Where no proof is offered from which any fair and reasonable estimate of the amount of damages sustained can be made, only nominal damages should be awarded, if any. Swift *v.* Broyles, 115 Ga. 885, 42 S. E. Rep. 277, 58 L. R. A. 390.

"When a nuisance produces a permanent and irreparable physical injury to person or property so that the entire damages are immediately estimable, all damages, both past and prospective, are recoverable in one action, and a recovery is a bar to any subsequent action." Woodstock Hardware, etc., Mfg. Co. *v.* Charleston Light, etc., Co. (S. C.), 63 S. E. Rep. 485.

Where plaintiff brought an action to recover for damages caused by the maintenance of a nuisance and obtained judgment and later brought two more actions for the same purpose which were settled, it was held in a fourth action upon the same grounds that plaintiff was entitled to recover damages which accrued after the time of the commencement of the second and third actions and not for those which accrued after the commencement of the first action. Garrett *v.* Wood, 55 N. Y. App. Div. 281, 67 N. Y. Supp. 122.

Damages in an equity suit may extend down to the date of the trial, but they should not be computed down to the date of the decision. Miller *v.* Edison Electric Illum. Co., 66 N. Y. App. Div. 470, 73 N. Y. Supp. 376.

[35] Wallace *v.* Drew, 59 Barb. 413.

"Where damages are claimed for injuries which may have resulted from one of two causes, for one of which the defendant is responsible,

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[36] Wheeler *v.* City of Worcester, 10 Allen, 591.

See also McFadden *v.* Missouri, etc., R. Co., 41 Tex. Civ. A. 350, 92 S. W. Rep. 989.

If several defendants without authority of law each drain the sewage from his residence into a stream, the drainage from all the residences thereby polluting the stream and creating a nuisance to the injury of a riparian owner lower down, each can only be held liable for such acts in a separate action, to the extent of the injury committed by himself. Carmichael *v.* Texarkana, 94 Fed. Rep. 561.

It was held that two corporations were not jointly liable for a nuisance caused by the discharge of noxious gases from their plants, where it was shown that these corporations were separate and distinct, with no common ownership, community of interest, common design or joint action. Key *v.* Armour Fertilizer Works, 18 Ga. App. 472, 89 S. E. Rep. 593.

10. Former Adjudication.

A criminal conviction of nuisance, founded on the same facts,[37] or a judgment in an action of trespass for attempt to abate the same nuisance,[38] is competent against the same party if both actions involve the same issues.

11. Defendant's Right or Title.

If the defendant relies upon a prescriptive right, he must prove affirmatively its enjoyment for a sufficient length of time.[39] In justifying under statute authority, the burden is on defendant to show that the statute power or duty could not reasonably well be executed without causing the annoyance complained of.[40]

and for the other of which he is not responsible, the plaintiff must fail if his evidence does not show that the damages are produced by the former cause. And he must also fail if it is just as probable that the damages were caused by the one as by the other, since the plaintiff is bound to make out his case by a preponderance of the evidence. Norfolk, etc., R. Co. *v.* Poole, 100 Va. 148, 40 S. E. Rep. 627, and authorities there cited. *A fortiori* he must fail if the damages resulted wholly from his own negligence, and if from his negligence of a greater or lesser degree concurring with that of the defendant, the law will not recognize a gradation of the fault and he still must fail." Chesapeake, etc., R. Co. *v.* Whitlow, 104 Va. 90, 51 S. E. Rep. 182.

[37] Peck *v.* Elder, 3 Sandf. 126; compare Queen *v.* Fairie, 8 E. & B. 485, s. c., 8 Cox Cr. C. 66.

[38] Bowyer *v.* Schofield, 1 Abb. Ct. App. Dec. 177. For the rules applicable to a former recovery between the same parties, for nuisance, see Richardson *v.* City of Boston, 19 How. U. S. 263; The Same *v.* The Same, 24 Id. 188; Fowle *v.* New Haven & N. Co., 107 Mass. 352; Vooght *v.* Winch, 2 B. & A. 662; Feversham *v.* Emerson, 11 Ex. 391; Plate *v.* N. Y. Central R. R. Co., 37 N. Y. 472; Avon Manuf. Co. *v.* Andrews, 30 Conn. 476; Connery *v.* Brooke, 73 Penn. St. 80; Potier *v.* Burden, 38 Ala. 651.

[39] Neale *v.* Seeley, 47 Barb. 314. The right to maintain a nuisance cannot be acquired by prescription. Boyd *v.* Schreiner (Tex. Civ. App.), 116 S. W. Rep. 100.

[40] Hull *v.* Managers of Metrop. Asylum Dist., 40 Law Times R. N. S. 497.

"It will not be presumed that the legislature intended that the dams (in which malarial carrying mosquitoes bred) should be constructed in such places or in such manner as to endanger the general

12. Reasonable Care, &c.

A nuisance being shown, it is not competent for defendant, unless exemplary damages are claimed, to show that the work or structure constituting it was made in the best and most careful manner,[41] nor that all usual precautions were taken,[42] nor that others were not injured.[43] Where reason-

health of the citizens of the community." Towaliga Falls Power Co. *v.* Sims, 6 Ga. App. 749, 756, 65 S. E. Rep. 844.

The act for the doing of which legislative authority is claimed must have been within the contemplation of the Legislature, and either expressly or impliedly permitted by it. Peo. *v.* Transit Dev. Co., 131 App. Div. 174, 115 N. Y. Supp. 297.

[41] Sedgw. on Dam. 7th ed. 284.

" 'In actions of this kind, the question whether the place where the trade or business is carried on, is a proper and convenient place for the purpose, or whether the use by the defendant of his own land is, under the circumstances, a reasonable use, are questions which ought not to be submitted to the finding of the jury.'" Susquehanna Fertilizer Co. *v.* Spangler, 86 Md. 562, 39 Atl. Rep. 270, 63 Am. St. Rep. 533.

"The defendant's plant was not a nuisance *per se;* whether it was a nuisance at all depended wholly on the proof, whether plaintiff's evidence established the fact could not be determined by the court. To establish that fact it was not necessary he should prove the business of defendant was carried on recklessly, or was not properly managed. It was sufficient to show that defendant selfishly carried on a lawful business in a populous neighborhood greatly to plaintiff's injury." Gavigan *v.* Atlantic Refining Co., 186 Pa. St. 604, 40 Atl. Rep. 834.

[42] Temperance Hall Asso. *v.* Giles, 4 Vroom, 260. See, to the contrary, Smith *v.* Fletcher, L. R. 9 Ex. 64, s. c., 8 Moak's Eng. 510, rev'g 3 Moak's Eng. 422.

"The exercise of care to prevent annoyance and discomfort, or to reduce to a minimum the injurious consequences incident to the manufacture of gas, cannot affect the question of liability so long as that care is ineffectual." Rosenheimer *v.* Standard Gaslight Co., 36 N. Y. App. Div. 1, 55 N. Y. Supp. 192.

[43] Temperance Hall Asso. *v.* Giles (above).

"'The test of the permissible use of one's own land is not whether the use or the act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all

able use is the measure of the right of a party, evidence of the general usage of the country in similar cases is competent.[44]

interests affected, his own and those of his neighbors, and having in view also public policy.'" Rosenheimer *v.* Standard Gaslight Co., 36 App. Div. 1, 55 N. Y. Supp. 192.

[44] Dumont *v.* Kellogg, 29 Mich. 420, s. c., 18 Am. Rep. 102; compare Timm. *v.* Bear, 29 Wis. 254.

CHAPTER XXXIX

ACTIONS FOR INJURIES BY ANIMALS

1. Wild beasts.
2. Dangerous character.
3. Notice to keeper.

1. Wild Beasts.

Injury to a person or personal property by a wild beast of a nature fierce and dangerous,[45] or any injury by any animal trespassing,[46] is sufficient evidence of negligence.

2. Dangerous Character.

In case of an animal not trespassing, dangerous character, and notice of it to defendant, must be shown.[47] A

[45] Scribner *v.* Kelly, 38 Barb. 14; Spaulding *v.* Oakes, 42 Vt. 343.

At common law it seems that one who harbors a dog knowing him to be vicious is liable for the injuries occasioned by him. Alexander *v.* Crosby (Iowa), 119 N. W. Rep. 717.

One may be guilty of negligence if he harbors a vicious animal although he does not own it or the premises on which it is kept, and he may be chargeable with notice of its viciousness if he fails to take notice of its vicious habits. Hayes *v.* Smith, 62 Ohio St. 161, 56 N. E. Rep. 879.

[46] Shearm. & R., § 186. This rule is subject to much modification by statute.

One who keeps wild animals in captivity must see to it at his peril that they do no damage. Barrett *v.* State, 220 N. Y. 423, 116 N. E. Rep. 99.

[47] Van Leuven *v.* Lyke, 1 N. Y. 515, affi'g 4 Den. 127. Previous injury to others need not. Reider *v.* White, 65 N. Y. 54; Worth *v.* Gilling, L. R. 2 C. P. 1. The statutes sometimes dispense with notice. 51 N. H. 110, 63 Penn. St. 346, 49 Barb. 41.

One who harbors a dangerous animal on his premises, does so at his peril and is answerable for all damages which result from its escape. Serio *v.* American Brewing Co., 141 La. 290, 74 So. Rep. 998.

The owner of course will not be allowed to plead ignorance of the animal's vicious habits or propensities, where by the exercise of ordinary care he could have acquired the requisite knowledge.

single act, though not resulting in injury,[48] and though not known to defendant,[49] may go to the jury as evidence of vicious character. If vicious character and notice are proved, negligence need not be.[50] If negligence is, a vicious act need not.[51] It is competent to prove that a dog has a habit of

Lloyd *v.* Bowen, 170 N. C. 216, 86 S. E. Rep. 797.

Proof that a person was bitten by a dog makes a *prima facie* case, which may however be defeated if it appears that the plaintiff brought on, or helped to bring on, the dog's attack, either by providing it or by lack of ordinary care or by a trespass of such a nature as is calculated to induce such an attack. Legault *v.* Malacker (Wis.), 163 N. W. Rep. 476.

But where a dog is suffering from rabies, the owner is not liable for injuries done by it, unless the evidence shows that he had knowledge or means of knowing of its condition and negligently failed to restrain or destroy it. Legault *v.* Malacker (Wis.), 163 N. W. Rep. 476. Hunter *v.* Metropolitan Expr. Co., 50 Misc. Rep. 158, 98 N. Y. Supp. 234.

[48] Cockerham *v.* Nixon, 11 Ired. L. 270.

One instance of viciousness is sufficient to charge the owner with notice and to make him liable for subsequent acts of a similar character. Rowe *v.* Ehrmantraut, 92 Minn. 17, 99 N. W. Rep. 211.

[49] See Whittier *v.* Franklin, 46 N. H. 26.

Where a wife who lived with her husband, the defendant, knew of a previous attack by the animal in question and the defendant admits his ownership a *prima facie* case for the plaintiff is made out. Boler *v.* Sorgenfrei, 86 N. Y. Suppl. 180.

[50] Kelly *v.* Tilton, 2 Abb. Ct. App. Dec. 495. And defendant's care is no bar. Id. But see 38 Wis. 300, s. c., 20 Am. Rep. 6. Nor is contributory negligence, unless amounting to voluntarily bringing the injury upon himself. Lynch *v.* McNally, 73 N. Y. 347.

But, where the owner of a dog did not know or believe, or have reason to know or believe that it was vicious or dangerous and there is no proof that he was negligent in permitting it to run at large or that he violated any ordinance in so doing, he is not liable for personal injuries caused by such dog. Buehler *v.* Kerr, 169 N. Y. App. Div. 927, 153 N. Y. Supp. 1108.

[51] Dickson *v.* McCoy, 39 N. Y. 400.

In an action to recover damages for personal injuries resulting from the bite of a dog, it was held error to charge the jury. "If this dog was running at large on the public highway when defendant was bitten, if you so find, it does away with the necessity of proving actual knowledge of the vicious tendency, and disposition of the dog, for he (the defendant) is chargeable therewith if the dog

attacking passing teams, in support of a disputed allegation that he attacked a passing team on a particular occasion.[52]

3. Notice.

An owner is presumed to know the generic nature of the animal; but to charge him for injury resulting from peculiar characteristics of a particular domestic animal, some notice of them must be shown.[53] It is sufficient if he has

is running at large on the public highway" for the reason that while the rule stated applies to wild animals, domestic animals are not presumed to be vicious. Leonard *v.* Donoghue, 87 N. Y. App. Div. 104, 84 N. Y. Supp. 60.

[52] Broderick *v.* Higginson, 160 Mass. 482, 484, 48 N. E. Rep. 269. It is a familiar fact that animals are more likely to act in a certain way at a particular time if the action is in accordance with their established habit or usual conduct than if it is not. There is a probability that an animal will act as he is accustomed to act under like circumstances. For this reason when disputes have arisen in the conduct of an animal, evidence of his habits in that particular has often been received. Id. See also Todd *v.* Rowley, 8 Allen, 57; Maggi *v.* Cutts, 123 Mass. 537; Lynch *v.* Moore, 154 Mass. 335, 28 N. E. Rep. 277; Willet *v.* Goetz, 125 Mich. 581, 84 N. W. Rep. 1071.

Evidence that the defendant's dog had been seen to attack people getting on and off of street cars, that the defendant had at times seen the dog rushing at people and had called it back is sufficient to justify the jury in finding that the defendant knew of facts sufficient to apprise him of the dangerous character of the dog. Fitzgerald *v.* Warholy, 109 N. Y. App. Div. 606, 96 N. Y. Supp. 243.

[53] Whart. on Neg., § 922; Shearm. & R., § 188, and cases cited. See Miller *v.* Atlantic Refining Co., 210 Pa. 628, 60 Atl. Rep. 306.

A general statement of a dog dealer that female dogs with pups are dangerous does not establish the vicious tendency of the particular dog in question or charge the defendant with the necessary notice. Cook *v.* Levintan, 94 N. Y. Supp. 396.

Where a witness for the plaintiff testified that he visited the premises in question a month or two before the plaintiff was bitten, saw the dog and was told by one of defendant's agents "look out for the dog, or it will bite you," it was held that such a warning was insufficient to prove the requisite *scienter*. Bogodonow *v.* N. Y. Lumber, etc., Co., 46 Misc. Rep. 120, 91 N. Y. Supp. 331.

On the issue as to whether a horse was vicious and whether such viciousness was known to the defendant, testimony of a witness

seen or heard enough to convince a man of ordinary prudence of its disposition to commit injuries substantially like those complained of.[54] Proof of savage and ferocious nature proves notice.[55] Evidence that he had chained it and warned persons of it,[56] or procured or kept it to guard his prem-

who bought the horse after it had kicked the plaintiff, to the effect that the animal was mild and gentle is incompetent. Woodward *v.* Loomis, 64 N. Y. App. Div. 27, 71 N. Y. Supp. 690.

[54] Shearm. & R., §§ 189, 190, 191; Applebee *v.* Percy, L. R. 9 Com. Pl. 647.

The most recent decisions tend to hold that an owner need not have actual notice of an animal's vicious propensities, to make him liable for injuries caused by it. Tubbs *v.* Shears (Okl.), 155 Pac. Rep. 549. But see Muller *v.* Shufeldt, 114 N. Y. Supp. 1012.

"Knowledge need not necessarily be actual in the ordinary acceptance of the term. Either constructive or imputed notice is sufficient. If in the exercise of seasonable diligence and common prudence the owner ought to have known an animal owned or kept by him was dangerously inclined and probably would, if unrestrained, inflict injury upon the person or property of another he is chargeable as if he had actual, direct and positive notice of acts of viciousness committed by it." Butts *v.* Houston, 76 W. Va. 604, 86 S. E. Rep. 473.

The owner's knowledge need only be such as was sufficient to put him on his guard, or to require him as an ordinarily prudent person, to anticipate the act resulting in the injury. Bachman *v.* Clark, 128 Md. 245, 97 Atl. Rep. 440.

One who has actual or constructive knowledge of a dog's vicious habits and harbors him is liable for the results of his viciousness. Merritt *v.* Machett, 135 Mo. App. 176, 115 S. W. Rep. 1066.

Knowledge of an animal's viciousness may be implied from circumstances. Poland *v.* Minshall, 96 N. Y. Supp. 200.

[55] Muller *v.* McKesson, 73 N. Y. 195, 199.

Where the plaintiff proves specific acts of vicious assault by the defendant's dog, evidence offered by the defendant as to the peaceful disposition of animal is inadmissible to rebut the plaintiff's proof. Johnson *v.* Eckberg, 94 Ill. App. 634.

[56] Reider *v.* White, 65 N. Y. 54; Kitredge *v.* Elliott, 16 N. H. 80.

Where the defendant kept a number of ferocious watch dogs which were chained day and night, this fact together with the purposes for which they were kept charged the owner with knowledge of their character. Brice *v.* Bauer, 108 N. Y. 428, 15 N. E. Rep. 695, 2 Am. St. Rep. 454.

Where it appeared that a horse which bit the plaintiff was frequently kept muzzled, it was held that this fact implied knowledge

ises,[57] is competent to show notice. General bad reputation is not evidence of bad character, but may be admitted with other circumstances tending to show notice.[58] Notice need not be personal. Notice to one to whom he had delegated the management of his business, or the care and control of the animal, and who was for this purpose put in defendant's place, is sufficient.[59] Evidence of notice, even if not necessary, is competent in aggravation. So is reckless conduct.[60]

of his viciousness, and the jury was warranted in finding for the plaintiff. Poland *v.* Minshall, 96 N. Y. Supp. 200.

[57] Worth *v.* Gilling, L. R. 2 C. P. 1; see Blackman *v.* Simmons, 3 Carr. & P. 138.

A party who offers evidence for the specific purpose of showing a similiar prior act by the defendant's dog cannot successfully contend when it is rejected that it was admissible for another and distinct purpose, viz., to show the general behavior of the dog. Deitrich *v.* Kettering, 212 Pa. 356, 61 Atl. Rep. 927.

[58] Keenan *v.* Hayden, 39 Wis. 558.

Testimony of a dog's reputation for being ferocious is competent only on the issue of the defendant's knowledge of the animal's disposition. Triolo *v.* Foster (Tex.), 57 S. W. Rep. 698.

The vicious character of a dog may be shown by its repute in the locality where it is kept. Fisher *v.* Weinholzer, 91 Minn. 22, 97 N. W. Rep. 426.

[59] Applebee *v.* Percy (above); Baldwin *v.* Casella, L. R. 7 Ex. 325, s. c., 3 Moak's, 434; Barrett *v.* Metropolitan Contracting Co., 172 Cal. 116, 155 Pac. Rep. 645.

"Knowledge by or notice to a servant charged with no duty in the matter of the vicious propensities of an animal owned by the master is not notice to the master." Clowdis *v.* Fresno Flume, etc., Co., 118 Cal. 315, 50 Pac. Rep. 373, 62 Am. St. Rep. 238.

Knowledge brought home to a party himself that his dog has bitten a certain person at a certain time, under certain circumstances is actual notice. Constructive notice means that there are facts and circumstances which are brought to his knowledge sufficient to indicate that the animal is dangerous or ferocious. Barclay *v.* Hartman, 16 Del. (2 Man.) 351, 43 Atl. Rep. 174.

[60] Swift *v.* Applebone, 23 Mich. 252. A statement by a wife to her husband, that a dog was in the house, that she could not drive him out, and that he had snapped at her, is hearsay, and is not admissible, in an action against the husband for killing the dog, for the purpose of showing that it had snapped at his wife. Ehrlinger *v.* Douglas, 81 Wis. 59, 29 Am. St. Rep. 863, 50 N. W. Rep. 1011.

Where it is proved that the defendant knowingly and without

regard to the rights of others kept and harbored a dog which was liable to attack people, an implication that the keeping was wanton, wilful and malicious is justified and the jury may award punitive or vindictive damages. Hahn *v.* Kordula, 5 Kan. App. 142, 48 Pac. Rep. 896.

To authorize the recovery of punitive damages for personal injuries, it is necessary to allege and prove not only that the animal was vicious, but also that it was known to be vicious by the person owning, keeping or harboring it prior to the time of the injury. Davidson *v.* Manning, 168 Ky. 288, 181 S. W. Rep. 1111.

CHAPTER XL

ACTIONS FOR ASSAULT AND BATTERY

1. Assault, by whom committed.
2. By servant, &c.
3. Manner and circumstances.
4. Plaintiff the aggressor.
5. Intent or motive.
6. The *res gestæ* of an assault.
7. Criminal conviction.
8. Admissions and declarations.
9. Requisite cogency of evidence.
10. The injury, and damages.
11. *Defense*—Justification.
12. Plaintiff the aggressor.
13. Provocation.
14. Character.
15. Previous punishment.

1. Assault, By Whom Committed.

A witness may state his belief as to the identity of a person he saw, although unable to speak positively,[61] if his belief be in the nature of an impression of the fact, not an inference or opinion.[62] Evidence of declarations made by the plaintiff is competent for the purpose of showing who did the act, if made as part of the *res gestæ*, within the rule below stated;[63] otherwise not,[64] even though there was no witness of the act,[65] or though the declarations were dying declarations.[66]

2. By Servant, &c.

To charge defendants for their servant's assault, it is enough to show that they gave the servant authority, or

[61] Beverly *v.* Williams, 4 Dev. & B. (N. C.) L. 236.

[62] 2 Abb. New Cas. 232, note.

[63] King *v.* Foster, 6 Carr. & P. 325; paragraph 6.

Declarations as to pain and suffering made immediately after the injuries were inflicted are also admissible as a part of the *res gestæ*. Bagley *v.* Mason, 69 Vt. 175, 37 Atl. Rep. 287; Robinson *v.* Halley, 124 Ia. 443, 100 N. W. Rep. 328.

[64] Morrissey *v.* Ingraham, 111 Mass. 63; People *v.* Graham, 21 Cal. 261; Denton *v.* State, 1 Swan (Tenn.), 279; Traver *v.* Smolik, 43 App. Cas. D. C. 150.

[65] State *v.* Davidson, 30 Vt. 377, 383.

[66] Spatz *v.* Lyons, 55 Barb. 476.

made it his duty, to act in respect to the business he was engaged in when the wrong was committed, and that the act complained of was done in the course of his employment;[67] and if this be shown, it is not material that the servant's act was wilful.[68] Without such evidence, it is not enough to show approval by their general agent.[69] If it be shown that it was necessary for the defendants to have a person at a certain place to act in case of emergency,—for instance, the station-master of a railroad company,—the fact that he was there, acting in a matter which the company may perform,—for instance, in ordering the arrest of one charged with penal offense against the company,—as if he had authority, is *prima facie* evidence that he had authority, and the presumption must be overthrown by the company.[70] But if the act was one which the company had no power to perform, such as a charge of what was no offense,—the presumption does not apply.[71]

[67] Rounds *v.* Del., Lack. & W. R. R. Co., 64 N. Y. 129, 136; Clish *v.* Boston, etc., R. Co., 219 Mass. 341, 106 N. E. Rep. 854; Hager *v.* St. Louis, etc., R. Co., 117 Ark. 311, 174 S. W. Rep. 555.

[68] Pennsylvania Mining Co. *v.* Jarnigan, 222 Fed. Rep. 889, 138 C. C. A. 369; Pine; Bluff, etc., Ry. Co. *v.* Washington, 116 Ark. 179, 172 S. W. Rep. 872. Winston *v.* Lusk, 186 Mo. App. 381, 172 S. W. Rep. 76, Mott *v.* Consumers' Ice Co., 73 N. Y. 543; Rounds *v.* Del., Lack. & W. R. R. Co. (above). As to the allegation of malice, see Shea *v.* Sixth Ave. R. R. Co., 62 N. Y. 180, affi'g 5 Daly, 221.

Thus a carrier is liable for a deliberate assault committed by its ticket agent upon a passenger seeking to secure correct change, for in selling the ticket and baffling the plaintiff in his effort to secure his change, he was acting within the scope of his employment, and if as an incident thereto, he wilfully committed a tort, the master is liable. Bledsoe *v.* West, 186 Mo. App. 460, 171 S. W. Rep. 622.

[69] Vanderbilt *v.* Richmond Turnpike Co., 2 N. Y. 479; 2 Greenl. Ev. 13th ed. 55, § 68.

[70] Moore *v.* Metropolitan Ry. Co., L. R. 8 Q. B. 36, s. c., Moak's Eng. 203. Compare Priest *v.* Hudson River R. R. Co., 65 N. Y. 589. For a discussion of the liability of a railroad company for an assault committed by its ticket agent, see Bludsoe *v.* West, 186 Mo. App. 460, 171 S. W. Rep. 622.

[71] Poulton *v.* London &c. Ry. Co., L. R. 2 Q. B. 534, and cases

In the absence of direct evidence of authority to interfere, slight evidence that the authority was exclusively in other servants is sufficient to repel the inference of authority in the one who did the act.[72]

3. Manner and Circumstances.

If defendant admits the injury to have been inflicted by him, it is presumed to have been done wrongfully, and the burden is on him to show his justification or excuse.[73]

If the wrong was the use of excessive force in an act otherwise lawful, the burden of proof is upon plaintiff to show that the force was excessive.[74]

cited. Compare chapter III, paragraph 50 of this vol.

"Where the evidence and all the inference properly to be drawn therefrom fairly tend to establish plaintiff's cause of action as set forth in the declaration, the court should decline to take the case from the jury either at the close of the plaintiff's evidence or at the close of all the evidence." Nicholls *v.* Colwell, 113 Ill. App. 219.

[72] Towanda Coal Co. *v.* Heeman, 86 Penn. St. 418.

"When great bodily harm is about to be inflicted by one person upon another, a third party is justified in exerting necessary force commensurate with the circumstances in preventing such threatened injury in a proper case. . . . But the principle itself has its necessary and concomitant limitation; that is, that the party in whose favor, or in preventing an injury to whom, the third party interposes, must not be so at fault himself as to forfeit his right to use the same force as is exerted in his behalf by the third person." Brouster *v.* Fox, 117 Mo. App. 711, 93 S. W. Rep. 318.

[73] Harvey *v.* Dunlop, Hill & D. Supp. 193; Lewis *v.* Fountain, 168 N. C. 277, 84 S. E. Rep. 278.

Presumptively no man has the right to inflict an act of physical violence upon another, and, where it is shown that he has done so, the burden is upon him to excuse his act in so doing, unless the evidence which shows the commission of the assault also shows facts which justify it. Robertson *v.* Sish, 115 Ark. 461, 171 S. W. Rep. 880

Upon proof of the assault, nothing appearing in the plaintiff's evidence to the contrary, the law

[74] Henry *v.* Lowell, 16 Barb. 268.

Whether the degree of force used was excessive or not, is usually a question of fact for the jury. Devor *v.* Knauer, 84 Ill. App. 184; Beck *v.* Minneapolis Union Ry. Co., 95 Minn. 73, 103 N. W. Rep. 746.

Witnesses may describe the manner, and testify to the tone of voice, language, etc.;[75] but the feeling or expectation aroused in the witness is not generally competent on direct examination, unless as explanatory of his own conduct testified to by him.[76] Evidence of declarations of the injured person as to the manner in which, or the means with which, the injury was done, is not competent, unless the declarations were made as part of the *res gestæ*.[77] It makes no difference that they were made to a medical attendant,[78] or as dying declarations.[79] The opinion of an expert as to the

presumes the assault to be wrongful. Happy *v.* Prichard, 111 Mo. App. 6, 85 S. W. Rep. 655.

The defendant is not presumed innocent until he is proven guilty. Kurz *v.* Doerr, 180 N. Y. 88, 72 N. E. Rep. 926, 105 Am. St. Rep. 716, 2 Ann. Cas. 71.

[75] Kerner *v.* State, 18 Ga. 194, 218; but, according to Messner *v.* People, 45 N. Y. 1, cannot express an opinion of the passions expressed in outcries. See chapter XXXI, paragraphs 44 and 45 of this vol.

"While mere words, although of provocation do not constitute a defense to the action, yet when used at the time or immediately preceding the battery, they may be shown in evidence under the general issue in mitigation of damages." Mitchell *v.* Gambill, 37 So. Rep. 290, 140 Ala. 316.

"At common law opprobrious words would never justify an assault or battery (Berry *v.* State, 105 Ga. 683, 131 S. E. Rep. 592) and we have no statute which makes such words a justification in a civil action." Berkner *v.* Dannenberg, 43 S. E. Rep. 463, 116 Ga. 954, 60 L. R. A. 559.

As "bearing upon the probability of the blow in question having been struck by the defendant without warning and without justifiable provocation, it was permissible to show the subject matter of the altercation which resulted in the alleged assault and battery, when the controversy began and the nature of it." Coruth *v.* Jones, 60 Atl. Rep. 814, 77 Vt. 441.

One may be guilty of an assault in taking his own property from another by force. Winter *v.* Beebe, 105 N. W. Rep. 953, 126 Wis. 379.

[76] Keener *v.* State, 18 Ga. 194, 218; Kuhn *v.* Freund, 87 Mich. 545, 49 N. W. Rep. 867.

[77] Collins *v.* Waters, 54 Ill. 485.

Declarations as to pain and suffering following immediately upon the infliction of the injuries are admissible as part of the *res gestæ*. Robinson *v.* Halley, 124 Iowa, 443, 100 N. W. Rep. 328; Bagley *v.* Mason, 69 Vt. 175, 37 Atl. 287.

[78] Collins *v.* Waters, 54 Ill. 485.

[79] Denton *v.* State, 1 Swan (Tenn.), 279.

manner or mode of the assault, or the resulting wounds, is competent,[80] but only so far as the question requires professional knowledge or special skill.[81] It is competent to show that the defendant was intoxicated, as making it probable that he committed the assault.[82]

4. Plaintiff the Aggressor.

If the defendant has pleaded that plaintiff was the aggressor, without setting up a counter-claim, and without requiring a reply, plaintiff may prove a justification though not alleged.[83] To show who was the aggressor, previous difficulties and ill will may be proved, in connection with threats.[84]

5. Intent or Motive.

As a general rule, plaintiff must be prepared with evidence either that the intention was unlawful, or that defendant was

[80] Fort *v.* Brown, 46 Barb. 366, and see chapter XXXI, paragraphs 32 and 43 of this vol.

[81] Cook *v.* State, 24 N. J. L. (4 Zabr.) 843, 852; Cooper *v.* State, 23 Tex. 331.

[82] Bagley *v.* Mason, 69 Vt. 175; 37 Atl. Rep. 287.

[83] N. Y. Code Civ. Pro., § 522, compared with Brown *v.* Bennett, 5 Cow. 181; Collier *v.* Moulton, 7 Johns. 109; Wilmarth *v.* Babcock, 2 Hill, 194.

The rule as to self-defense is the same in civil and criminal actions. Germolus *v.* Sausser, 83 Minn. 141, 85 N. W. Rep. 946.

[84] Coruth *v.* Jones, 77 Vt. 441, 60 Atl. Rep. 814; Murphy *v.* Dart, 42 How. Pr. 31; Jewett *v.* Banning, 21 N. Y. 27, affi'g 23 Barb. 13. As to the competency of evidence of previous exhibitions of strength by the wrong-doer, see Darling *v.* Westmoreland, 52 N. H. 401, s. c., 13 Am. Rep. 55, and cases cited.

In Brouster *v.* Fox, 93 S. W. Rep. 318, 117 Mo. App. 711, the court said: "All persons, present and participating in an act of this nature, by either words or counsel and advice or gestures, looks or signs, or who may in any way or by any means, countenance and approve the same, are in law deemed to be aiders and abettors and liable as principals for such tortious act. . . . And it is not necessary to prove such advising, counseling, aiding and abetting by positive and direct evidence, but such fact, like any other may be established by circumstances. . . . On the other hand, one person cannot be held for the act of another in the commission of such

in fault.[85] But the unlawfulness may have been unknown to defendant.[86] All the circumstances immediately connected with the transaction tending to exhibit and explain the motive of the defendant are competent for the purpose of showing whether he acted maliciously or in an honest belief that he was justified in what he did.[87] Declarations by the

trespass as aider and abettor or counselor and adviser unless there was a common purpose in the minds of the person sought to be held and the third party to inflict bodily harm on the complainant."

[85] BREESE, J., Paxton *v.* Boyer, 67 Ill. 132, s. c., 16 Am. Rep. 615; Nicholls *v.* Colwell, 113 Ill. App. 219.

"An intent to do violence is an essential ingredient of the offence, but the degrees of violence is, of course, immaterial." Mailand *v.* Mailand, 83 Minn. 453, 86 N. W. Rep. 445.

Intent to injure need not be shown, if the evidence established the illegality of the act complained of. Mahr *v.* Williams, 95 Minn. 261, 104 N. W. Rep. 12, 111 Am. St. Rep. 462, 1 L. R. A. N. S. 439, 5 Ann. Cas. 303.

"If the act occasioning the injury is unlawful, the intent of the wrongdoer is immaterial; but where the party inflicting the injury is not a wrongdoer, but is doing an act not unlawful, and injury results to another, then the intent becomes material." Nicholls *v.* Colwell, 113 Ill. App. 219.

"In the civil as distinguished from the criminal action, an intent to injure is not essential to the liability of the person committing the assault." Carlton *v.* Henry, 129 Ala. 479, 29 So. Rep. 924.

Where the defendant's acts are characterized by a gross disregard for the safety of others, an unlawful intent may be inferred. Reynolds *v.* Pierson, 29 Ind. App. 273, 64 N. E. Rep. 484.

[86] See, for instance, Elder *v.* Morrison, 10 Wend. 128; Morris Hotel Co. *v.* Henley, 145 Ala. 678, 40 So. Rep. 52.

It is sufficient to show that the assault was wrongful and unlawful or the result of negligence. Mohr *v.* Williams, 104 N. W. Rep. 12, 95 Minn. 261, 1 L. R. A. N. S. 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303.

[87] Voltz *v.* Blackman, 64 N. Y. 440; Elfers *v.* Wooley, 116 N. Y. 294, 295–296, 22 N. E. Rep. 548. Where a complaint in an action for assault and battery sets forth facts from which malice may be inferred, although there is no express averment that the assault was made with malice, evidence of the circumstances immediately connected with the transaction tending to show that defendant acted maliciously is competent and may be given. (Id.)

Evidence of frequent robberies and disturbances in the same vicinity, but not connected with

one who committed the assault, if forming part of the *res gestæ*, are competent for this purpose.[88] So are his previous threats,[89] but subsequent threats are not competent.[90]

the transaction in question, is not admissible to establish motive or intent, under a plea of self-defense, as it tends to raise collateral issues and divert the attention of the jury. Courvoisier *v.* Raymond, 23 Colo. 113, 47 Pac. Rep. 284.

"In case of assault and battery, both parties may be guilty of a breach of the peace, and liable to indictment; but a civil action cannot be brought by each against the other." Brouster *v.* Fox, 93 S. W. Rep. 318, 117 Mo. App. 711.

If a person uses more force than is necessary to save himself from an assault about to be made upon him, he may himself be found guilty of assault. Beavers *v.* Bowen, 80 S. W. Rep. 1165, 26 Ky. Law Rep. 291; Ickenroth *v.* St. Louis Transit Co., 102 Mo. App. 597, 77 S. W. Rep. 162; Brouster *v.* Fox, 117 Mo. App. 711, 93 S. W. Rep. 318.

"An act otherwise criminal is justified when it is done to protect the person committing it from imminent personal injury, the act appearing reasonably necessary to prevent the injury and nothing more being done than is reasonably necessary for the purpose." Beck *v.* Minneapolis Union Ry. Co., 95 Minn. 73, 103 N. W. Rep. 746.

"The mere belief of a person that it is necessary to use force to prevent an injury to himself is not alone sufficient to make out a case of self-defense, for the facts as they appear to him at the time must be such as reasonably to justify such belief." Germolus *v.* Sausser, 83 Minn. 141, 85 N. W. Rep. 946; Beck *v.* Minneapolis Union Ry. Co., 95 Minn. 73, 103 N. W. Rep. 746.

It is for the jury to say whether from the facts presented there existed a reasonable necessity for the use of force. Beck *v.* Minneapolis Union Ry. Co., 95 Minn. 73, 103 N. W. Rep. 746.

[88] United States *v.* Omeara, 1 Cranch C. Ct. 165; Erving *v.* Hatcher, 175 Iowa, 443, 154 N. W. Rep. 869.

But statements made by the defendant on other occasions indicating his desire to avoid trouble are not admissible owing to their remoteness. Evans *v.* Elwood, 123 Iowa, 92, 98 N. W. Rep. 584.

[89] Chapter XVI, paragraph 5 and chapter XXXV, paragraph 4 of this vol. Moran *v.* Vicroy, 24 Ky. Law Rep. 2415, 74 S. W. Rep. 244.

But evidence of previous assaults, not the cause of the injuries sued for, is inadmissible. Reizenstein *v.* Clark, 104 Iowa, 287, 73 N. W. Rep. 588.

"Upon the issue of self-defense where there is evidence conducing to show that the plaintiff was the aggressor, and made the first

[90] Newman *v.* Goddard, 3 Hun, 70; Handy *v.* Johnson, 5 Md. 450, 463.

6. The Res Gestæ of an Assault.

In the case of bodily injury the *res gestæ* include the statements of the cause of injury made immediately upon and in view of its occurrence and the sufferer's expressions of feeling made while the consequences were subsisting and in progress. It is not essential that the main fact to which they relate should be instantly contemporaneous with the declarations. It is enough that the two were so intimately connected in point of time and by the circumstances of mental excitement or bodily suffering, that it cannot be presumed that the speaker had time to contrive or devise anything for his own advantage.[91]

On the other hand, if there has been a lapse of time,[92] or change of place and of interlocutors,[93] and particularly if

hostile demonstration against the defendant, evidence of previous threats and the hostile demonstrations by him against the defendant is . . . competent as tending to show that the defendant was in peril . . . and that the plaintiff began the difficulty, and his motive." Moran *v.* Vicroy, 74 S. W. Rep. 244, 24 Ky. Law Rep. 2415.

[91] As, for instance, what a wife said, immediately after a battery and wounding of her. Thompson *v.* Trevanion, Skinner, 402. Or that a man found injured and groaning in the street, said he had just been run over by a cab which the witness saw driving rapidly away. King *v.* Foster, 6 Carr. & P. 325. Or that a man returning to his bed-room at night, said he had fallen down stairs when alone. Ins. Co. *v.* Mosley, 8 Wall. 405. Or that a wife who ran from her room in the night wounded and bleeding, said, on taking refuge in another room, that her husband had stabbed her. Comm. *v.* M'Pike, 3 Cush. 181; Sherley *v.* Billings, 8 Bush, 147, s. c., 8 Am. Rep. 451; Castner *v.* Sliker, 33 N. J. L. 95. Otherwise of conversation after the combat was over. Halloway *v.* Halloway, 1 Monr. 132. For other illustrations, see Stone *v.* Segur, 11 Allen, 568; Norwich Transportation Co. *v.* Flint, 13 Wall. 3, affi'g 7 Blatchf. 536.

Declarations as to pain and suffering are admissible as part of the *res gestæ* if made immediately after the infliction of the injuries. Bagley *v.* Mason, 69 Vt. 175, 37 Atl. Rep. 287; Robinson *v.* Halley, 124 Ia. 443, 100 N. W. Rep. 328.

[92] As where a night has intervened, Spatz *v.* Lyons, 55 Barb. 476, or some hours of the daytime. Rosenbaum *v.* The State, 33 Ala. 354, 361.

[93] As where after an assault, and after obtaining a warrant, plaintiff met witness to whom the declarations were made at a different spot from that of assault. Cherry *v.*

some other incident has intervened,[94] subsequent declarations, though connected in subject and apparently following as the effect upon its cause, are not competent, except as against the declarant.

Acts and declarations of bystanders called forth by the principal fact in evidence, are competent, upon the same principle and within the same limits.[95]

But in admitting declarations under the rule of the *res gestæ*, narratives of past facts are excluded.[96]

7. Criminal Conviction.

The conviction of defendant on a criminal prosecution for the same assault, if founded on a plea of guilty, is competent as an admission but is not conclusive.[97] So is such a plea, with only the indictment to which it was pleaded.[98] But a conviction not founded on such a plea is not competent.[99]

McCall, 23 Geo. 193. Or where after the assault the witness followed defendant from the room, and reproached him out of doors, where the declarations were made. Handy *v.* Johnson, 5 Md. 450, 463.

[94] See chapter XXXI, paragraphs 17–19 of this vol.

[95] Norwich Transportation Co. *v.* Flint, 13 Wall. 9, affi'g 7 Blatchf. 536; Petrie *v.* Cartwright, 114 Ky. 103, 24 Ky. Law Rep. 903, 70 S. W. Rep. 297, 102 Am. St. Rep. 274, 59 L. R. A. 720; Hannabalson *v.* Sessions, 116 Iowa, 457, 90 N. W. Rep. 93, 93 Am. St. Rep. 250; Cremore *v.* Huber, 18 N. Y. App. Div. 331, 45 N. Y. Supp. 947.

[96] This is the New York rule. More latitude is given in some other jurisdictions, upon the principle that what characterizes the act with motive and purpose, should not be excluded merely because it states that which is past. Carson *v.* Singleton, 23 Ky. Law Rep. 1626, 65 S. W. Rep. 821.

[97] 2 Whart. Ev., § 783; Green *v.* Bedell, 48 N. H. 546; Hauser *v.* Griffith, 102 Iowa, 215, 71 N. W. Rep. 223; Wagner *v.* Gibbs, 80 Miss. 53, 31 So. Rep. 434, 92 Am. St. Rep. 598.

[98] Corwin *v.* Walton, 18 Mo. 71; Birchard *v.* Booth, 4 Wis. 67; Musick *v.* Enos, 95 Kan. 397, 148 Pac. Rep. 624.

[99] Rosc. N. P. 221. It may sometimes be admissible as evidence of reputation. Id., 221, citing Petrie *v.* Nuttall, 11 Exch. 569. For the mode of proving the conviction, see Chapters XXIX and XLI.

8. Admissions and Declarations.

Defendant's silence when charged with the wrong, is competent against him.[1] The fact that declarations were dying declarations is not ground of admitting them in a civil action.[2]

The rule as to admitting the declarations and admissions of one wrong-doer as evidence against another, has already been stated.[3]

When evidence has been given that a party to the action once attributed the injury to another cause than that to which he has testified it is competent to show, in corroboration of his testimony, that no such other cause ever existed.[4]

9. Requisite Cogency of Evidence.

The weight of American authority is that plaintiff is not required to prove the charge beyond a reasonable doubt.[5] A seaman suing his officer must make out a clear case, by credible and consistent proof.[6]

10. The Injury and Damages.

The opinions of witnesses as to the extent of the injury

[1] Jewett *v.* Banning, 21 N. Y. 27, affi'g 23 Barb. 13; Kelly *v.* People, 55 N. Y. 565. Even though it appear that on a previous occasion he denied it. Jewett *v.* Banning (above).

But the intent of a person present at an assault as to complicity therein is not determined by his failing to express disapproval or opposition. Kuney *v.* Dutcher, 56 Mich. 308, 22 N. W. Rep. 866.

[2] Spatz *v.* Lyons, 55 Barb. 476.

[3] Chapter VII, paragraph 9, of this vol.

[4] Melhuish *v.* Collier, 15 Q. B. 878, s. p., Wrege *v.* Westcott, 30 N. J. L. 212.

[5] Blackmore *v.* Ellis, 70 N. J. L. 264, 57 Atl. Rep. 1047; Chapter XXVI, paragraph 31 of this vol.; Elliott *v.* Van Buren, 33 Mich. 49, s. c., 20 Am. Rep. 668. Whether, as held in this case, a preponderance of evidence is sufficient, see note to paragraph 31 above referred to.

[6] Benton *v.* Whitney, Crabbe, 417.

are competent, within limits already stated.[7] So, also, of the declarations of the plaintiff as to suffering.[8]

If exemplary damages are claimed, all the circumstances immediately connected with the transaction, tending to exhibit or explain the motive of the defendant, are admissible in evidence.[9]

[7] Chapter XXXI, paragraph 46 of this vol.; Anthony *v.* Smith, 4 Bosw. 503.

Both past and prospective damages may be awarded. Shoemaker *v.* Sonju, 15 N. D. 518, 108 N. W. Rep. 42, 11 Ann. Cas. 1173.

The measure of damages is such sum as will compensate the plaintiff for loss of time together with such other sum as will compensate him for the physical and mental pain suffered. Beavers *v.* Bowen, 80 S. W. Rep. 1165, 26 Ky. Law Rep. 291.

"Mental suffering is a proper element of damages to be considered by a jury in estimating the amount of their verdict in cases of unlawful assault." Happy *v.* Prichard, 85 S. W. Rep. 655, 111 Mo. App. 6.

Loss of time may be shown by the plaintiff as resulting in loss of earnings. Lund *v.* Tyler, 88 N. W. Rep. 333, 115 Iowa, 236.

"Damages occurring as a result of the injuries received down to the time of trial, may be recovered." Hubbard *v.* Perlie, 25 App. Cas. D. C. 477.

Declarations as to pain and suffering made immediately after the injury are admissible as part of the *res gestæ*. Bagley *v.* Mason, 69 Vt. 175, 37 Atl. Rep. 287; Robinson *v.* Halley, 124 Ia. 443, 100 N. W. Rep. 328.

[8] Chapter XXXI, paragraphs 44 and 45 of this vol.; Elliott *v.* Van Buren, 33 Mich. 49; Towle *v.* Blake, 48 N. H. 92; Earl *v.* Tupper, 45 Vt. 275; Aveson *v.* Kinnaird, 6 East, 191, approved in 8 Wall. 406. As to mental suffering, compare Ford *v.* Jones, 62 Barb. 484.

[9] Voltz *v.* Blackmar, 64 N. Y. 440; Sampson *v.* Henry, 11 Pick. 379; Rauma *v.* Lamont, 82 Minn. 477, 85 N. W. Rep. 236; Maisenbacker *v.* Society Concordia, 71 Conn. 369, 42 Atl. Rep. 67, 71 Am. St. Rep. 213. Punitive damages may be awarded even after the death of the victim of the assault. Wagner *v.* Gibbs, 80 Miss. 53, 31 So. Rep. 434, 92 Am. St. Rep. 598.

In some states it seems that the common law doctrine of punitive damages does not prevail. Hanna *v.* Sweeney, 78 Conn. 492, 62 Atl. Rep. 785, 4 L. R. A. N. S. 907.

Punitive damages may be recovered although the defendant may have been punished criminally for the same act of assault. Wagner *v.* Gibbs, 80 Miss. 53, 31 So. Rep. 434, 92 Am. St. Rep. 598.

Where the assault was intentional, without just cause or ex-

Special damages should be alleged in order to be proved, and are not admitted by failure to deny.[10] Circumstances of aggravation known to defendant, and indicating malice,—such as plaintiff's illness at the time,—are competent for the purpose of aggravating the damages, though not alleged as special damages.[11]

cuse and malicious, exemplary damages may be awarded. (Mo. App. 1899) Lyddon *v.* Dose, 81 Mo. App. 64; Blackmore *v.* Ellis, 70 N. J. L. 264, 57 Atl. Rep. 1047; Ickemoth *v.* St. Louis Transit Co., 102 Mo. App. 597, 77 S. W. Rep. 162; Lochte *v.* Mitchell (Miss.), 28 So. Rep. 877.

It is only necessary that the malice should have existed for a moment before the assault. Lowe *v.* Ring, 123 Wis. 107, 101 N. W. Rep. 381.

The award of exemplary damages is discretionary with the jury, and it is therefore erroneous to direct them to allow such damages if they find the existence of malice. Johnston *v.* Wells, 112 Mo. App. 557, 87 S. W. Rep. 70.

The question of an award of punitive damages should be left to the jury. Kitteringham *v.* McClutchie (Miss.), 41 So. Rep. 65.

"After actual damage is shown, it is unnecessary to show its money extent to sustain a judgment for exemplary damages." McConathy *v.* Deck, 34 Colo. 461, 83 Pac. Rep. 135, 4 L. R. A. N. S. 358, 7 Ann. Cas. 896.

Where exemplary damages may be awarded, the financial condition of the defendant may be shown. Courvoisier *v.* Raymond, 23 Colo. 113, 47 Pac. Rep. 284.

While evidence of the defendant's pecuniary standing is admissible upon the question of punitive damages, it cannot be considered in determining compensatory damages. Traver *v.* Smolik (D. C.), 43 App. Cas. D. C. 150.

[10] Molony *v.* Dows, 15 How. Pr. 261, and cases cited.

It is error to permit testimony as to medical treatment had after the commencement of the action. Hubbard *v.* Perlie, 25 App. Cas. D. C. 477.

[11] Sampson *v.* Henry, 11 Pick. 379.

Humiliation, bodily pain and mental anguish each and all resulting as they do from an unprovoked assault and consequent personal injury, are elements of general damages, and properly referable to the jury under a general allegation of assault and wounding. Wingate *v.* Bunton, 193 Mo. App. 470, 186 S. W. Rep. 32.

A verdict awarding exemplary damages where it was found that the defendant fired several shots at the plaintiff, an unarmed boy, while the latter was trespassing upon the former's premises, will

11. Defense—Justification.

Justification must be specially pleaded.[12] In justifying under a reasonable regulation of a corporation who employed defendant, it is not necessary for the defendant to give positive proof that the regulation was made by the directors or the general superintendent. Proof of the existence of the regulation is enough in the first instance.[13] The mode of proving possession of property,[14] and of justifying under legal process [15] has already been stated. Plaintiff's threats, while resisting the execution of process, are competent against him.[16]

12. Plaintiff the Aggressor.

The fact that plaintiff was the aggressor must be proved by the defendant if relied on by him.[17] The fact that the assault was committed in defending himself or his property, or that of others intrusted to him, against plaintiff as a trespasser seeking forcible possession, is relevant, both on

not be disturbed. Lewis *v.* Fleer, 30 Pa. Super. Ct. 237.

[12] Coats *v.* Darby, 2 N. Y. 517; Foland *v.* Johnson, 16 Abb. Pr. 235; Orschelu *v.* Scott, 90 Mo. App. 352; Hart *v.* Jones, 14 Ala. App. 327, 70 So. Rep. 206; Harden *v.* Hodges, 33 Tex. Civ. App. 155, 76 S. W. Rep. 217; Illinois Steel Co. *v.* Novak, 184 Ill. 501, 56 N. E. Rep. 966.

Thus if justification has not been pleaded, it is erroneous for the court to charge the jury upon the question of self-defense. Wilken *v.* Exterkamp, 102 Ky. 143, 42 S. W. Rep. 1140, 19 Ky. L. 1132; Blackmore *v.* Ellis, 70 N. J. Law, 264, 57 Atl. Rep. 1047; Mitchell *v.* Gambill, 140 Ala. 316, 37 So. Rep. 290.

[13] Vedder *v.* Fellows, 20 N. Y. 126.

"Clearly self-defense cannot be proved under the general issue, in order to permit it to be used as a defense it must be specially pleaded." Blackmore *v.* Ellis, 70 N. J. Law, 264, 57 Atl. Rep. 1047.

[14] Chapter XXXV, paragraph 5 and chapter XXXVII, paragraph 2 of this vol.

[15] Chapter XXXVI, paragraph 8 of this vol.

[16] Fulton *v.* Staats, 41 N. Y. 498.

[17] Stevens *v.* Lloyd, 1 Cranch C. Ct. 124.

The burden of proving the assault is on the plaintiff, but it is not incumbent upon him to show that the defendant was not acting in self-defense. Orschelu *v.* Scott, 90 Mo. App. 352.

the question of intent to do bodily harm, and on the question of the degree of force justifiable.[18]

13. Provocation.

Defendant may show, in mitigation or bar of exemplary damages, but not in bar of the action,[19] that the plaintiff provoked the assault; [20] but not unless the provocation was

[18] Filkins *v.* People, &c. of N. Y., 69 N. Y. 101, rev'g 1 Buff. Super. Ct. SHELDON 505; Winter *v.* Atkinson, 92 Ill. App. 162; Drew *v.* Comstock, 57 Mich. 176, 23 N. W. Rep. 721.

A plea of self-defense is not established, if it appears that the defendant used more force than was necessary to repel the attack upon him, and did himself become the aggressor. Watson *v.* Hastings, 17 Del. 47, 39 Atl. Rep. 587; Wells *v.* Englehart, 118 Ill. App. 217; Monize *v.* Begaso, 190 Mass. 87, 76 N. E. Rep. 460; Brouster *v.* Fox, 117 Mo. App. 711, 93 S. W. Rep. 318.

It should be noted however that the private right of recaption is subordinate to the preservation of the public peace, since the public peace is a superior consideration to any man's private right of property, consequently the right depends upon the existence of two indispensable elements, namely, possession in the rightful owner and a disturbance thereof by the wrongdoer without a claim of right. Wingate *v.* Bunton, 193 Mo. App. 470, 186 S. W. Rep. 32.

Thus where another has gained possession of one's personal property in a peaceable manner, the latter cannot justify an assault on the ground that it was in an attempt to regain his property. Watson *v.* Rinderknecht, 82 Minn. 235, 84 N. W. Rep. 798; Winter *v.* Beebe, 126 Wis. 379, 105 N. W. Rep. 953.

[19] Cushman *v.* Waddell, Baldw. 58; Prentiss *v.* Shaw, 56 Me. 427; Daniel *v.* Giles, 108 Tenn. 242, 66 S. W. Rep. 1128; Parham *v.* Langford, 43 Tex. Civ. A. 31, 93 S. W. Rep. 525; Rarden *v.* Maddox, 141 Ala. 506, 39 So. Rep. 95.

Moreover, evidence of provocation cannot be considered in mitigation of purely compensatory damages. Housman *v.* Peterson, 76 Or. 556, 149 Pac. Rep. 538.

[20] Voltz *v.* Blackmar, 64 N. Y. 440; Daniel *v.* Giles, 108 Tenn. 242, 66 S. W. Rep. 1128.

For this purpose evidence of abusive language on the part of the plaintiff is admissible. Rarden *v.* Maddox, 141 Ala. 506, 39 So. Rep. 95; Le Laurin *v.* Murray, 75 Ark. 232, 87 S. W. Rep. 131.

The extent to which punitive damages may be mitigated by provocation is a question of fact to be passed upon by the jury in each particular case, and depends upon the nature and character of the provocation. Cooper *v.*

so recent, or continued to so recent a time,[21] or had so recently come to defendant's knowledge,[22] as to induce the presumption that the violence was committed under the immediate influence of the passion thus wrongfully excited.[23] The fact that plaintiff and defendant fought by agreement, or mutual consent, is not a bar to the action, but may be proved in mitigation.[24] For the same purpose defendant may show that he acted under an honest belief that he was justified in doing the act complained of, or under the impulse of sudden passion or alarm excited by the conduct of the plaintiff.[25]

Demby, 122 Ark. 266, 183 S. W. Rep. 185.

As to proof of mere words of provocation in mitigation see Mitchell *v.* Gambill, 140 Ala. 316, 37 So. Rep. 290.

[21] Stetlar *v.* Nellis, 60 Barb. 524, 42 How. Pr. 163.

Evidence of the giving of provocation two days prior to the alleged assault, has been held admissible in mitigation of punitive damages, where it was the fairly established cause of the affray. Newton *v.* Hawkes, 113 Me. 44, 92 Atl. Rep. 936.

[22] Willis *v.* Forrest, 2 Duer, 310. Compare Vedder *v.* Fellows, 20 N. Y. 126; Carson *v.* Singleton, 65 S. W. Rep. 821, 23 Ky. L. 1626.

[23] Le Laurin *v.* Murray, 75 Ark. 232, 87 S. W. Rep. 131; Corning *v.* Corning, 6 N. Y. 97. A defendant of whom compensation is sought for a murderous assault upon plaintiff may give in evidence in mitigation a defamatory article written and published by the plaintiff more than twenty-four hours prior to such assault. Ward *v.* White, 86 Va. 212, 19 Am. St. Rep. 883, 9 S. E. Rep. 1021.

[24] Adams *v.* Waggoner, 33 Ind. 531, s. c., 5 Am. Rep. 230; Lewis *v.* Fountain, 168 N. C. 277, 84 S. E. Rep. 278; Thomas *v.* Riley, 114 Ill. App. 520.

"Where a combat involves a breach of the peace, the mutual consent of the parties thereto is to be regarded as unlawful, and as not depriving the injured party, or, for that matter, each injured party, from recovering damages

[25] Voltz *v.* Blackmar, 64 N. Y. 440.

Although words, or insults, or opprobrious epithets, will not justify an assault, still it is well settled that "any provocation calculated to heat the blood or arouse the passion of a reasonable man, if offered at the time of the assault or so recently before as to become a part of the *res gestæ*, is admissible in evidence, and must be considered by the jury in mitigation of damages." Daniel *v.* Giles, 108 Tenn. 242, 66 S. W. Rep. 1128.

14. Character.

Evidence as to the plaintiff's character is not admissible either in aggravation [26] or in mitigation [27] of damages, unless in cases of indecent assault or attempt to ravish.[28]

for injuries received from the unlawful action of the other." Lund *v.* Tyler, 115 Iowa, 236, 88 N. W. Rep. 333.

"Consent to engage in mutual combat may be inferred from circumstances." Where such mutual consent exists, the fact as to who committed the first act of violence is immaterial. McNeil *v.* Mullin, 70 Kan. 634, 79 Pac. Rep. 168.

Where the combat is by mutual consent, it is immaterial who struck the first blow. McNeil *v.* Mullin, 70 Kan. 634, 79 Pac. Rep. 168.

[26] Givens *v.* Bradley, 3 Bibb, 192, 195; Fahey *v.* Crotty, 63 Mich. 383, 6 Am. St. Rep. 305, 29 N. W. Rep. 876; Vance *v.* Richardson, 110 Cal. 414, 42 Pac. Rep. 909.

Evidence of the plaintiff's general reputation for peace and quiet was properly excluded. Treschman *v.* Treschman, 28 Ind. App. 206, 61 N. E. Rep. 961.

Evidence as to the peaceable character of the defendant is inadmissible. Coruth *v.* Jones, 77 Vt. 441, 60 Atl. Rep. 814.

The general character of the defendant is not in issue and evidence tending to prove him to be a man of good character and reputation is inadmissible. (Mo. App. 1899) Lyddon *v.* Dose, 81 Mo. App. 64; Markey *v.* Angell, 22 R. I. 343, 47 Atl. Rep. 882.

[27] Corning *v.* Corning, 6 N. Y. 97. So of his intemperance, unless that be shown to have contributed to his injury. 1 Whart. on Ev. 62, § 47, citing Drohm *v.* Brewer, 77 Ill. 280.

While evidence of a quarrelsome character is usually excluded, it may become pertinent and admissible under a plea of self-defense, where known to the defendant at the time of the alleged assault. Russ *v.* Good (Vt.), 97 Atl. Rep. 987; Cooper *v.* Demby, 122 Ark. 266, 183 S. W. Rep. 185.

Where a defense in an action for assault and battery, is self-defense, evidence of the quarrelsome character of the plaintiff and of his general reputation as a quarrelsome and dangerous man is competent where such facts were known to the defendant at the time of the assault. Henning *v.* Bartz, 25 Ohio Circuit Ct. 15; Lowe *v.* Ring, 123 Wis. 107, 101 N. W. Rep. 381.

[28] Crossman *v.* Bradley, 53 Barb. 125; Ford *v.* Jones, 62 Barb. 484. When a plaintiff seeks damages for an injury to her feelings, growing out of the indecency of the defendant's conduct, her character in regard to chastity is in issue, and her damages depend somewhat on the question whether she is a virtuous woman, who would be greatly shocked at the peculiar nature of the assault, or a woman

15. Previous Punishment.

The criminal conviction and punishment of defendant cannot be proved to mitigate damages.[29]

who is accustomed to yield herself to illicit intercourse. Miller *v.* Curtis, 158 Mass. 127, 35 Am. St. Rep. 469, 32 N. E. Rep. 1039. There has been much difference of opinion in regard to the evidence to be received in such cases. It has been held that evidence of general reputation in regard to chastity is competent, and sometimes that specific acts of lewdness may be shown, and sometimes that they may not. See Mitchell *v.* Work, 13 R. I. 645; Gore *v.* Curtis, 81 Me. 403, 10 Am. St. Rep. 265; Watry *v.* Ferber, 18 Wis. 500; Ford *v.* Jones, 62 Barb. 484. In such cases reputation as to chastity is of evidential value not only on the question of damages, but as to the probability of the assault having been committed. Barton *v.* Bruley, 119 Wis. 326, 96 N. W. Rep. 815; Gulerette *v.* McKinley, 27 Hun, 320, 324; Sheahan *v.* Barry, 27 Mich. 217; Johnson *v.* Caulkins, 1 Johns. Cas. 116; West *v.* Druff, 55 Iowa, 335; White *v.* Murtland, 71 Ill. 250; Love *v.* Masoner, 6 Baxt. 24; Carpenter *v.* Wall, 11 Ad. & E. 803; Boynton *v.* Kellogg, 3 Mass. 189; Miller *v.* Curtis, 158 Mass. 127, 35 Am. St. Rep. 469, 32 N. E. Rep. 1039.

[29] Cook *v.* Ellis, 6 Hill, 466; Hoadley *v.* Watson, 45 Vt. 289, s. c., 12 Am. Rep. 197. *Contra*, Smithwick *v.* Ward, 7 Jones (N. C.) L. 64.

The commission of one assault cannot be established by proof of the commission of others. Barton *v.* Bruley, 119 Wis. 326, 96 N. W. Rep. 815.

CHAPTER XLI

ACTIONS FOR MALICIOUS PROSECUTION

1. Grounds of action.
2. The prosecution.
3. Defendant's agency.
4. Several co-defendants.
5. Plaintiff's innocence.
6. Want of probable cause.
7. Malice.
8. Termination of the prosecution.
9. Damages.
10. *Defense;* Truth of the charge.
11. Probable cause.
12. Freedom from malice.
13. Advice of counsel.

1. Grounds of Action.[30]

The essential facts are that defendant maliciously,[31] and also without reasonable or probable cause,[32] prosecuted or instigated [33] an unfounded [34] proceeding against plaintiff, to his injury, and which terminated in his favor.[35]

[30] See, generally, Kelley *v.* Osborn, 86 Mo. App. 239; Wheeler *v.* Nesbit, 24 How. U. S. 544. For the distinction, in pleading and evidence, between an action for illegal arrest or false imprisonment, and one for malicious prosecution, see Burns *v.* Erben, 40 N. Y. 463, affi'g 1 Robt. 555. As to defamation, see Sheldon *v.* Carpenter, 4 N. Y. 579; Perkins *v.* Mitchell, 31 Barb. 461.

[31] Blunt *v.* Little, 3 Mass. 102. Equally in the case of a civil as a criminal prosecution. Stewart *v.* Sonneborn, 98 U. S. (8 Otto) 187.

The action may be founded upon the malicious procurement of a search warrant. Harlan *v.* Jones, 16 Ind. App. 398, 45 N. E. Rep. 481.

[32] See paragraphs 6, 11; Harper *v.* Harper, 49 W. Va. 661, 39 S. E. Rep. 661.

[33] See Miller *v.* Milligan, 48 Barb. 30; Thompson *v.* Lumley, 1 Abb. New Cas. 254.

"By the common law, and according to the holdings in many States, a private person may justify an arrest by showing that a felony had been actually committed and that he had reasonable grounds to suspect that the person arrested committed the felony." Enright *v.* Gibson, 219 Ill. 550, 76 N. E. Rep. 689.

[34] Paragraph 5.

A complaint which contains no allegation whatever against the *bona fides* of the suit does not state a good cause of action. Cahoon *v.* Hoggan, 31 Utah, 74, 86 Pac. Rep. 763.

[35] Moulton *v.* Beecher, 1 Abb. New Cas. 193, and cases cited. Or, that such termination was

2. The Prosecution.

Before malice or want of cause is shown, plaintiff should prove the prosecution complained of; and for this purpose the record, if any, of the proceeding is competent.[36] The mode of proving a record has been already stated.[37] If the record contain improper matter, it is not to be excluded on that ground, but defendant may ask the court to instruct the jury to disregard such matter.[38] Where the parts for which defendant may be responsible are separable,—as in case of a witness sued for maliciously promoting an unfounded charge,—or a complainant who made one of several affidavits before a magistrate,—the other parts of the proceedings are not evidence in favor of defendant.[39] An

wrongfully prevented by plaintiff. Burt *v.* Place, 4 Wend. 591.

A complaint which does not allege that the prosecution complained of terminated in favor of the plaintiff is insufficient. Whitesell *v.* Study, 37 Ind. App. 429, 76 N. E. Rep. 1010.

[36] Granger *v.* Warrington, 8 Ill. (3 Gilm.) 299.

"The record is introduced for the purpose of showing that the prosecution has come to an end and for nothing more." Tumalty *v.* Parker, 100 Ill. App. 382.

The proceedings had in the criminal prosecution are properly admitted in evidence. Lautman *v.* Pepin, 26 Ind. App. 427, 59 N. E. Rep. 1073.

In an action for maliciously prosecuting an attachment and garnishment the pleadings and affidavits in the action are admissible. Metcalf *v.* Bockoven, 62 Neb. 877, 87 N. W. Rep. 1055.

Where information charged the defendant with knowingly failing, neglecting, and refusing to obey the rules and regulations of the board of health, a certified copy of the rules and regulations in question are admissible in the suit for malicious prosecution to show what such rules and regulations were. Pierce *v.* Doolittle, 130 Iowa, 333, 106 N. W. Rep. 751, 6 L. R. A. N. S. 143.

[37] See Chapter on JUDGMENTS.

[38] Granger *v.* Warrington, 18 Ill. (3 Gilm.) 299.

Where counsel fails to object to the introduction in evidence of the record of the former prosecution he cannot complain of the court's refusal to strike out objectionable parts thereof as he should have informed himself of its contents and objected thereto. Martin *v.* Corscadden, 34 Mont. 308, 86 Pac. Rep. 33.

[39] See Burt *v.* Place, 4 Wend. 591; Hankinson *v.* Giles, 17 Abb. Pr. 251, s. c., 29 How. Pr. 478.

An order of the court that the defendant be marked prosecutor

indictment, if the final record has not been made up, may be proved by producing the original and calling the clerk to prove that it is a record of his court.[40] A variance between the allegation and the proof of the former proceeding is not to be regarded unless raising a strong probability that the proceeding is not the same.[41] To show how far the prose-

and taxed with costs is not competent to show malice or absence of probable cause. Coble *v.* Huffines, 133 N. C. 422, 45 S. E. Rep. 760.

Entries in the justice's docket to the effect that " after hearing the evidence in the above entitled cause, the defendant found not guilty and discharged; and there seeming no grounds for complaint, judgment is hereby entered against George Corscadden, complaining witness, for costs," are wholly irrelevant and incompetent, whether offered as a prior adjudication of the issue on trial, or as the expression of opinion by the justice thereon. Martin *v.* Corscadden, 34 Mont. 308, 86 Pac. Rep. 33.

A judgment in the criminal prosecution which recites that the prosecution having been instituted with malice and without probable cause, costs are taxed against the complainant, is inadmissible where it appears that the same was rendered without jurisdiction. McAllister *v.* Johnson, 108 Iowa, 42, 78 N. W. Rep. 790.

[40] Watts *v.* Clegg, 48 Ala. N. S. 561. Compare People *v.* Poyllon, 2 Cai. 202.

When it is sought to prove what was testified to at the hearing before the justice in the prosecution alleged to have been malicious, this should be done by an examination of the justice himself or of some witness who heard the testimony. Eggett *v.* Allen, 119 Wis. 625, 96 N. W. Rep. 803.

[41] Leidig *v.* Rawson, 2 Ill. 272; and see Mills *v.* McCoy, 4 Cow. 406.

Where, in an affidavit used to secure an indictment of the plaintiff, the defendant charged the plaintiff with falsely swearing that she had a certain amount of money to her credit as shown by her bank book, the defendant was allowed, in a subsequent suit for malicious prosecution, to testify that what he had intended to state in his affidavit was that the plaintiff had falsely sworn to the amount of cash she had paid to him, and that the erroneous statements in the affidavit were due to a misunderstanding on the part of the magistrate before whom he had laid his complaint. O'Brien *v.* Frasier, 47 N. J. Law, 349, 1 Atl. Rep. 465, 54 Am. Rep. 170.

When the complaint is defective in not showing want of probable cause and termination of the suit in favor of the plaintiff an amendment will be allowed. Haglin *v.* Apple, 65 Ark. 274, 45 S. W. Rep. 989.

cution was pressed by defendant, plaintiff may prove acts or documents proceeding from third persons, though wholly unconnected with defendant, to have been the occasion of its termination, and for this purpose a writing—for instance, a letter to the magistrate—may be proved by parol.

3. Defendant's Agency.

Slight evidence that defendant was the instigator is sufficient to go to the jury.[42] If the prosecution was instituted by defendants' officer or agent, plaintiff should show that it was an act within the general or special authority of the agent or officer. A general authority to prosecute may be inferred from the nature of the employment, and the usual course of business.[43] But declarations, after the

[42] Miller *v.* Milligan, 48 Barb. 30.

Although an affidavit upon which the criminal prosecution was begun, made by a person not a party to the suit is inadmissible in the absence of evidence that it was authorized or ratified by the defendant, the error in admitting it is cured by subsequent proof of such authorization or ratification. Shannon *v.* Sims, 146 Ala. 673, 40 So. Rep. 574.

[43] Bank of New South Wales *v.* Owston, 40 L. T. R. N. S. 500; Walker *v.* Eastern Counties Ry. Co., L. R. 5 C. P. 640; Chap. III, paragraph 50 and chapter XL, paragraph 2 of this vol.

When it was proved that the manager of the "industrial department" of the defendant company had full power in hiring and discharging collection agents and that he had never been required to render any accounting to the officers and directors of the company, it was deemed that his act in causing the arrest of the plaintiff on a charge of larceny, which was disproved, was a wrong attributable to the corporation and was not the personal *dictum* of the manager himself. Manasha *v.* Royal Ben. Soc., 21 Misc. 474, 47 N. Y. Supp. 628.

So, too, where a general manager of a corporation who had extensive authority to direct its affairs, gave his subordinates orders to protect the corporation from unlawful depredations, his subsequent ratification of the unlawful act of one of the company's agents thereby made the company liable in an action for malicious prosecution. Topolewski *v.* Plankinton Packing Co., 143 Wis. 52, 126 N. W. Rep. 554.

And where it was proved that the agent of the defendant company, had directed and exercised authority over a gang of men setting up the company's poles, his

plaintiff's arrest, of the defendant's servant, who made the arrest, are inadmissible in evidence.[44]

4. Several Co-defendants.

Separate acts and declarations of one defendant ought not to be admitted in evidence, to charge another, not present, unless there is independent proof of a conspiracy.[45]

action in causing the arrest of the plaintiff to get the latter out of the way was deemed an act binding on the principal. Jackson *v.* American Tel. Co., 139 N. C. 347, 51 S. E. Rep. 1015, 70 L. R. A. 738.

But the local cashier of a railroad ticket office had no authority, implied from the character of his employment, which could render the company liable for his act in causing the arrest of one whom he had suspected of having taken some of the company's money. "The authority must first be shown before the acts done or declarations made in pursuance of the authority can bind the principal or impose any liability whatever upon him." Daniel *v.* Atlantic Coast Line R. Co., 136 N. C. 517, 48 S. E. Rep. 816, 67 L. R. A. 455, 1 Ann. Cas. 718.

A wife, who in the absence of her husband, has charge of the farm or home, and the general management of affairs, is not by virtue of that relation, authorized in his name to institute a criminal prosecution and make him liable therefor. Miles *v.* Salisbury, 21 Ohio Circuit Ct. 333, 12 Ohio Circuit Dec. 7.

[44] Geary *v.* Stevenson, 169 Mass. 23, 47 N. E. Rep. 508.

In an action for maliciously suing out an attachment, evidence of instructions given the constable by the plaintiff in the suit after the issuance of the writ are inadmissible. Alsop *v.* Lidden, 130 Ala. 548, 30 So. Rep. 40.

[45] Carpenter *v.* Shelden, 5 Sandf. 77; Snydacker *v.* Brosse, 51 Ill. 357. Compare Chapter VII, paragraph 9 of this vol.

Evidence that there was an agreement between the defendants that one of them should file an information and cause the arrest of the plaintiff, and that both would encourage and assist in the prosecution, justified the finding that both defendants had instigated and procured the arrest of the plaintiff. Wilson *v.* Thurlow, 156 Iowa, 656, 137 N. W. Rep. 956.

"A prosecution for larceny for goods stolen from the firm is not within the scope of a mercantile partnership. From this principle results the settled rule that one partner can not be made liable for the arrest or prosecution of a person by a co-partner, unless he advises, directs or participates therein, and then only in his individual capacity." Marks *v.* Hastings, 101 Ala. 165, 175, 13 So. Rep. 297.

Where a member of a firm living

5. Plaintiff's Innocence.

There must be other evidence of the unfounded nature of the charge, than the plaintiff's acquittal.[46] For this purpose a judgment in another civil action between the parties, determining the very point in issue,—such as replevin for a thing charged to have been stolen,—is competent.[47]

in another state only learned that the husband of his co-partner, who conducted his wife's business, had caused the arrest of a debtor of the firm and had appealed from the judgment in favor of the latter after such appeal had been taken, and then discouraged any further litigation and had the appeal dismissed, he was not liable in the subsequent action for malicious prosecution brought by the debtor. The court held that partners were general agents of each other only in contractual matters and that one partner could not be held for the illegal acts of the co-partner unless he assented thereto. Rosenkrans *v.* Barker, 115 Ill. 331, 3 N. E. Rep. 93, 56 Am. Rep. 169.

[46] Skidmore *v.* Bricker, 77 Ill. 164; Harper *v.* Harper, 49 W. Va. 661, 39 S. E. Rep. 661. The prosecution complained of being an arrest for assault, if plaintiff gives evidence that defendant was the aggressor, defendant may show the nature of the difficulty, and plaintiff's threats. Carpenter *v.* Halsey, 57 N. Y. 657, affi'g, it seems, 60 Barb. 45.

In general a discharge is *prima facie* evidence of want of probable cause, though not conclusive. Eggett *v.* Allen, 119 Wis. 625, 96 N. W. Rep. 803.

But see Davis *v.* McMillan, 142 Mich. 391, 105 N. W. Rep. 862, 113 Am. St. Rep. 585, 3 L. R. A. N. S. 928, 7 Ann. Cas. 854 where it is stated:

"We think it can safely be said that the weight of authority denies the rule that discharge by a magistrate upon request of the prosecuting attorney is *prima facie* evidence of want of probable cause."

[47] Ewing *v.* Sandford, 21 Ala. 157, 165. As to evidence of compounding the felony prosecuted for, see Fagan *v.* Knox, 1 Abb. New Cas. 246, s. c., 66 N. Y. 525; Van Vorhes *v.* Leonard, 1 Supm. Ct. (T. & C.) 148.

The defendant officer arrested the plaintiff on a warrant for withholding certain bricks from a complainant at whose instance the warrant had been issued. Thereafter the complainant's right to the bricks was determined in a replevin suit. In the subsequent action which the defendant in replevin brought against the officer for malicious prosecution, the latter was allowed to offer the record of the action between the plaintiff and the complainant as tending to show probable cause. Smith *v.* Clark, 37 Utah, 116, 106 Pac. Rep. 653, 26 L. R.

6. Want of Probable Cause.

The plaintiff is bound to show a want of probable cause.[48] Malice may be inferred from want of probable cause, but the want of probable cause will not be inferred, even though malice is shown to have existed.[49] The question of probable cause depends on evidence of the facts appearing to defend-

A. N. S. 953, Ann. Cas. 19123, 1366.

[48] Kutner *v.* Fargo, 34 N. Y. App. Div. 317, 319; Foster *v.* Pitts, 63 Ark. 387, 38 S. W. Rep. 1114; Kolka *v.* Jones, 6 N. D. 461, 71 N. W. Rep. 558; Weaver *v.* Montana Central Ry. Co., 20 Mont. 163, 50 Pac. Rep. 414; Tumalty *v.* Parker, 100 Ill. App. 382; Cunningham *v.* Moreno, 9 Ariz. 300, 80 Pac. Rep. 327.

"The facts being conceded, want of probable cause is a question of law to be determined by the court. If there is a conflict of evidence as to the facts claimed by the plaintiff to show this, it is the duty of the court to instruct the jury clearly what facts, when established, will justify a finding of want of probable cause. A general charge is not sufficient." Rankin *v.* Crane, 104 Mich. 6, 61 N. W. Rep. 1007.

[49] Hicks *v.* Brantley, 102 Ga. 264, 29 S. E. Rep. 459. The finding of a justice of the peace, made upon the preliminary trial of a person charged with crime, that the complaint of the prosecuting witness against the accused was malicious and without probable cause, cannot be received in evidence in support of the claim of lack of probable cause. Farwell *v.* Laird, 58 Kans. 402, 49 Pac. Rep. 518.

"'Malice is not an inference of law from want of probable cause. Malice, however, need not be proved by direct and positive testimony, but may be inferred from the facts which go to establish the want of probable cause, and this is all that is meant when it is said that malice may be inferred from want of probable cause. But the jury are not required to make this inference, and they should not be so instructed that such an inference may be made, unless the facts attending the conduct and determination of the prosecution and those adduced to establish the want of probable cause, are of a character to warrant such an inference.'" Talbott *v.* Great Western Plaster Co., 86 Mo. App. 558.

"Although malice may be inferred by the jury from want of probable cause, yet both are matters of proof, and want of probable cause can never be inferred from malice." Hamer *v.* Ogden First Nat. Bank, 9 Utah, 215, 33 Pac. Rep. 941.

"The existence of malice does not raise a presumption of want of probable cause; while from proof of want of probable cause, malice

ant,[50] or which he ought to have ascertained,[51] at the time he acted; and want of probable cause cannot be shown by facts not appearing till subsequently.[52] Slighter evidence will suffice to prove want of probable cause than is necessary to prove an affirmative;[53] but it must be substantially

may, but it is not necessarily to be inferred." Tumalty *v.* Parker, 100 Ill. App. 382.

The jury may but is not bound to infer malice from want of probable cause. Pierce *v.* Doolittle, 130 Iowa, 333, 106 N. W. Rep. 751, 6 L. R. A. N. S. 143.

"Plaintiff must prove both want of probable cause and malice, and . . . where the absence of the former is established, the presence of the latter may be inferred. In other words, when the proof tends to show the absence of the former a *prima facie* case is made for the jury. The burden then rests upon the defendant to rebut this *prima facie* case, and this he must do by any evidence tending to show the existence of probable cause and the want of malice on his part." Martin *v.* Corscadden, 34 Mont. 308, 86 Pac. Rep. 33.

Actual malice need not be affirmatively proved. Price *v.* Denison, 95 Minn. 106, 103 N. W. Rep. 728.

[50] Stewart *v.* Sonneborn, 98 U. S. (8 Otto) 187.

"Whether the circumstances alleged to show probable cause existed, and are true is a matter of fact. Whether they amount to probable cause, assuming them to be true, is a question of law." Hamer *v.* Ogden First Nat. Bank, 9 Utah, 215, 33 Pac. Rep. 941.

[51] Grinnell *v.* Stewart, 32 Barb. 544, s. c., 12 Abb. Pr. 220, 20 How. Pr. 478.

The plaintiff is not confined, respecting the evidence offered by him to show want of probable cause, to facts he could affirmatively show were within the actual knowledge of the defendant, but has the right to prove such facts as might have come to his knowledge, had he made proper investigation and inquiry. Price *v.* Denison, 95 Minn. 106, 103 N. W. Rep. 728.

[52] Stewart *v.* Sonneborn (above).

The conduct of the defendant must be considered in the light of what appeared to him when the action was begun rather than in the light of facts which appeared subsequently. L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 121 Fed. Rep. 233, 57 C. C. A. 469.

[53] Haupt *v.* Pohlmann, 1 Robt. 121, s. c., 16 Abb. Pr. 301.

"As want of probable cause involves negative proof, undoubtedly less evidence of this allegation, on the part of the plaintiff, would be required than in a case of affirmative allegations; and where the facts and circumstances upon which the existence of probable cause depends are peculiarly within the

shown.[54] It cannot be inferred from evidence even of express malice,[55] nor from the mere fact of the unsuccessful termination of the proceeding.[56] But the voluntary dis-

knowledge of the defendant, slight proof of want of probable cause will suffice." McBean *v.* Ritchie, 18 Ill. 114.

[54] Gorton *v.* De Angelis, 6 Wend. 418; Murray *v.* Long, 1 Id. 140.

[55] Stewart *v.* Sonneborn, 98 U. S. (8 Otto) 187, and cases cited; Besson *v.* Southard, 10 N. Y. 236.

"Malice and want of probable cause must both be present." Young *v.* Lindstrom, 115 Ill. App. 239.

[56] Stewart *v.* Sonneborn (above); Gordon *v.* Upham, 4 E. D. Smith, 9. There is much diversity of opinion as to whether the discharge of an accused by a committing magistrate, or refusal of a grand jury to indict, is *prima facie* evidence of the want of probable cause for the prosecution. For cases holding that it is see Ritter *v.* Ewing, 174 Pa. St. 341, 34 Atl. Rep. 584; Secor *v.* Babcock, 2 Johns. 203; Bostick *v.* Rutherford, 4 Hawks, 83; Straus *v.* Young, 36 Md. 246; Smith *v.* Eye, 52 Pa. St. 419; Vinal *v.* Core, 18 W. Va. 1; Bornholdt *v.* Souillard, 36 La. Ann. 103; Frost *v.* Holland, 75 Me. 108. *Contra*, Helwig *v.* Beckner, 149 Ind. 131, 46 N. E. Rep. 644, 48 N. E. Rep. 788; Eastman *v.* Monastes, 32 Ore. 291, 51 Pac. Rep. 1095; Israel *v.* Brooks, 23 Ill. 575; Thompson *v.* Beacon Rubber Co., 56 Conn. 493, 16 Atl. Rep. 554; Heldt *v.* Webster, 60 Tex. 207; Apgar *v.* Woolston, 43 N. J. Law, 57. The mere fact that a criminal prosecution was instituted for the purpose of collecting a debt will not justify a finding that there was a want of probable cause. Strehlow *v.* Petit, 96 Wis. 22, 71 N. W. Rep. 102; Baboo Gunesh Dutt *v.* Mugneeram Chowdry, 11 Beng. L. R. 321. Compare Palmer *v.* Avery, 41 Barb. 290; Scott *v.* Simpson, 1 Sandf. 601; Vanderbilt *v.* Mathis, 5 Duer, 304; Whitfield *v.* Westbrook, 40 Miss. 311. See Davis *v.* McMillan, 142 Mich. 391, 105 N. W. Rep. 862, 113 Am. St. Rep. 585, 3 L. R. A. N. S. 928, 7 Ann. Cas. 854; Harper *v.* Harper, 49 W. Va. 661.

"In determining whether the prosecution was founded on probable cause, the existing state of facts must be reviewed from the standpoint of the prosecution, and not from that of the accused. For this reason, trial and acquittal do not raise the presumption of the want of probable cause." Harper *v.* Harper, 49 W. Va. 661, 39 S. E. Rep. 661.

An acquittal is not conclusive of want of probable cause. Carroll *v.* New Jersey Cent. R. Co., 134 Fed. Rep. 684.

The defendant may show the facts and circumstances to prove how it came about that the judge directed a verdict of acquittal in the criminal prosecution as bearing on the question of probable cause when such evidence does not

missal of a civil action by the party controlling the same is *prima facie* evidence of want of probable cause.[57]

If the prosecution was a criminal charge, so that character would have been relevant to the issue, plaintiff's good character, with defendant's knowledge of it, are competent as tending to show want of probable cause.[58]

7. Malice.

Actual malice must be shown,[59] but it is not necessary to

contradict the record. Carroll *v.* New Jersey Cent. R. Co., 134 Fed. Rep. 684.

[57] Kolka *v.* Jones, 6 N. D. 461, 71 N. W. Rep. 558.

"A discharge not brought about by the procurement of the defendant, nor attended by circumstances involving the conduct of the defendant which of themselves indicate want of probable cause, is no evidence of want of probable cause. Davis *v.* McMillan, 142 Mich. 391, 105 N. W. Rep. 862, 113 Am. St. Rep. 585, 3 L. R. A. N. S. 928, 7 Ann. Cas. 854.

In an action for malicious prosecution it is proper for the defendant to show the occurrences at the time of the trial for the purpose of disproving the existence of a discharge of the plaintiff under the indictment. Proof of a discharge is a prerequisite to the plaintiff's case, and if it resulted from an agreement of the parties, it unquestionably has a most important bearing on the question of damages. Loftus *v.* Meyer, 84 N. Y. Supp. 861.

[58] Blizzard *v.* Hays, 46 Ind. 166, s. c., 15 Am. Rep. 291; Israel *v.* Brooks, 23 Ill. 575.

Where the defendant offered testimony tending to show that the plaintiff was guilty of embezzlement, the plaintiff had the right to prove his general reputation as to honesty in rebuttal. See San Antonio, &c. R. Co. *v.* Griffin, 20 Tex. Civ. App. 91, 48 S. W. Rep. 542.

[59] Bulkeley *v.* Smith, 2 Duer, 261, s. c., 11 N. Y. Leg. Obs. 300; and see Farnam *v.* Feeley, 56 N. Y. 451.

Malice in its ordinary sense may always be shown by proof of actual bad feeling and personal hatred. Hence when the plaintiff calls as a witness an agent of the defendant to prove that he, the agent, arrested the plaintiff and the circumstances under which the arrest was made, it is competent for the defendant to show that he was not actuated by any feeling of ill-will in order to exclude an inference of malice in fact. Campbell *v.* Baltimore, etc., R. Co., 97 Md. 341, 55 Atl. Rep. 532.

Malice is a question of fact for the jury. Lawrence *v.* Leathers, 31 Ind. App. 414, 68 N. E. Rep. 179.

show angry feeling or vindictive motive.[60] It may be shown by circumstances not alleged.[61] It may be inferred by the jury,[62] but is not presumed by the law,[63] from want of probable cause. It cannot be proved by the mere fact of the unsuccessful termination of the prosecution,[64] nor from

[60] (BRONSON, J.), Burhans *v.* Sanford, 19 Wend. 417.

Evidence that the plaintiff was quarrelsome and a bully was not admissible where the prosecution alleged to have been malicious was for wilful trespass on land. Noble *v.* White, 103 Iowa, 352, 72 N. W. Rep. 556.

[61] Solis *v.* Manning, 37 How. Pr. 13.

A plaintiff who brought an action for malicious prosecution based on his arrest for opening the defendant's letters, was allowed to offer, as evidence of malice, the defendant's authorization to open the letters in question, even though he had not specifically pleaded such authorization. Sutor *v.* Wood, 76 Tex. 403, 13 S. W. Rep. 321.

[62] Blunt *v.* Little, 3 Mas. 102, and cases cited. Where the purpose of the proceeding complained of is shown to have been the collection of a debt, and not the enforcement of the laws against crime, malice may be inferred from that fact alone, the question being one of fact for the jury. Peterson *v.* Reisdorph, 49 Neb. 529, 68 N. W. Rep. 943. But see cases cited in note 56 above.

Malice *per se* is a question for the jury. L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 121 Fed. Rep. 233, 57 C. C. A. 469.

While "malice may be inferred from the facts which go to make proof of want of probable cause, it is incumbent on the plaintiff to show, at least *prima facie*, want of probable cause." Cunningham *v.* Moreno, 9 Ariz. 300, 80 Pac. Rep. 327.

A charge that a jury may infer malice from want of probable cause is not erroneous. Merrell *v.* Dudley, 139 N. C. 57, 51 S. E. Rep. 777.

[63] Stewart *v.* Sonneborn, 98 U. S. (8 Otto) 187, and cases cited; Jennings *v.* Davidson, 13 Hun, 393. While, in some cases malice may be inferred from want of probable cause, the law makes no such presumption, and it is for the jury, and not for the court, to make such inference of fact. McGowan *v.* McGowan, 122 N. C. 145, 29 S. E. Rep. 97.

The plaintiff should not be allowed to state what motive the defendant had in instituting the prosecution complained of. He may however state the facts from which the jury may derive the motive. Hamer *v.* Ogden First Nat. Bank, 9 Utah, 215, 33 Pac. Rep. 941.

[64] Stewart *v.* Sonneborn, 98 U. S. (8 Otto) 187.

Where things by the defendant were in their essence lawful, viz: the process was used to enforce

mere omission to prosecute; but a voluntary discontinuance is *prima facie* sufficient evidence of it.[65] It may be inferred from an intention to use criminal process as a means of extorting payment of a debt.[66]

8. Termination of the Proceeding.

A record showing acquittal[67] is sufficient evidence of

his legal and equitable rights, the fact that such things were done with malicious motives would not make them wrongful. Whitesell *v.* Study, 37 Ind. App. 429, 76 N. E. Rep. 1010.

[65] Burhans *v.* Sanford, 19 Wend. 417, and cases cited; Garrison *v.* Pearce, 3 E. D. Smith, 255.

Similarly there seems to be no error in admitting testimony as to the manner of the arrest as it has some bearing upon the question of malice and is a part of the general transaction. See also Jeremy *v.* St. Paul Boom Co., 84 Minn. 516, 88 N. W. Rep. 13.

[66] Grinnell *v.* Stewart, 32 Barb. 544, s. c., 12 Abb. Pr. 220, 20 How. Pr. 478. Arrest in an action on one side of an account only, by one having knowledge of the other side, is presumptive evidence of malice. (Shaw, Ch. J.), Briggs *v.* Richmond, 10 Pick. 391, 395.

"Where one commences a criminal prosecution for the purpose of compelling his debtor to pay a just debt, it is *prima facie* evidence of want of probable cause and of malice, and shifts the burden of showing it was not so, on the defendant." MacDonald *v.* Schroeder, 214 Pa. 411, 63 Atl. Rep. 1024, 6 L. R. A. N. S. 701, 6 Ann. Cas. 506.

The criminal code cannot be resorted to for the purpose of collecting debts where there is no probable cause for supposing that an offense against the law has been committed and in the absence of probable cause malice may be inferred. Daily *v.* Donath, 100 Ill. App. 52.

"Where a criminal prosecution is commenced under circumstances which make it apparent that the prosecutor had some collateral purpose in view, rather than the vindication of the law, as where a prosecution was commenced in order to compel the surrender of notes about which there was a dispute, a finding of a want of probable cause will be fully justified." Paddock *v.* Watts, 116 Ind. 146, 18 N. E. Rep. 518, 9 Am. St. Rep. 832.

The institution of criminal proceedings for trespass upon land where the party knows that his only remedy was in a civil action, shows malice even though he was in fact entitled to the land in question. Noble *v.* White, 103 Iowa, 352, 72 N. W. Rep. 556.

[67] Mills *v.* McCoy, 4 Cow. 406.

Under the Alabama statute an action for maliciously suing out an

termination favorable to plaintiff.[68] If a formal record has not been made up, the acquittal may be proved by reading the minute entry, with testimony of the clerk to its being a record of his court.[69]

It is not enough to show a compromise,[70] nor that the prosecuting officer refused to proceed to trial.[71] Evidence

attachment may be maintained before the attachment suit is terminated. Alsop *v.* Lidden, 130 Ala. 548, 30 So. Rep. 401.

[68] That it is conclusive, see Steph. Ev. 48, citing Leggatt *v.* Tollervey, 14 Ex. 301; and see Caddy *v.* Barlow, 1 Man. & Ry. 277.

Evidence that the grand jury made a finding of "no bill" is admissible to show termination of the prosecution. Shannon *v.* Sims, 146 Ala. 673, 40 So. Rep. 574.

[69] Watts *v.* Clegg, 48 Ala. N. S. 561.

When a justice of the peace first testified that he had kept no record of a case tried by him, except to note the minutes of the proceeding on the back of the complaint and warrant issued in the matter; that about a year previous to the time that he gave this testimony he had made copies of the complaint, warrant and minutes noted thereon and had since been unable to find the originals, he was allowed, in an action for malicious prosecution brought by the defendant in the former action, to give oral testimony as to the contents of the minutes and in open court to certify that a certain paper was a true copy of the complaint which was then received in evidence. Tillotson *v.* Warner, 3 Gray (Mass.), 574.

Likewise the docket of a justice of the peace was admitted to show that the prosecution against the plaintiff had been terminated, even though it appeared that the justice had not written up his docket at the time he should have done so. Ames *v.* Snider, 69 Ill. 376.

[70] McCormick *v.* Sisson, 7 Cow. 715.

Where one who had been arrested became a party to a written stipulation discontinuing the trial of the cause for which he had been arrested, he was not permitted in a subsequent action which he brought for malicious prosecution to testify that he had not asked for a discontinuance but had merely assented thereto, since a compromise, which is an insufficient basis for a suit for malicious prosecution, could be inferred from the written agreement. Russell *v.* Morgan, 24 R. I. 134, 57 Atl. Rep. 809.

[71] Thomason *v.* Demotte, 9 Abb. Pr. 242, s. c., 18 How. Pr. 529.

The entry of a *nolle prosequi* is a sufficient termination of a case in the plaintiff's favor to enable him to maintain an action for malicious

that the jury hesitated by reason of doubt as to guilt is not competent.[72]

9. Damages.

The process and proceedings thereon by which the injury to plaintiff and his property and repute were done, are competent for the purpose of showing the damages.[73] The officer's return, that the process was not levied, is not conclusive against plaintiff.[74] Special damages cannot be proved unless alleged.[75] Opinions of witnesses are not

prosecution, if it was not procured by the plaintiff for or occasioned by a compromise to which he was a party. Lamprey *v.* Hood, 73 N. H. 384, 62 Atl. Rep. 380.

[72] Scott *v.* Sheelor, 28 Gratt. 891.

[73] Donnell *v.* Jones, 13 Ala. 490, 17 Id. 689.

Where it is established that the defendant was actuated by malicious motives and acted without probable cause, the jury may consider in awarding damages the plaintiff's arrest and detention, the search of his dwelling, the injury to his reputation and feelings, together with such expenses if any, as he may necessarily have incurred in and about the prosecution in question. Herbener *v.* Crossan, 20 Del. 38, 55 Atl. Rep. 223.

It is competent to show as an element of damage, an injury to the reputation of the person against whom the suit was prosecuted. French *v.* Guyot, 30 Col. 222, 70 Pac. Rep. 683.

"Mental suffering proximately caused by the injury is an element of actual damage." Shannon *v.* Simms, 146 Ala. 673, 40 So. Rep. 574.

[74] Mott *v.* Smith, 2 Cranch C. Ct. 33.

The order of proof is within the discretion of the trial court and it may properly refuse to go into the question of damages until the proof necessary to sustain such damages had been adduced. Cunningham *v.* Moreno, 9 Ariz. 300, 80 Pac. Rep. 327.

[75] Strang *v.* Whitehead, 12 Wend. 64; Vanderslice *v.* Newton, 4 N. Y. 130. Compare Lawrence *v.* Hagerman, 56 Ill. 68, s. c., 8 Am. Rep. 674.

"The recovery of punitive damages is proper in case of malicious prosecution, where the plaintiff recovers at all, at least in all cases where the prosecution was begun or actively carried on by the defendant himself, and is not the unauthorized and unratified act of an agent." Eggett *v.* Allen, 119 Wis. 625, 96 N. W. Rep. 803.

It seems that in some of our states, contrary to the English doctrine the defendant against whom a civil suit has been brought

competent directly to the amount of damage to credit or business standing.[76] Evidence of defendant's wealth is competent to enhance damages.[77]

10. Defense; Truth of the Charge.

Truth is a justification without denial of malice.[78] The defendant may protect himself by any additional facts tending to show that the plaintiff was guilty of the crime charged against him, although defendant may not have known such facts when he began the prosecution.[79]

maliciously and without probable cause, will be permitted to recover compensatory damages in an action for malicious prosecution. Metcalf *v.* Bockoven, 62 Nebr. 877, 87 N. W. Rep. 1055.

When one's reputation is affected and the effect upon the reputation is made an element of damage, a witness may testify as to what he heard other people say in reference to the suit in question. French *v.* Guyot, 30 Colo. 222, 70 Pac. Rep. 330.

[76] Donnell *v.* Jones, 13 Ala. 490. Compare chapter XXXIV, paragraph 5 of this vol.

In an action for maliciously suing out a landlord's writ of attachment against a patch of sweet potatoes, evidence of expert sweet potato-growers as to the value of the crop at the date of the levy and the date of the release thereof is admissible for the purpose of showing the measure of damage. See Pratt *v.* Hampe, 114 Iowa, 237, 86 N. W. Rep. 292.

[77] Whitfield *v.* Westbrook, 40 Miss. 311.

It is competent to show the financial standing of the defendant and his ability to respond to judgment. French *v.* Guyot, 30 Colo. 222, 70 Pac. Rep. 683.

[78] Bank of British North America *v.* Strong, L. R. 1 App. Cas. 307, 317, s. c., 16 Moak's Eng. 24, 33.

Similarly "An action for malicious prosecution cannot be maintained, even though express malice be shown, if the defendant had good reason to believe, and did believe, when he made complaint, that the plaintiff had committed the offense charged." Cullen *v.* Hanisch, 114 Wis. 24, 89 N. W. Rep. 900.

[79] Thurber *v.* Eastern Building & Loan Ass'n, 118 N. C. 29, 24 S. E. Rep. 730.

"It is well established by authority that in an action for malicious prosecution it is a complete defense to show that the plaintiff was in fact guilty of the offense charged against him by defendant, and this though the proof of guilt is furnished by evidence not known to the defendant when the prosecution against the plaintiff was instituted." Mack *v.*

11. Probable Cause.

Probable cause may be shown under a general denial.[80] Belief of probable cause does not alone amount to probable cause; reasonable grounds for belief must be shown.[81] The

Sharp, 138 Mich. 448, 101 N. W. Rep. 631, 5 Ann. Cas. 109.

Although the affidavit upon which the prosecution was instigated was void for want of necessary allegations, the defendant in the malicious prosecution suit may show that the plaintiff had committed the offence which the affidavit attempted to charge, as a bar to a recovery. Shannon *v.* Simms, 146 Ala. 673, 40 So. Rep. 574.

Knowledge of the innocence of the person charged with crime acquired by the prosecutor after the institution of the criminal proceedings does not show want of probable cause. See Fox *v.* Smith, 25 R. I. 255, 55 Atl. Rep. 698.

[80] Simpson *v.* McArthur, 16 Abb. Pr. 302, note; Kellogg *v.* Scheuerman, 18 Wash. 293, 51 Pac. Rep. 344, 52 Pac. Rep. 237; Lautman *v.* Pepin, 26 Ind. App. 427, 59 N. E. Rep. 1073; Steadman *v.* Keels, 129 Mich. 669, 89 N. W. Rep. 555; McAllister *v.* Johnson, 108 Iowa, 42.

When the facts are disputed the court may instruct hypothetically or otherwise leaving the jury to find the fact. Lawrence *v.* Leathers, 31 Ind. App. 414, 68 N. E. Rep. 179.

"As a rule general, the question of probable cause may be for the court; yet, where it depends on disputed facts and conflicting evidence as to defendant's good faith and just belief, the question is for the jury." L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 121 Fed. Rep. 233, 57 C. C. A. 469.

"What facts, and whether particular facts, constitute probable cause, is a question for the court, but what the facts are in a particular case, where the evidence is conflicting, or, if undisputed, whatever inferences may be fairly drawn therefrom, is a question for the jury." Mundal *v.* Minneapolis, etc., R. Co., 92 Minn. 26, 99 N. W. Rep. 273, 100 N. W. Rep. 363.

Probable cause is a mixed question of law and fact, becoming a question of law after the facts are ascertained and devolving upon the court the duty to instruct the jury as to the law arising upon the facts. Staples *v.* Johnson, 25 App. Cas. D. C. 155; Campbell *v.* Baltimore, etc., Ry. Co., 97 Md. 341, 55 Atl. Rep. 532; Carroll *v.* New Jersey Cent. R. Co., 134 Fed. Rep. 684.

"While it is for the jury to determine the facts in any given case, what constitutes proper cause is a question of law." Young *v.* Lindstrom, 115 Ill. App. 239. See also Ahrens, etc., Mfg. Co. *v.* Hoeher, 106 Ky. 692, 51 S. W. Rep. 194, 21 Ky. Law 299.

[81] Whitfield *v.* Westbrook, 40 Miss. 311.

"'Probable cause is such a state of facts in the mind of the prose-

fact that the prosecution terminated in convicting plaintiff, is conclusive evidence of probable cause, and is only rebutted by evidence that his conviction was fraudulently procured by defendant by means which prevented plaintiff from setting up his defense.[82] A decision or order against

cutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty.'" Kansas, etc., Coal Co. *v.* Gallaway, 71 Ark. 351, 74 S. W. Rep. 521, 100 Am. St. Rep. 79.

"Probable cause is such a state of facts and circumstances as would lead a man of ordinary caution and prudence acting conscientiously, impartially, reasonably, and without prejudice, to believe that some one of the grounds for the suing out the writ existed. And in deciding upon the existence of probable cause, the plaintiff's belief in the existence of a ground for the attachment cannot be considered; nor the existence of such facts as might have influenced his judgment; but the test is, the effect they might have upon the judgment of an ordinarily prudent and reasonable man." Alsop *v.* Lidden, 130 Ala. 548, 30 So. Rep. 401.

It seems that the test of probable cause is that the belief must be that of a reasonable and prudent man, and all that can be required of the defendant is that he has acted as a man of ordinary caution and prudence would be likely to act under the same circumstances. But see Eggett *v.* Allen, 106 Wis. 633, 82 N. W. Rep. 556.

Probable cause consists of a belief in the charge or facts alleged, based on sufficient circumstances to reasonably induce such belief in a person of ordinary prudence in the same situation. Kelley *v.* Osborn, 86 Mo. App. 239.

"The inquiry must be, not whether the plaintiff was actually guilty, but whether the facts and circumstances were such as to warrant the defendant, as a prudent and conscientious man, to believe him guilty; and while mere reputation or the general report of plaintiff's guilty is not sufficient to establish probable cause, it is not necessary that the defendant should have seen and conversed with the witnesses themselves." Martin *v.* Corscadden, 34 Mont. 308, 86 Pac. Rep. 33.

Probable cause has been defined as "a reasonable cause of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged." Price *v.* Denison, 95 Minn. 106, 103 N. W. Rep. 728.

[82] Miller *v.* Deere, 2 Abb. Pr. 1; Burt *v.* Place, 4 Wend. 591; McDonald *v.* Schroeder, 214 Pa. 411, 63 Atl. Rep. 1024, 6 L. R. A. N. S. 701, 6 Ann. Cas. 506.

"The presumption of probable cause arising from conviction is not however an indisputable presump-

him *pendente lite* is competent,[83] but not conclusive.[84] Evidence that defendant acted in good faith is competent, but not alone to show probable cause.[85] Plaintiff's bad character is not primarily competent as evidence of probable cause,[86] though it may be shown, if plaintiff has given

tion; it may be rebutted by evidence which destroys the natural probative force of the finding or verdict upon which the sentence is based." Maynard *v.* Sigman, 65 Neb. 590, 91 N. W. Rep. 576.

[83] Zantzinger *v.* Weightman, 2 Cranch C. Ct. 478.

Where the plaintiff in an action for malicious prosecution was found guilty on the criminal trial, but the verdict was set aside and a new trial ordered, and the defendant neglected and refused to go forward with that trial, the conviction is not conclusive of the existence of probable cause. MacDonald *v.* Schroeder, 214 Pa. 411, 63 Atl. Rep. 1024, 6 L. R. A. N. S. 701, 6 Ann. Cas. 549.

"We accordingly hold that, in an action for malicious prosecution, a conviction of the plaintiff, which was reversed on appeal and the plaintiff discharged, is not conclusive, but strong *prima facie*, evidence of probable cause, which may be rebutted, not only by evidence tending to show that the conviction was obtained by fraud or perjury, but also by any competent evidence which satisfies the jury that the prosecutor did not have proper cause for instituting the prosecution." Skeffington *v.* Eylward, 97 Minn. 244, 105 N. W. Rep. 638, 114 Am. St. Rep. 711.

[84] Haupt *v.* Pohlmann, 1 Robt. 121, s. c., 16 Abb. Pr. 301.

[85] Shafer *v.* Loucks, 58 Barb. 426.

"If there be probable cause for a prosecution, it is immaterial that the prosecutor was actuated by malice, and also immaterial that the accused was not only found not guilty, but was actually innocent." Tumalty *v.* Parker, 100 Ill. App. 382.

In an action of malicious prosecution testimony tending to prove the innocence of the plaintiff of the crime alleged is irrelevant, as probable cause does not depend upon the guilt or innocence of the accused, but upon the prosecutor's belief in his guilt upon reasonable grounds at the time of prosecution. Fox *v.* Smith, 25 R. I. 255, 55 Atl. Rep. 698.

The testimony and opinion of the judge who dismissed the prosecution claimed to have been malicious, tending to show that he made such dismissal only by resolving every doubt in favor of the defendant, are admissible on the question of probable cause. Kansas, etc., Coal Co. *v.* Galloway, 71 Ark. 351, 74 S. W. Rep. 521, 100 Am. St. Rep. 79.

[86] 1 Whart. Ev. 62, § 47; and see Hickman *v.* Jones, 9 Wall. 197.

It has been held improper to show that the plaintiff in an action for malicious prosecution had a rep-

evidence to the contrary.[87] It may also be shown in mitigation of damages.[88]

utation of being a bully and quarrelsome. Noble *v.* White, 103 Iowa, 352, 359, 72 N. W. Rep. 556.

See also Waters *v.* West Chicago St. R. R. Co., 101 Ill. App. 265.

It has been held in Indiana, however, that it was not error to instruct the jury that it must consider evidence of the general character of the plaintiff which was admitted to rebut evidence of want of probable cause. Oliver *v.* Pate, 43 Ind. 132, 138.

See also Peck *v.* Chouteau, 91 Mo. 138, 146, 3 S. W. Rep. 577, 60 Am. St. Rep. 236.

But when the plaintiff alleged injury to his good name and reputation, "in his business as a carpenter and builder," it was held correct to allow the defendant to offer evidence that the plaintiff was not of good business credit and repute at the time of the alleged malicious prosecution. Finley *v.* St. Louis Refrigerator, etc., Co., 99 Mo. 269, 13 S. W. Rep. 87.

[87] See paragraph 6.

"Evidence of the previous bad reputation of plaintiff is always admissible to rebut proof of want of probable cause, as well as to mitigate the damages." But particular instances of bad conduct are not admissible. Martin *v.* Corscadden, 34 Mont. 308, 86 Pac. Rep. 33.

Where the prosecution complained of was for an offense involving moral turpitude, the plaintiff's general reputation at the time of the prosecution, if the defendant was where he would be likely to know it, is always involved in the issue, and the defendant may properly be permitted to show that it was bad. See McIntire *v.* Levering, 148 Mass. 546, 20 N. E. Rep. 191, 12 Am. St. Rep. 594, 2 L. R. A. 517.

Where the prosecution complained of was for one embezzlement, evidence of other embezzlements from the same owner and at about the same time, all of which were known to the defendant in the action for malicious prosecution, is admissible. Perkins *v.* Spaulding, 182 Mass. 218, 65 N. E. Rep. 72.

Evidence as to former criminal acts of the plaintiff communicated by him to the defendant prior to the prosecution is irrelevant as tending to show probable cause and absence of malice. Martin *v.* Corscadden, 34 Mont. 308, 86 Pac. Rep. 33.

[88] 1 Whart. Ev. (above).

Where an action for malicious prosecution was based on an attempt to indict for perjury, the exclusion of the defendant's evidence of the plaintiff's bad reputation at the time in question was erroneous, since the plaintiff claimed injury to her character and thereby directly put her reputation in issue, thus making the defendant's evidence competent in mitigation of damages. O'Brien

12. Freedom From Malice.

To disprove malice in making a criminal charge, defendant may be asked, as a witness in his own behalf, whether, when he made the charge, he believed that plaintiff had been guilty of the offense.[89] The declarations of the defendant, made as part of the *res gestæ*, of an act in the proceedings alleged to be malicious, are competent in his own favor to negative malice.[90] But the declarations of his agent or attorney, unless brought home to him, are not.[91]

v. Fraiser, 47 N. J. Law, 349, 1 Atl. Rep. 465, 54 Am. Rep. 170.

The Illinois courts have likewise held that the defendant, in an action for malicious prosecution, might, in mitigation of damages, attack the plaintiff's character by showing his general reputation at the time of the alleged malicious prosecution. Rosenkrans *v.* Barker, 115 Ill. 331, 3 N. E. Rep. 93, 56 Am. Rep. 169.

"We are inclined to think that evidence of the general bad reputation of the plaintiff should have been admitted to rebut the proof of want of probable cause, as well as in mitigation of damages." Bacon *v.* Towne, 4 Cush. (Mass.) 217, 240.

[89] McKown *v.* Hunter, 30 N. Y. 625. And see Goodman *v.* Stroheim, 36 Super. Ct. (4 J. & S.) 216. That he cannot be asked if he acted without malice, see Lawyer *v.* Loomis, 3 Supm. Ct. (T. & C.) 393. Compare chapter XXXIV, paragraph 12 of this vol.

Evidence that the defendant had stated that he would spend a thousand dollars to have his revenge is competent to show malice. Coble *v.* Huffines, 133 N. C. 422, 45 S. E. Rep. 760, 132 N. C. 399, 43 S. E. Rep. 909.

[90] Wood *v.* Barker, 37 Ala. 60.

Evidence that before the institution of the prosecution complained of the defendant went to a deputy prosecutor to consult him as to the propriety of commencing the prosecution, and detailed to him the facts and circumstances of the case, upon which statement the deputy advised him to proceed and in pursuance of which advice he did proceed, is competent as tending to rebut malice. Wright *v.* Hanna, 98 Ind. 217.

[91] Floyd *v.* Hamilton, 33 Ala. 235.

In an action for malicious prosecution based on prior attachment proceedings, it appeared that in the former action the defendant's attorney directed a deputy sheriff to leave the property levied on as he found it, but to keep watch over it until the sheriff came. It was held error to admit this statement of the attorney in evidence, since it was a mere declaration of a third person which was not competent to show want of malice on the part of the defendant. Floyd *v.* Hamilton, 33 Ala. 235.

13. Advice of Counsel.

The fact that defendant acted under advice of counsel is relevant, both to show probable cause[92] and absence of malice.[93] To render the opinion or advice competent, it must appear that it was given before defendant proceeded,[94] and the statement of facts which was laid before the attorney or counsel must be shown.[95] Defendant need not show

[92] Hall *v.* Suydam, 6 Barb. 83. See Atkinson *v.* Vancleave, 25 Ind. App. 508, 57 N. E. Rep. 731.

The defense of advice of counsel is admissible under a general denial. McAllister *v.* Johnson, 108 Iowa, 42, 78 N. W. Rep. 790.

Advice of counsel is competent to show probable cause only when reasonable diligence was used to learn the facts on which the advice of counsel was sought. Ahrens, etc., Mfg. Co. *v.* Hoeher, 106 Ky. 692, 51 S. W. Rep. 194, 21 Ky. Law 2199.

When a man "places all the facts before his counsel, and acts upon his opinion, proof of the fact makes out a case of probable cause, provided the disclosure appears to have been full and fair, and not to have withheld any of the material facts." Kansas, etc., Coal. Co. *v.* Galloway, 71 Ark. 351, 74 S. W. Rep. 521, 100 Am. St. Rep. 79.

[93] Jackson *v.* Mather, 7 Cow. 301. When the circumstances show that no reasonable grounds for the prosecution exist, the want of probable cause is established; and while it is competent in such an action to show that the prosecution was undertaken on the advice of counsel, to show that there was probable cause for such prosecution, the fact that such advice was given is only one of the circumstances of the case for consideration by the jury. Hicks *v.* Brantley, 102 Ga. 264, 29 S. E. Rep. 459. Evidence that defendant, in an action for malicious prosecution, had said concerning plaintiff that he was a rascal, and that before he was through with him he would have him behind the bars, is admissible on the question of malice, even though such statement was made after he had taken advice of counsel, and been told that plaintiff was guilty. Hidy *v.* Murray, 101 Iowa, 65, 69 N. W. Rep. 1138.

The fact that a party procures and acts upon the advice of an attorney does not of itself exempt him from liability or afford absolute justification. It is merely competent to rebut malice and want of probable cause. See Atkinson *v.* Vancleave, 25 Ind. App. 508, 57 N. E. Rep. 731.

[94] Blunt *v.* Little, 3 Mass. 102.

An attorney who testifies as to advice given the defendant in the prosecution alleged to have been malicious, cannot be asked as to what advice he would have given under circumstances not disclosed to him. Noble *v.* White, 103 Iowa, 352, 72 N. W. Rep. 556.

[95] Id., and see Laird *v.* Taylor, 66

the ability or learning of the attorney, as this is presumed from evidence that he was a duly licensed practitioner.[96] If defendant shows a full and fair statement made by him to a respectable attorney, and that he acted on his advice, strong evidence that defendant did not believe there was probable cause is necessary.[97]

Barb. 139; Wuest *v.* American Tobacco Co., 10 S. Dak. 394, 73 N. W. Rep. 903.

The defendant will not be allowed to testify that he related all of the circumstances without stating what they were; the inference as to what circumstances would constitute a proper disclosure being for the jury and not for the witness to draw. Perrenoud *v.* Helm, 65 Neb. 77, 90 N. W. Rep. 980.

[96] Horne *v.* Sullivan, 83 Ill. 32.

"A lawyer 'learned in the law' cannot advise himself as to the right and propriety of suing out an attachment, and when prosecuted for suing it out maliciously, rebut all malice by showing that he advised himself." L. Bucki, etc., Lumber Co. *v.* Atlantic Lumber Co., 121 Fed. Rep. 233, 57 C. C. A. 679.

[97] Skidmore *v.* Bricker, 77 Ill. 164.

"It is a question of fact for the jury to say, upon the evidence, whether a full and fair disclosure of the facts was made to counsel, and whether his advice was sought and relied upon in good faith." Mundal *v.* Minneapolis, etc., R. Co., 92 Minn. 26, 99 N. W. Rep. 273, 100 N. W. Rep. 363.

Advice of counsel will not shield the defendant unless he acts in good faith both in stating the facts to the attorney and in acting on the advice received. Williams *v.* Cascebeer, 126 Cal. 77, 58 Pac. Rep. 380.

An instruction to the jury that "if the defendant did not make a full, and fair and honest statement of all the facts in his knowledge to his counsel and act upon the advice given thereon, but did act upon a fixed determination of his own, then such advice could avail him nothing," is not objectionable. Martin *v.* Corscadden, 34 Mont. 308, 86 Pac. Rep. 882.

Where, in the action for malicious prosecution the plaintiff's theory is that the defendant maliciously caused a third person to commence the prosecution, evidence that the prosecutor made a statement of facts to an attorney and was advised that she could sustain a prosecution, was held admissible, not for the purpose of relieving the defendant from the imputation of malice, but as a consideration for the jury upon an inquiry as to whether the prosecutor was influenced by the counsel of the attorney or the prompting of the defendant. Southern Express Co. *v.* Couch, 133 Ala. 285, 32 So. Rep. 167.

CHAPTER XLII

ACTIONS FOR FALSE IMPRISONMENT

1. General rules.
2. Grounds of action.
3. Legal process, &c.
3a. Character.
4. Damages.
5. Justification.

1. General Rules.

The reader should consult the fuller statement of the rules applicable to the mode of proof, given in the chapters on ASSAULT AND BATTERY AND MALICIOUS PROSECUTION.

2. Grounds of Action.[98]

Evidence of malice is not essential;[99] want of probable cause is.[1]

[98] For the distinction between this action and malicious prosecution, see Chapter XLI, and Sleight *v.* Ogle, 4 E. D. Smith, 445; Ackroyd *v.* Ackroyd, 3 Daly, 38; Von Latham *v.* Libby, 38 Barb. 339, s. c., 17 Abb. Pr. 237; Brown *v.* Chadsey, 39 Barb. 253.

"False imprisonment is the unlawful arrest or detention of a person without warrant, or by an illegal warrant, or a warrant illegally instituted, and either in a prison or place used temporarily for that purpose, or by force and constraint without confinement." Miller *v.* Fano, 134 Cal. 103, 66 Pac. Rep. 183.

The temporary deprivation of the liberty of an inmate of a county house for disorderly conduct and obscene language, is not such a confinement as will be considered a false imprisonment. Cunningham *v.* Shea, 111 App. Div. 624, 97 N. Y. Supp. 884.

False imprisonment and malicious prosecution may be joined where the plaintiff and defendant are the same and both the causes of action grow out of one continuous transaction. San Antonio, etc., Ry. *v.* Griffin, 20 Tex. Civ. A. 91, 48 S. W. Rep. 542.

[99] Platt *v.* Niles, 1 Edm. 230; Garnier *v.* Squires, 62 Kan. 321, 62 Pac. Rep. 1005; Hewitt *v.* Newburger, 66 Hun, 230, 20 N. Y. Supp. 913.

Motive is immaterial except on the question of damages. Oates *v.* Bullock, 136 Ala. 537, 33 So. Rep. 835, 96 Am. St. Rep. 38.

[1] Id., Hawley *v.* Butler, 54 Barb.

3. Legal Process, &c.

The appropriate recitals in process put in evidence by plaintiff as the instrument of his arrest, are *prima facie* evidence against him, of the facts recited.[2] If the plaintiff relies upon the failure of the judgment to support the process against him, he must show that the process by defendant was issued on the particular judgment; also the defect or vacatur relied on.[3] The police records, if not kept pursuant to a requirement of law, are not competent as evidence of the injury and indignity to plaintiff resulting from defendant's charge against him, unless it be shown that defendant knew that it was the custom to make such a record.[4]

490, disapproving a previous decision in 49 Id. 101; and see Carl *v.* Ayres, 53 N. Y. 14; Farnham *v.* Feeley, 56 N. Y. 451.

But it has been held that in an action against a police officer, "for trespass and false imprisonment, probable cause and absence of malice constitute no defense. There must be an existing legal cause of arrest; and that cause must be a law violated." Markey *v.* Griffin, 109 Ill. App. 212. See also cases there cited.

A letter from a prosecuting attorney authorizing the institution of the prosecution is admissible on the question of probable cause. Thurston *v.* Wright, 77 Mich. 96, 43 N. W. Rep. 860.

[2] Walworth, Ch. J.; Bradstreet *v.* Furgeson, 23 Wend. 638, affi'g 17 Id. 181, and cases cited; Scott *v.* Ely, 4 Wend. 555.

Where a justice had no jurisdiction to issue an attachment to compel the attendance of a witness, such attachment "was void, and the arrest and detention under it constituted false imprisonment as a matter of law." Holz *v.* Rediske, 116 Wis. 353, 92 N. W. Rep. 1105.

A person is not liable for an honest mistake in merely identifying another to the arresting officer. Miller *v.* Fano, 134 Cal. 103, 66 Pac. Rep. 183.

[3] See Brown *v.* Demont, 9 Cow. 263; Barhydt *v.* Valk, 12 Wend. 145.

Plaintiff can properly offer in evidence in an action for false imprisonment, the record for the court of Quarter Sessions showing her acquittal to establish the fact that the defendant had no reasonable grounds for causing the arrest. Even the testimony of the witnesses in that trial were admissible. Butler *v.* Stockdale, 19 Pa. Sup. Ct. 98.

[4] Garvey *v.* Wayson, 42 Md. 178, 187, 1 Whart. Ev., § 639.

"If the criminal law be set in motion for the purpose of collecting a debt or compelling the delivery

3a. Character.

Evidence to establish the previous good character of the plaintiff is admissible.[5]

4. Damages.

Matters of aggravation,[6] as distinguished from grounds of special damages, may be proved though not pleaded.

of property, or to accomplish some other ulterior and unlawful purpose, then it is begun maliciously as much as though inspired by hatred or revenge." Eggett *v.* Allen, 119 Wis. 625, 96 N. W. Rep. 803.

[5] Diers *v.* Mallon, 46 Neb. 121, 64 N. W. Rep. 722; Downing *v.* Butcher, 2 Moody & R. 374; Russell *v.* Shuster, 8 Watts & S. 308; fraud; Haywood *v.* Reed, 4 Gray, 574; Gough *v.* St. John, 16 Wend. 646; Potter *v.* Webb, 6 Greenl. 14; Simpson *v.* Westenberger, 28 Kan. 756; Davis *v.* Saunders, 133 Ala. 275, 32 So. Rep. 275.

Evidence offered by the plaintiff that he had never before been arrested or complained of for any crime, was properly excluded. Geary *v.* Stevenson, 169 Mass. 23, 47 N. E. Rep. 508.

Good character is presumed. Wolf *v.* Perryman, 82 Texas, 112, 17 S. W. Rep. 772.

Where the plaintiff alleges that he "'has been greatly damaged in his good name and reputation where he lives, by reason of said imprisonment,'" it is not error to admit evidence "to show that before and at the time of the arrest the plaintiff's reputation for honesty was bad," so long as the effect of such evidence is properly indicated to the jury by the trial judge. Drummond *v.* Henderson, 62 Ohio St. 136, 56 N. E. Rep. 650.

Evidence of the previous depraved character of the plaintiff is admissible as explanatory of her being in a reformatory (the place of imprisonment) and as furnishing a motive for her being willing to stay there. Smith *v.* Sisters of Good Shepherd, 87 S. W. Rep. 1083, 27 Ky. L. 1107.

[6] Stanton *v.* Seymour, 5 McLean, 267.

Proof that the defendant "acted in good faith, believing he was only discharging a duty the law imposed upon him, may be introduced upon the trial in mitigation of damages; and, if the jury finds this to be the fact," the plaintiff's "recovery should be confined to compensation for the actual damage sustained." Roberts *v.* Hackney, 109 Ky. 265, 58 S. W. Rep. 810, 59 S. W. Rep. 328, 22 Ky. Law 975.

When exemplary damages are claimed, the defendant may, in mitigation of these, show that he was resisted by the plaintiff in his effort to effect the arrest of the latter, and any relevant circumstances showing a reasonable prov-

5. Justification and Mitigation.

Under a denial of an allegation that the imprisonment was without warrant, defendant may justify under legal process.[7] A justification which is not in issue is not admis-

ocation after a resort to force in making the arrest." Petit *v.* Colmery, 20 Del. (4 Penn.) 266, 55 Atl. Rep. 344.

"The general rule as to exemplary damages is that when an injury has been inflicted maliciously and wantonly, the jury are not restricted to actual or compensatory damages, but may give such damages in addition thereto as the circumstances of the case seem to warrant, to deter others from like offenses." Petit *v.* Colmery, 20 Del. (4 Pa.) 266, 55 Atl. Rep. 344.

Where the proof shows that the arrest was made in a public place and the beating and bruising was upon a public street of the city while the plaintiff was being carried to the lockup, judgment against the officer making arrest and his surety, in the sum of $800 each was not deemed excessive to compensate the plaintiff for his humiliation, mortification and injuries. Scott *v.* Commonwealth, 93 S. W. Rep. 668, 29 Ky. L. 571.

It is competent to show the manner of the arrest. Holz *v.* Rediske, 116 Wis. 353, 92 N. W. Rep. 1105.

Even though the plaintiff does not claim damages for mental suffering, humiliation and injury to feelings, these may be clearly included in the general claim for damages "and other wrongs" committed by the defendant against the plaintiff. Butler *v.* Stockdale, 19 Pa. Sup. Ct. 98.

The plaintiff may testify as to his treatment in jail, the discomforts undergone and the mental and bodily suffering caused by the imprisonment. San Antonio, etc., Ry. *v.* Griffin, 20 Tex. Civ. App. 91, 48 S. W. Rep. 542. See also Miller *v.* Fano, 134 Cal. 103, 66 Pac. Rep. 183.

The plaintiff may show the condition of the prison in which he was confined as to cleanliness or odors. Fuqua *v.* Gambill, 140 Ala. 464, 37 So. Rep. 235.

Proof of malice is competent on the question of damages. Garnier *v.* Squires, 62 Kan. 321, 62 Pac. Rep. 1005.

Proof of mental pain and humiliation is competent. Golibart *v.* Sullivan, 30 Ind. App. 428, 66 N. E. Rep. 188.

[7] Boynton *v.* Tidwell, 19 Tex. 118.

Any person who procures the issuance of a void warrant is liable in damages to the person named therein and who is arrested under the authority it is supposed to import. Oates *v.* Bullock, 136 Ala. 537, 33 So. Rep. 835, 96 Am. St. Rep. 38.

One who authorizes, encourages, directs or assists an officer to do an unlawful act, or procures an unlawful arrest without process, or participates in an unlawful ar-

sible in bar under a denial,[8] unless the facts may be available if offered solely in mitigation of damages. In justifying under process, a defendant other than the officer who executed it need not prove its return.[9] Evidence that a party meaning to influence the other's conduct made representations or admissions (even as to the nature or contents of a record) having that effect, will estop him from showing the contrary to the prejudice of the latter.[10]

rest or imprisonment, is liable. Miller *v.* Fano, 134 Cal. 103, 66 Pac. Rep. 183.

[8] Brown *v.* Chadsey, 39 Barb. 253.

Where the plaintiff had been arrested by a sheriff under a magistrate's warrant from another county pursuant to the code of the state, it was error to admit in evidence that the plaintiff had been indicted for another offense in another state and was at the time a fugitive from the latter state. Lamb *v.* Dillard, 94 Ga. 206, 21 S. E. Rep. 463.

Where a constable made an arrest by virtue of a warrant and found that the party arrested, though answering the description set forth in the warrant, was nevertheless the wrong party, he cannot justify himself by pretending that he acted under the provisions of a law which empowered peace officers to make arrests without a warrant where they had reasonable grounds to believe that the party taken into custody had committed a public offense. Holmes *v.* Blyler, 80 Iowa, 365, 45 N. W. Rep. 756.

"False imprisonment is an interference with the personal liberty of the party complaining, which is unlawful and without authority. In malicious prosecution the arrest would be by process lawful and regular in itself, but sued out from malicious motives and without proper cause. Yet, in false imprisonment, as in slander, honest intentions and mistake will constitute mitigation." Dunlevy *v.* Wolferman, 106 Mo. App. 46, 79 S. W. Rep. 1165.

[9] Plummer *v.* Dennett, 6 Greenl. (Me.) 421.

The justice who issued the warrant may testify fully as to what took place when the parties first appeared before him, what proceedings were had, and what conduct on the part of the defendant disclosed any maliciousness or overanxiety to proescute the case. Thurston *v.* Wright, 77 Mich. 96, 43 N. W. Rep. 860.

[10] Howard *v.* Hudson, 2 Ell. & B. 1. Compare McMasters *v.* Ins. Co. of N. Am., 55 N. Y. 222, 227. Where evidence is produced showing that one induced an officer to arrest the plaintiff, he cannot avoid the consequences by alleging that the officer at the same time had reasonable cause to believe that the plaintiff was guilty of the

To show good faith in his conduct defendant may give in evidence any communication actually made to him before he acted, and which influenced his action; but not so even of a record which was not communicated to him, and to which plaintiff was neither party nor privy.[11]

felony mentioned. Rich *v.* McInerny, 103 Ala. 345, 15 So. Rep. 663, 49 Am. St. Rep. 32.

Where there is competent testimony from which the jury might find that the one making the arrest was the agent of the defendant in all transactions between the parties, the plaintiff may testify as to statements made to him by the agent which tend to show that the defendant instituted the suit to collect an indebtedness due him. Bell *v.* Day, 9 Kan. App. 111, 57 Pac. Rep. 1054.

Where it is sought to hold the defendant liable for the act of his employee, declarations of such employee after the false arrest complained of are inadmissible. Geary *v.* Stevenson, 169 Mass. 23, 47 N. E. Rep. 508.

[11] Thomas *v.* Russell, 9 Ex. 764.

A letter describing a person for identification and only stating that he had absconded with funds of a Philadelphia lodge (in another jurisdiction) but not showing that the writer had any personal knowledge of the theft, will not justify the marshal in taking the person described in the letter into custody. Malcolmson *v.* Scott, 56 Mich. 459, 23 N. W. Rep. 166.

The defendant offered in evidence the rules of his institution providing that inmates guilty of swearing should be punished. This evidence was excluded, thereby causing reversible error. Cunningham *v.* Shea, 111 App. Div. 624, 97 N. Y. Supp. 884.

In an action against physicians for falsely certifying that the plaintiff was insane, evidence of conversations had between the physicians and others in which the plaintiff's supposed condition as to lunacy was disclosed to the physicians before and as preparatory to the making of the certificate is competent to show the good faith of the physician and in mitigation of damages. Bacon *v.* Bacon, 76 Miss. 458, 24 So. Rep. 968.

CHAPTER XLIII

ACTIONS FOR SLANDER OR LIBEL

1. Order of proof.
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1. Order of Proof.

The usual order of proof is: 1. Plaintiff's vocation, if involved; 2. Other extrinsic facts in the inducement, if any are material; 3. The utterance or publication; 4. Facts essential to the colloquium or innuendoes; 5. Extrinsic evidence of malice; 6. Damages.

2. Inducement.

Matter alleged by way of inducement, if not material to the cause of action, is not in issue, and is not admitted by failure to deny, nor need it be proved if denied; but if material, it is admitted or must be proved.[12] Matter of inducement

[12] Coleman *v.* Southwick, 9 Johns. 45, s. c., 6 Am. Dec. 253; May *v.* Brown, 3 B. & C. 122; Folk. Stark. 555, § 525; Towns, 653, § 385; Kinney *v.* Nash, 3 N. Y. 177; Age-Herald Pub. Co. *v.* Waterman, 188 Ala. 272, 66 So. Rep. 16, Ann. Cas. 1916, E. 900; Van Heusen *v.* Argenteau, 194 N. Y. 309, 87 N. E. Rep. 437.

wholly collateral to the issue, may be proved by parol, without producing existing record evidence.[13]

3. Plaintiff's Vocation, &c.

Plaintiff's vocation or official character need not be proved, even though alleged,[14] if the words are actionable apart from that; but it may be proved, even though not alleged, if the words directly tend to injure him in it.[15] If the actionableness of the words depends upon injury in vocation[16] (and the vocation is in issue), plaintiff must prove that he was in the vocation alleged[17] at the time of the publication;[18] but evidence of appointment just before may be sufficient *prima facie* evidence of continuance.[19]

The defamatory matter itself, if it admits that defendant had a particular official character or vocation, is *prima facie* evidence for plaintiff on that point.[20] The holding an office which is not matter of documentary appointment, may be shown by evidence of acting in it.[21] If documentary, the original appointment should be proved, or its absence accounted for and secondary evidence given.[22] If the business is one for which a license is required by law, plaintiff need not prove a license,[23] unless the imputation

[13] Southwick *v.* Stevens, 10 Johns. 443; Gattis *v.* Kilgo, 128 N. C. 402, 38 S. E. Rep. 931.

[14] Lewis *v.* Walter, 3 B. & C. 138; Cassavoy *v.* Pattison, 93 N. Y. App. Div. 370, 87 N. Y. Supp. 658.

[15] Sanderson *v.* Caldwell, 45 N. Y. 398.

[16] See Miller *v.* David, L. R. 9 C. P. 118, s. c., 8 Moak's Eng. 434; Tobias *v.* Harland, 4 Wend. 537.

[17] Manning *v.* Clement, 7 Bing. 362.

[18] Harris *v.* Burley, 8 N. H. 216; Forward *v.* Adams, 7 Wend. 204. Compare Cramer *v.* Riggs, 17 Id. 209.

[19] Rosc. N. P. 36.

[20] Yrisarri *v.* Clement, 3 Bing. 432, 2 Whart. Ev., § 1153.

[21] Cannell *v.* Curtis, 2 Bing. N. C. 228, 2 Stark. Ev. 3d ed. 627, and see page 240 of this vol.; Brown *v.* Mims, 2 Mills' Const. (S. C.) 235.

[22] Folk. Stark. 552 (411), § 520. Otherwise, where the office is not material to the cause of action.

[23] Pry *v.* Bennett, 28 N. Y. 324, affi'g 3 Bosw. 200. Compare chapter XVI, paragraph 3 and

of pursuing it without a license is involved in the defamation.[24]

4. Good Repute.

Plaintiff need not, in the first instance, give any evidence of his good name.[25]

5. Slander.

Although plaintiff's allegation sets forth the words of the alleged slander (as the rules of pleading now usually require), he need not prove the utterance of those precise words,[26] nor necessarily all of them, even in substance;[27] but he must prove

chapter XIX, paragraph 2 of this vol.

[24] See Pickford *v.* Gutch, 8 T. R. 305, n.; Collins *v.* Carnegie, 1 Ad. & E. 695.

[25] Massee *v.* Williams, 207 Fed. Rep. 222, 124 C. C. A. 492; Krulic *v.* Petcoff, 122 Minn. 517, 142 N. W. Rep. 897, Ann. Cas. 1914, D. 1056; Morgan *v.* Bennett, 40 N. Y. App. Div. 619, 57 N. Y. Supp. 1088; Cox *v.* Thomason, 2 C. & J. 361. Whether he may do so before it has been impugned by defendant's evidence is disputed. For the *affirmative*, see Williams *v.* Greenwade, 3 Dana, 432; Bennett *v.* Hde, 6 Conn. 24, 27; King *v.* Waring, 5 Esp. 14. For the *negative*, see Cornwall *v.* Richardson, R. & M. 305; Inman *v.* Foster, 8 Wend. 602; Shipman *v.* Burrows, 1 Hall, 399, and cases cited.

Such evidence is, however, admissible as bearing on the question of damages. Stark *v.* Knapp, 160 Mo. 529, 61 S. W. Rep. 669.

But it is held to the contrary in Burkhart *v.* North American Cir., 214 Pa. St. 39, 63 Atl. Rep. 410.

The plaintiff's character, in the absence of testimony to the contrary, may be presumed to be good. Hallowell *v.* Guntle, 82 Ind. 554.

[26] Desmond *v.* Brown, 29 Iowa, 53, s. c., 4 Am. Rep. 194; Hersh *v.* Ringwalt, 3 Yates (Pa.), 508, s. c., 2 Am. Dec. 392. *Contra*, Towns. 622, § 365. "There is nothing more difficult than for a witness to recollect the exact language used by another; and to require this would be to defeat the recoveries in actions for verbal slander, in almost every instance." CHURCH, Ch. J., Williams *v.* Miner, 18 Conn. 464, 474. If the precise words are important, and the witness, though confident, is not positive in his testimony, the jury may find the words not proved. Harding *v.* Brooks, 5 Pick. 244, 249. See 3 Abb. New Cas. 233, n. The rules as to a witness refreshing his memory by memoranda, have been already stated, chapter XVI, paragraph 37 of this vol.

[27] Ransom *v.* McCurley, 140 Ill.

the utterance of substantially the words alleged,[28] or of a sufficient part of them to sustain an action.[29] Substantially different words, though imputing the same charge, are not enough;[30] but substantially the same words, though varying in form of expression, are admissible.[31] If the charge alleged was a specific one, evidence that defendant made a general charge is a variance.[32]

Under the new procedure, a variance that has not misled defendant to his prejudice, may be cured by amendment or disgarded.[33]

If the pleading states only the substance (where this is allowed), it is enough to prove the substance.[34]

626, 31 N. E. Rep. 119; Massee *v.* Williams, 207 Fed. Rep. 222, 124 C. C. A. 492; Purple *v.* Horton, 13 Wend. 9; Nestle *v.* Van Slyck, 2 Hill, 282; Olmsted *v.* Brown, 12 Barb. 657. Even though the words unproved qualify those proved. Folk. Stark. 461, § 429. *Contra*, Towns. 622, § 365.

[28] Estes *v.* Antrobus, 1 Mo. 197, s. c., 13 Am. Dec. 496, and n. cit.; Bundy *v.* Hart, 46 Mo. 460, s. c., 2 Am. Rep. 525. And in the tongue or language alleged. Keenholts *v.* Becker, 3 Den. 346; Warmouth *v.* Cramer, 3 Wend. 394. But a variance in this respect, as in others, may be cured by amendment. Lettman *v.* Ritz, 3 Sandf. 734.

[29] Hume *v.* Arrasmith, 1 Bibb (Ky.), 165, s. c., 4 Am. Dec. 626; Massee *v.* Williams, 207 Fed. Rep. 222, 124 C. C. A. 492.

[30] Irish American Bank *v.* Bader, 59 Minn. 329, 61 N. W. Rep. 328; Wheeler *v.* Robb, 1 Blackf. 330, s. c., 12 Am. Dec. 245, and n. *Contra*, Williams *v.* Miner, 18 Conn. 464, 474, and cases cited. The object of this rule is to give notice to defendant, not merely of the nature of the charge, but the language in which it was uttered. Doherty *v.* Brown, 10 Gray, 250.

[31] Smith *v.* Hollister, 32 Vt. 695.

[32] Aldrich *v.* Brown, 11 Wend. 596; Emery *v.* Miller, 1 Den. 208; Coons *v.* Robinson, 3 Barb. 625. As a general rule, the evidence substantially varies from the allegation, when it proves a charge of an offense not identically the same with that alleged though of the same species. Payson *v.* Macomber, 3 Allen, 69, 72.

[33] N. Y. Code Civ. Pro., § 539; Coleman *v.* Playsted, 36 Barb. 26.

[34] Nye *v.* Otis, 8 Mass. 121, s. c., 5 Am. Dec. 79; Whiting *v.* Smith, 13 Pick. 364. Or even equivocal or apparently innocuous words, with extrinsic evidence of manner, circumstances, etc., giving them the meaning of the general allegation. Pond *v.* Hartwell, 17 Pick. 269, 270, Shaw, C. J.

Words alleged, though not slanderous, may be proved by plaintiff, to show the intent with which slanderous words, alleged in the same count, were spoken.[35]

Utterances not included in those alleged[36] cannot be proved as a cause of action; but may be proved to show meaning and intent, within limits stated below.

The result of the rules on this point, shortly stated, is that: Where the allegation and proof vary as to the words, it is enough if plaintiff proves that a distinct slanderous charge alleged, which is separable from any other unproven words alleged, was uttered in substantially the words alleged, it not appearing to have been materially qualified by other words not alleged.

The action is transitory and the place not material, and it may be proved different from that alleged.[37]

6. — Its Utterance.

Utterance of the words denied in one plea or defense, may be proved by a plea or defense confessing utterance,[38] but not by one avoiding without confessing. The utterance may be proved by plaintiff's testimony, though other persons not produced as witnesses were present.

[35] Dioyt *v.* Tanner, 20 Wend. 190.

[36] Whether those of defendant (Camfield *v.* Bird, 3 Carr. & K. 56); or those of another person, alleged to have been adopted by defendant (Blessing *v.* Davis, 24 Wend. 100).

Evidence of repetition of words on another occasion is admissible as proof of malice. Anderson *v.* Shockley, 266 Mo. 543, 181 S. W. Rep. 1151.

[37] Cassem *v.* Galvin, 158 Ill. 30, 35, 41 N. E. Rep. 1087.

[38] Alderman *v.* French, 1 Pick. 1, s. c., 11 Am. Dec. 114. *Contra*, Wheeler *v.* Robb, 1 Blackf. (Ind.) 330, s. c., 12 Am. Dec. 245. Under the new procedure, which allows the joining of defenses not necessarily inconsistent, the question is, whether the special plea or answer expressly, or by necessary implication, admits or does not admit the publication. A justification may or may not. Under proper pleadings, a defendant may show both that he never published the defamatory matter, and that, whoever may have done so, it was true. Denial of publication, and averment of truth, are not inconsistent (Payson *v.* Macomber, 3 Allen, 69, 73); unless pleaded in such a way as to be inconsistent.

There must be some evidence that the words were heard and understood by some person other than plaintiff, to whom they were addressed.[39]

A variance as to the person is not necessarily fatal.[40] The moral or intellectual character of the hearer is not relevant.[41] The time of utterance must be proved to have been before action; and if the only witness cannot swear to this, his testimony is irrelevant.[42] But a variance in respect to the time is immaterial.[43]

7. Publication of Libel.

Publication by defendant should be proved before reading the contents.[44] An allegation of publication by defendant admits proof of publication by his authorized agent or servant.[45] If joint publication is alleged, it must be proved to have been joint.[46] Under either an allegation of printing or one of writing, the other form of publication may be

Jackson *v.* Stetson, 15 Mass. 48, 52.

[39] Walker *v.* White, 192 Mo. A. 13, 178 S. W. Rep. 254; Broderick *v.* James, 3 Daly, 481; Haile *v.* Fuller, 2 Hun, 519. Compare Phillips *v.* Barber, 7 Wend. 439. Words spoken in a foreign language must be proved to have been spoken in the hearing of one who understood them. Bac. Abr. Slander (D. 3).

If the words were spoken in jest and were so understood they are not actionable. Hanson *v.* Feuling, 160 Wis. 511, 152 N. W. Rep. 287.

[40] Goodrich *v.* Warner, 21 Conn. 432, 443; Kimball *v.* Page, 96 Me. 487, 52 Atl. Rep. 1010.

[41] Sheffill *v.* Van Deusen, 15 Gray, 485.

[42] Scovel *v.* Kingsley, 7 Conn. 284.

[43] Potter *v.* Thompson, 22 Barb. 87. Even though the evidence is of an utterance more than two years before suit (Birchett *v.* Davis, 21 Pick. 404); in which case, however, defendant should be allowed to amend by pleading the statute of limitations. Id.

[44] Folk. Stark. 556, § 526.

As to how far the mailing of a letter constitutes a publication, see Schaller *v.* Miller, 173 N. Y. App. Div. 998, 159 N. Y. Supp. 1140.

[45] Folk. Stark. 571 (427), § 538.

One who induced the presentation of false charges, is guilty of publication. Fulton *v.* Ingalls, 165 N. Y. App. Div. 323, 151 N. Y. Supp. 130.

[46] Johnson *v.* Hudson, 7 Ad. & E. 233, n.

proved, unless defendant is misled.[47] The rules for proving handwriting have been already stated.[48]

Publication may be proved by plaintiff's testimony; but not by that of defendant, if he claims his privilege. It may be proved by evidence of defendant's declarations and admissions out of court,[49] and if his admission was qualified by suggesting that there were errors in the printing, the burden is on him to show material errors.[50] It may be proved by the one who read it, notwithstanding he did it under a pledge of secrecy.[51]

Proof that a newspaper or periodical came from defendant's office, and was one copy of an edition of the same date, and alleging on its face that he is the proprietor, is evidence of publication by defendant.[52] One proved to have been proprietor of a journal two or three years previously, may be presumed to have continued proprietor.[53] Evidence of of delivery by defendant, whether in way of circulation among readers,[54] or by way of deposit in a public office,[55] is *prima facie* evidence of publication. Sale by a clerk or agent in a shop, in the usual course of business, is *prima facie* evidence of publication by the principal.[56] Evidence of sale of

[47] Trumbull *v.* Gibbons, 3 City H. Rec. 97.

[48] Chapter XXI, paragraphs 5 to 18 of this vol., and see Cochrane *v.* Butterfield, 18 N. H. 115. Compare U. S. *v.* Chamberlain, 12 Blatchf. 390.

[49] Wischstadt *v.* Wischstadt, 47 Minn. 358, 50 N. N. Rep. 225; Lewis *v.* Few, 5 Johns. 1, 33; Burt *v.* McBain, 29 Mich. 260. As to allegation of truth, coupled with admissions, see Rice *v.* Withers, 9 Wend. 138; Rouse *v.* White, 25 N. Y. 170.

[50] Rex *v.* Hall, 1 Str. 416.

[51] Towns. 650, § 384.

[52] Towns. 644, § 379.

The editor of a newspaper is responsible for libels printed therein. Leuch *v.* Berger, 161 Wis. 564, 155 N. W. Rep. 148.

But making an oral statement in the presence of a newspaper reporter does not constitute a common-law libel. Schoepflin *v.* Coffey, 162 N. Y. 12, 56 N. E. Rep. 502. N. Y. Penal Law, § 1352, punishes the willful statement of libellous matter to a publisher.

[53] Fry *v.* Bennett, 28 N. Y. 324, affi'g 3 Bosw. 200.

[54] Respublica *v.* Davis, 3 Yates (Pa.), 128, s. c., 2 Am. Dec. 366.

[55] King *v.* Amphilt, 4 B. & C. 35.

[56] Folk. Stark. 573 (429), § 538.

a single copy, though to plaintiff's agent, shows publication.[57]

An open libel, with proof that it is written or signed in the hand of defendant, is *prima facie* evidence of publication by him.[58] Evidence that a manuscript in defendant's handwriting was printed and published, is evidence from which the jury may infer printing and publication by direction of defendant.[59] Publication of a handbill or *affiche* is *prima facie* shown by evidence that it was posted, so that it might have been seen and read, without anything to indicate that it was not.[60]

Publication of a letter addressed to a third person is *prima facie* shown by the fact that it passed through the mail, in course, and is produced unsealed on the trial.[61] Publication of a letter addressed to plaintiff himself may be *prima facie* shown by evidence that defendant read it to another.[62]

8. Place and Time of Publication.

Designation of a place, in the date of a libellous writing, is *prima facie* evidence that it was written there, as against the writer. Publication by defendant in a journal, wherever

[57] Duke of Brunswick *v.* Harmer, 14 Q. B. 185.

[58] Folk. Stark. 559 (417), § 530; Lawson *v.* Hicks, 38 Ala. 279, 81 Am. Dec. 49.

[59] Folk. Stark. 560 (418), § 531; Tarpley *v.* Blabey, 2 Bing. New Cas. 437.

But merely writing the libel does not constitute publication. Youmans *v.* Smith, 153 N. Y. 214, 47 N. E. Rep. 265.

[60] Towns. 639, § 372. And see Rice *v.* Withers, 9 Wend. 138.

[61] Warren *v.* Warren, 1 Cr., M. & R. 250, Towns. 639, § 374. See Chapter XVI, paragraph 6 of this vol.; Shipley *v.* Todhunter, 7 Carr. & P. 680.

The sending of a letter to the plaintiff's attorneys is a publication. Brown *v.* Elm City Lumber Co., 82 S. E. Rep. 961, L. R. A. 1915, E. 275, Ann. Cas. 1916, E. 631, 167 N. C. 9.

[62] McCoombs *v.* Tuttle, 5 Blackf. (Ind.) 431.

But merely mailing to the plaintiff a letter containing libelous matter does not constitute a publication thereof unless there is reason to believe that some person will open and read it before it reaches the plaintiff. Schaller *v.* Miller, 173 N. Y. App. Div. 998, 159 N. Y. Supp. 1140.

printed, and circulation at a place within the State, is evidence of publication at the latter place.[63] A variance in the date of publication is not material,[64] if defendant is not misled.

9. — Contents.

The libellous document must be produced, as the primary evidence of its contents. If it has been lost or destroyed, without the plaintiff's fault, it may be accounted for, and secondary evidence of the contents given,[65] unless it was a privileged communication.[66]

Publication in a book or newspaper having been brought home to defendant, any copy of the impression may be read in evidence; it is not necessary to produce or account for the identical copy referred to in the evidence of publication.[67] As against one liable merely as the writer of an article printed the original copy must be produced or accounted for.[68]

Secondary evidence must reproduce the words. The witness' conception of their effect, or the substance of the charge, is not sufficient.[69] But the witness may state the substance of the words, as far as he can recollect them.[70] If a copy is produced, evidence reasonably identifying it as corresponding to the one brought home to defendant, and published by him, is enough.[71]

[63] Commonwealth *v.* Blanding, 3 Pick. 304.

[64] Gates *v.* Bowker, 18 Vt. 23.

[65] Gates *v.* Bowker, 18 Vt. 23, 26; Rainy *v.* Bravo, L. R. 4 P. C. 287, s. c., 3 Moak's Eng. 194.

[66] Dawkins *v.* Rokeby, L. R. 8 Q. B. 255.

[67] See Southwick *v.* Stevens, 10 Johns. 443; Huff *v.* Bennett, 4 Sandf. 120, affi'd in 6 N. Y. 337; Simmons *v.* Holster, 13 Minn. 249.

A moving picture film may give rise to an action for libel. Merle *v.* Sociological Research Film Corp., 166 N. Y. App. Div. 376, 152 N. Y. Supp. 829.

[68] Adams *v.* Kelly, Ry. & M. M. 157. So of one who published by reading or singing the particular copy. Johnson *v.* Hudson, 7 Ad. & E. 233.

[69] Rainy *v.* Bravo (above).

[70] Id. It will be for the jury to say whether his recollection can be trusted. Id.; see paragraph 8. The rules as to refreshing memory have already been stated. Chapter XVI, paragraph 37 of this vol.; Huff *v.* Bennett, 6 N. Y. 337.

[71] Johnson *v.* Hudson, 7 Ad. &

Plaintiff may, either orally or in writing, abandon at the trial part of the libellous matter, provided the part remaining is actionable;[72] and may read the part remaining to show the meaning of the part relied on.[73]

Where only part of the libel is alleged, the fact that the part not alleged materially qualifies that alleged, although as qualified it is still libellous, is a variance.[74]

10. Meaning of Ambiguous Words.

Unless the court holds that the words are not capable of bearing the meaning assigned, extrinsic evidence is competent, and necessary, to show that on the occasion in question they did bear that meaning.[75] Plaintiff must satisfy the jury either that, under the circumstances, the words themselves fairly bore that meaning, or that the speaker intended, and the hearers understood, that meaning to be conveyed. For this purpose dictionaries and other such books of authority may be used;[76] evidence of defendant's known us-

E. 233; and see Southwick *v.* Stevens, 10 Johns. 443.

[72] Genet *v.* Mitchell, 7 Johns. 120; Gould *v.* Weed, 12 Wend. 12; Stow *v.* Converse, 4 Conn. 17, 28. According to some authorities, this cannot be done if the additional words change the meaning of those alleged. Towns. 622, § 365; Rutherford *v.* Evans, 6 Bing. 438.

[73] Genet *v.* Mitchell (above).

[74] Rainy *v.* Bravo, L. R. 4 P. C. 287, s. c., 3 Moak's Eng. 194.

[75] Rosc. N. P. 829, and cases cited. And see Wolcott *v.* Goodrich, 5 Cow. 714; Bullock *v.* Koon, 9 Id. 30; Sanderson *v.* Caldwell, 45 N. Y. 398. The court is not bound to take notice whether words spoken in a foreign country are slanderous there. Plaintiff should be prepared to prove the foreign law. Langdon *v.* Young, 33 Vt. 136; Bundy *v.* Hart, 46 Mo. 460, s. c., 2 Am. Rep. 525.

It is for the jury to determine whether the words complained of bear a libellous meaning, if they are ambiguous. Demos *v.* New York Evening Journal Pub. Co., 210 N. Y. 13, 103 N. E. Rep. 771.

Alleged defamatory words are to be given their ordinary meaning, Wright *v.* Great Northern R. Co. (Mo. App.), 186 S. W. Rep. 1085.

Evidence as to how the words were understood by the hearers is admissible. Jones *v.* Banner, 172 Mo. App. 132, 157 S. W. Rep. 967; Lemaster *v.* Ellis, 173 Mo. App. 332, 158 S. W. Rep. 904.

[76] Pow. Ev. 105.

Evidence of the meaning of technical or local terms is admissible.

ages of speech [77] may be given; the sense commonly attached to foreign, or cant, or slang phrases may be shown by the testimony of witnesses; [78] papers referred to in the words proved may be read; [79] and, in the case of slander, all the conversation of the party at the time is admissible.[80]

If plaintiff relies on extrinsic circumstances as putting the sting of a charge of crime into words not necessarily actionable in themselves, he must prove sufficient of those circumstances to raise a fair presumption that the conduct imputed might have been a criminal offense; but he need not show that it necessarily would have been.[81]

11. Their Application to the Plaintiff.

If the defamatory matter does not name plaintiff, extrinsic evidence is competent [82] and necessary [83] to supply

Herler *v.* Pierce, 50 Pa. Super. Ct. 568.

[77] See, on this subject, chapter V, paragraph 86 of this vol.

Other statements of the defendant are admissible to show the meaning of the one in question. State *v.* Howard, 169 N. C. 312, 84 S. E. Rep. 807.

[78] Wachter *v.* Quenzer, 29 N. Y. 547; Blakeman *v.* Blakeman, 31 Minn. 396, 18 N. W. Rep. 103.

[79] Nash *v.* Benedict, 25 Wend. 645.

[80] Beeson *v.* Gossard Co., 167 Ill. App. 561; Coleman *v.* Playsted, 36 Barb. 26. See Smith *v.* Miles, 15 Vt. 245, 249. The better opinion under the free rules of evidence now followed is, that a witness who heard the conversation, and who testifies to all the circumstances, may, in case of ambiguous words, be permitted to state the impression they made upon his mind at the time he heard them, but this impression is not sufficient to determine their meaning, unless the jury find that defendant intended them to be so understood. Compare Towns. 650, § 384, note in 3 Abb. New Cas. 233; Smith *v.* Miles, 15 Vt. 245, 249, REDFIELD, J. *Contra*, Pow. Ev. 100; Duke of Brunswick *v.* Harmer, 3 Carr. & K. 10; Weed *v.* Bibbins, 32 Barb. 315, and cases cited.

[81] See, for instance, Wilbur *v.* Ostrom, 1 Abb. Pr. N. S. 275; Case *v.* Buckley, 15 Wend. 327; Alexander *v.* Alexander, 9 Id. 141.

[82] Mix *v.* Woodward, 12 Conn.

[83] Id., Miller *v.* Maxwell, 16 Wend. 9; Patten *v.* Des Moines Register Co., 151 Iowa, 476, 131 N. W. Rep. 661; Hanson *v.* Globe Newspaper Co., 159 Mass. 293, 34 N. E. Rep. 462, 20 L. R. A. 856; Kenworthy *v.* Journal Co., 117 Mo. App. 327, 93 S. W. Rep. 882; Dunlap *v.* Sundberg, 55 Wash. 609, 104 Pac. Rep. 830, 133 Am. St. Rep.

the designation. For this purpose a subsequent publica-

262, 287; Parker *v.* Raymond, 3 Abb. Pr. N. S. 343, N. Y. Code Civ. Pro., § 535; Van Ingen *v.* Mail, etc., Pub. Co., 14 Misc. 326, 35 N. Y. Supp. 838, aff'd in 156 N. Y. 376, 50 N. E. Rep. 979; Corr *v.* Sun Printing & Pub. Assoc., 177 N. Y. 131, 135, 69 N. E. Rep. 288; Nunnally *v.* New Yorker Staats-Zeitung, 111 N. Y. App. Div. 482, 97 N. Y. Supp. 911, aff'd in 186 N. Y. 532, 78 N. E. Rep. 1108; Nunnally *v.* Tribune Ass'n, 111 N. Y. App. Div. 485, 97 N. Y. Supp. 908, aff'd 186 N. Y. 533, 78 N. E. Rep. 1108; Stokes *v.* Morning Journal Assoc., 66 N. Y. App. Div. 569, 73 N. Y. Supp. 245.

The authorities are at variance as to whether witnesses may testify that they understood that the plaintiff was the person referred to in the libel. Enquirer *v.* Johnston, 72 Fed. Rep. 443, 18 C. C. A. 628; Dexter *v.* Harrison, 146 Ill. 169, 34 N. E. Rep. 46; Prosser *v.* Callis, 117 Ind. 105, 19 N. E. Rep. 735; State *v.* Mason, 26 Or. 273, 38 Pac. Rep. 130, 46 Am. St. Rep. 629, 26 L. R. A. 779 (evidence admissible); Gribble *v.* Pioneer Press Co., 37 Minn. 277, 34 N. W. Rep. 30; Stokes *v.* Morning Journal Assoc., 66 App. Div. 569, 73 N. Y. Supp. 245 (evidence inadmissible).

1050. Whether this may be done by the testimony of those to whose knowledge it came, that they at the time understood defendant to be meant, is disputed. For the *negative*, see Gibson *v.* Williams, 4 Wend. 320; Van Vechten *v.* Hopkins, 5 Johns. 211, s. c., 4 Am. Dec. 339, and note; Maynard *v.* Beardsley, 7 Wend. 560. For the *affirmative*, see Russell *v.* Kelly, 44 Cal. 641, s. c., 13 Am. Rep. 169, 2 Whart. Ev., § 975. Compare paragraph 10, note. Where the publication was a picture proved by secondary evidence, the declarations of spectators made while looking at it, were held admissible to show whose portrait it was. Du Bost *v.* Beresford, 2 Camp. 511. The plaintiff may call his friends, or others acquainted with the circumstances, to state that on reading the libel they at once concluded that it was aimed at the plaintiff. It is not necessary that all the world should understand the libel; it is sufficient if those who knew the plaintiff can make out that he is the person meant. Enquirer Co. *v.* Johnston, 34 U. S. App. 607, 72 Fed. Rep. 443. Where it does not appear that the readers of the publication alleged to be libelous knew anything of the parties or of the circumstances save what they gathered from the publication, and thus stand in the same position with reference to the publication as the jurors, evidence as to the understanding of such readers as to the meaning of the publication is inadmissible. Hearne *v.* De Young, 119 Cal. 670, 52 Pac. Rep. 150, 499.

tion by the defendant, in which the plaintiff's name is mentioned, may be shown.[84]

12. Circulation.

Production and proof of one copy of a publication is not necessarily evidence that others were circulated.[85] But plaintiff may prove the circulation [86] or degree of notoriety given to defendant's print.[87] The fact of circulation of the report may be proved by producing a writing, or a publication of it made by a third person, provided there is evidence competent against defendant to connect him with it; otherwise not.[88]

13. Falsity.

If defendant relies on justification, plaintiff may show all the circumstances of the transaction charged, relevant to

[84] Russell *v.* Kelly, 44 Cal. 641, s. c., 13 Am. Rep. 169. Where a newspaper libel, not naming the plaintiff, is based upon articles naming the plaintiff, which were previously published on the same day in other newspapers, having a general circulation in the same community, the plaintiff is entitled to give such articles in evidence, when tending to prove the condition of the public mind and the means of information the public had, as attendant circumstances indicating that the defendant's article referred to the plaintiff. Van Ingen *v.* Mail & Express Pub. Co., 156 N. Y. 376, 50 N. E. Rep. 979.

[85] Watts *v.* Fraser, 7 Ad. & E. 223.

[86] Fry *v.* Bennett, 28 N. Y. 324, affi'g 3 Bosw. 200. And an article in defendant's paper stating its average circulation is competent against him. Fry *v.* Bennett, 1 Abb. Pr. 289, s. c., 4 Duer, 247, 651.

Circulation books of a newspaper are admissible to show the extent of the injury. Dalton *v.* Calhoun County Dist. Ct., 164 Iowa, 187, 145 N. W. Rep. 498, Ann. Cas. 1916 D. 695.

[87] Rice *v.* Withers, 9 Wend. 138.

It is competent to show on the question of damages the number of copies of the libel published and the fact that the matter became a general subject of discussion. Bigley *v.* National Fidelity, etc., Co., 94 Nebr. 813, 144 N. W. Rep. 810, 50 L. R. A. N. S. 1040.

[88] Schwartz *v.* Thomas, 1 Am. Dec. 479, s. c., 2 Wash. 167; Robertson *v.* Bennett, 44 Super. Ct. (J. & S.) 66, 71.

the question of his innocence;[89] including his own declarations made as part of the *res gestæ*.[90] The record of plaintiff's acquittal on a criminal prosecution for the same charge is not competent against defendant, if he was not privy to the prosecution.[91]

14. Malice.

The difference between what is called express or actual malice, and implied malice, is only a distinction of evidence. "Express malice" is malice shown by some affirmative proof beyond that afforded by the falsity of defamatory words; "implied malice" is that which is naturally inferred as a presumption of fact drawn by the law from the proof of the falsity of defamatory words uttered without privilege.[92]

[89] See Palmer *v.* Haight, 2 Barb. 210.

[90] Gandy *v.* Humphries, 35 Ala. 617; 2 Whart. Ev., § 1102.

[91] Corbley *v.* Wilson, 71 Ill. 209, s. c., 22 Am. Rep. 98.

[92] Huson *v.* Dale, 19 Mich. 17, s. c., 2 Am. Rep. 66; Viele *v.* Gray, 10 Abb. Pr. 1, s. c., 18 How. Pr. 550. The burden of proof of malice is on the plaintiff and is discharged by proof of publication, unless the occasion is one of privilege; and in that case the plaintiff must satisfy the jury of malice in fact by a preponderance of evidence. Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. Rep. 865. "The burden of proving actual malice, it is true, rested upon the plaintiff, but he was not necessarily required to introduce aside from the intrinsic evidence afforded by the libelous charge itself and the circumstances under which it was uttered, extraneous testimony concerning the state of mind or feeling of the members of the corporation toward him, although such evidence would have been admissible." Union Mutual Life Ins. Co. *v.* Thomas, 48 U. S. App. 575, 578–579, 83 Fed. Rep. 803. It is the general rule that the publication and all the circumstances attending and surrounding it, may be given in evidence upon the question of malice; and it may be shown that the defendant in publishing the article relied entirely upon the publication in another paper, and did not verify the report of that paper, as evidence touching the question of negligence or careless disregard of the rights of the plaintiff, notwithstanding the fact that the article published in such other paper was correct; and whether or not the method adopted by the defendant amounted to such disregard is matter for the jury under proper instruction by the court. Turner *v.* Hearst, 115 Cal. 394, 47 Pac. Rep. 129.

Where there is no privilege, this presumption conclusively dispenses with the necessity of extrinsic evidence of malice to sustain the action.[93] But evidence of express malice is competent, whether the communication be privileged or not.[94] For this purpose any act or language of the defendant (before suit brought), tending to prove malice on his part, in respect to the particular publication complained of, as distinguished from general ill will, is competent.[95] The fact that the false charges were published as true of defendant's own knowledge, is evidence of malice.[96] Animosity by or against a parent or

[93] King *v.* Root, 4 Wend. 113; Klinck *v.* Colby, 46 N. Y. 427, 431; White *v.* Nichols, 3 How. U. S. 266; Fry *v.* Bennett, 5 Sandf. 54, s. c., 9 N. Y. Leg. Obs. 330; Holmes *v.* Clisby, 121 Ga. 241, 48 S. E. Rep. 934, 104 Am. St. Rep. 103; Prewitt *v.* Wilson, 128 Iowa, 198, 103 N. W. Rep. 365; Lee *v.* Stanfill, 171 Ky. 71, 186 S. W. Rep. 1196. Malice in publishing a newspaper report of judicial, legislative or other official proceedings is in no case implied from the fact of publication. N. Y. L. 1854, p. 314, c. 130, § 1. Malice is presumed where the printed language charges the plaintiff with a felony, and in such case the action cannot be wholly defeated by evidence negativing malice. Cox *v.* Strickland, 101 Ga. 482, 28 S. E. Rep. 655.

[94] Fry *v.* Bennett, 28 N. Y. 324. When a publication is libelous *per se*, the falsity thereof and defendant's malice will be presumed, though both are alleged, where plaintiff does not base his right of action on such allegations. Thomas *v.* Bowen, 29 Ore. 258, 45 Pac. Rep. 768.

[95] Id., Rosc. N. P. 832; Littlejohn *v.* Greeley, 13 Abb. Pr. 41, further decisions, Id. 311, s. c., 22 How. Pr. 345.

Proof of falsity of the alleged libelous publication is evidence of malice. Crane *v.* Bennett, 177 N. Y. 106, 69 N. E. Rep. 274, 101 Am. St. Rep. 722; Cohalan *v.* New York Press Co., 212 N. Y. 344, 106 N. E. Rep. 115; Samuels *v.* Evening Mail Assoc., 9 Hun, 288, rev'd on dissenting opinion, 75 N. Y. 604; Burkhardt *v.* Press Pub. Co. (1st Dept.), 130 N. Y. App. Div. 22, 114 N. Y. Supp. 451.

Proof of actual ill will is admissible, as well as of such gross negligence or carelessness as to show a wanton disregard of the rights of others. Tim *v.* Hawes, 97 Misc. 30, 160 N. Y. Supp. 1096.

It may be shown that the defendant uttered the words out of hatred for the plaintiff. Doane *v.* Grew, 220 Mass. 171, 107 N. E. Rep. 620, L. R. A. 1915, C. 774, Ann. Cas. 1917, A. 338.

[96] Rosc. N. P. 830; Tim *v.* Hawes, 97 Misc. 30, 160 N. Y. Supp. 1096.

So, too, if the libel was published with reckless disregard of whether

guardian, or next friend, is not alone competent to show malice by or against the child or ward.[97]

To show malice evidence is competent [98] that defendant repeated substantially the same charge,[99] to any person,[1] and at

it was true or false. International & G. N. Ry. Co. *v.* Edmundson (Tex.), 185 S. W. Rep. 402.

[97] York *v.* Pease, 2 Gray, 282, 284. So, of a city editor's refusal to publish a retraction is not evidence of malice on the part of the proprietors. Edsall *v.* Brooks, 2 Robt. 414, s. c., 33 How. Pr. 191.

[98] This I understand to be the present rule in the courts of New York, and one well sustained by the object of all the rules that have been asserted on this subject, when we make due allowance for the new canons of pleading. But the authorities are very conflicting, the line of decision has constantly wavered, and well-considered decisions may be found to the contrary of almost every clause in the rule stated in the text.

[99] Beshiers *v.* Allen, 46 Okl. 331, 148 Pac. Rep. 141, L. R. A. 1915, E. 413; Downs *v.* Cassidy, 47 Mont. 471, 133 Pac. Rep. 106, Ann. Cas. 1015, B. 1155; Gill *v.* Ruggles, 95 S. C. 90, 78 S. E. Rep. 536. In an action for slander plaintiff is entitled to prove, as bearing upon the question of malice, other slanderous statements than those set forth in the complaint, made by defendant, imputing the same charge as that embodied in the words set forth. Enos *v.* Enos, 135 N. Y. 609, 32 N. E. Rep. 123; Botsford *v.* Chase, 108 Mich. 432, 66 N. W. Rep. 325; Cruikshank *v.* Gordon, 118 N. Y. 178, 23 N. E. Rep. 457. It is not necessary that such other statements shall be in the same words or substantially the same as those set forth; it is sufficient if they are a repetition of the same calumny. Enos *v.* Enos, 135 N. Y. 609, 32 N. E. Rep. 123. And they are admissible, whether spoken prior or subsequent to the beginning of the action. Barker *v.* Prizer, 150 Ind. 4, 48 N. E. Rep. 4. In an action for libel, subsequent publications similar in character to that complained of are admissible upon the question of malice. Owen *v.* Dewey, 107 Mich. 67, 65 N. W. Rep. 8. And this though there may be statements on the second publication looking toward other matters. Hearne *v.* De Young, 119 Cal. 670, 52 Pac. Rep. 150, 499. "It is the prevailing doctrine that the reiteration of a libel or slander after suit brought may be proved on the question of malice and damages, probably with this qualification, however, that the cause of action for the reiteration has been barred by the statute of limitations, or that the language subsequently reiterated is for some other reason not actionable." Turton *v.* New

[1] Root *v.* Lowndes, 6 Hill, 519; Bassell *v.* Elmore, 48 N. Y. 561, affi'g 65 Barb. 627.

any time before suit brought, even though statute barred by the lapse of time;[2] but not evidence of actionable words,[3] not statute barred,[4] imputing a substantially different charge[5] (unless they so refer to the charge in suit as to express direct evidence of the meaning and malice of defendant in making it);[6] nor of any words after suit brought.[7] A charge proved under this rule is not available as a ground of recovery, any further than, by showing malice it enhances exemplary damages for the publication alleged.[8]

Insulting acts, preceding or accompanying a defamatory publication, are competent on the question, and can be put in evidence of motive.[9] So are subsequent insulting acts relating to the same charge.[10]

York Recorder Co., 144 N. Y. 144, 150, 38 N. E. Rep. 1009. In an action for slander, evidence of an altercation so connected with the utterance of the alleged slanderous words as to form part of the *res gestæ* is admissible as bearing upon the question of malice. Provost *v.* Brueck, 110 Mich. 136, 67 N. W. 1114.

The New York rule seems to be contrary to that stated in the text, on the ground that to allow the plaintiff to prove reiteration of the libel or slander, each of which would be the subject of a separate suit, might in effect result in several recoveries for the same publication. Collier *v.* Postum Cereal Co., 150 N. Y. App. Div. 169, 134 N. Y. Supp. 847; Orsetti *v.* Bonetto, 163 N. Y. Supp. 417. *Contra*, O'Malley *v.* Illinois Pub., etc., Co., 194 Ill. App. 544.

Refusal to retract is admissible as evidence of malice. Stokes *v.* Morning Journal Assoc., 72 N. Y. App. Div. 184, 76 N. Y. Supp. 429.

[2] Titus *v.* Sumner, 44 N. Y. 266; Distin *v.* Rose, 69 N. Y. 122, 124.

[3] Rundell *v.* Butler, 7 Barb. 260.

[4] Root *v.* Lowndes (above).

[5] Howard *v.* Sexton, 4 N. Y. 157, 161; Titus *v.* Sumner, Id. 266, 270; Distin *v.* Rose, 69 Id. 122, 124; Taylor *v.* Kneeland, 1 Dougl. (Mich.) 67, 76; Giehl *v.* Winkler, 164 Ill. App. 358.

[6] Finnerty *v.* Tipper, 2 Camp. 72. For instance, a subsequent publication which identifies plaintiff. Mix *v.* Woodward, 12 Conn. 262, 287.

[7] Frazier *v.* McCloskey, 60 N. Y. 337, rev'g 2 Supm. Ct. (T. & C.) 266; Distin *v.* Rose, 69 N. Y. 122, 124. *Contra*, Miller *v.* Kerr, 2 McCord (S. C.), 285, s. c., 13 Am. Dec. 722; Johnson *v.* Brown, 57 Barb. 118; 1 Whart. Ev. 44, § 32.

[8] Williams *v.* Miner, 18 Conn. 464, 472, and cases cited.

[9] 1 Whart. Ev. 44, § 32; Bond *v.*

[10] Tate *v.* Humphrey, 2 Campb. 73 note; 1 Whart. Ev. 43, § 32.

A communication of the defamation to a third person, made by the hearer, if the natural and probably intended consequence of defendant's act, is competent to show the injury; and with it the damage caused by it may be shown.[11]

An answer of justification though withdrawn [12] or unsustained by proof, is not evidence of malice unless bad faith is shown.[13]

14a. Defendant's Wealth.

Evidence of the financial standing of the defendant is admissible to show the influence his word would have in the community.[14]

15. Action on Privileged Communication.

Where the communication, if made in good faith, is privileged, the burden is on plaintiff to show express malice, that is, actual wrongful motive. To carry this question to the jury it is not enough that the representations are consistent with malice; [15] the evidence must raise a probability of malice; and be more consistent with it than with the non-

Douglas, 7 C. & P. 626; Kean *v.* McLaughlin, 2 S. & R. 469. See C. *v.* A. B., 2 Weekly Notes, 291.

[11] Fowles *v.* Bowen, 30 N. Y. 20. And see paragraphs 3 and 17.

But the defendant is not liable for the repetition of defamatory words, without his authority, by persons over whom he has no control. Adams *v.* Cameron, 27 Cal. App. 27, 150 Pac. Rep. 1005, 151 Pac. Rep. 286.

[12] Wilson *v.* Robinson, 7 Q. B. Ad. & E. (N. S.) 68.

[13] Klinck *v.* Colby, 46 N. Y. 427, 437, 69 Id. 127. Otherwise at common law.

Otherwise if the answer was interposed maliciously and without probable cause for believing it true. Bellis *v.* Roberts, 52 Misc. 493, 102 N. Y. Supp. 575.

[14] Botsford *v.* Chase, 108 Mich. 432, 66 N. W. Rep. 325; Barkly *v.* Copeland, 74 Cal. 1, 5 Am. St. Rep. 413, 417, 15 Pac. Rep. 307; Brown *v.* Barnes, 39 Mich. 211; Hayner *v.* Cowden, 27 Ohio St. 292; Bennett *v.* Hyde, 6 Conn. 24; Buckley *v.* Knapp, 48 Mo. 152; Hosley *v.* Brooks, 20 Ill. 115; Humphries *v.* Parker, 52 Me. 502; Karney *v.* Paisley, 13 Iowa, 89; Adcock *v.* March, 8 Ired. Law, 360; Lewis *v.* Chapman, 19 Barb. 252; O'Malley *v.* Illinois Pub., etc., Co., 194 Ill. App. 544.

[15] Hart *v.* Gumpach, L. R. 4 P. C. 439, 460, s. c., 4 Moak's Eng. 138, 156.

existence of it.[16] But slight evidence is sufficient.[17] It is not necessary to prove it by extrinsic evidence. It may be inferred from the relation of the parties, the circumstances attending the publication, and even from the terms of the publication itself.[18] It cannot be inferred from its mere falsity,[19] unless there is evidence that defendant knew it to be false.[20] Nor is it necessarily inferred from severe denunciation in the words;[21] nor from circulating to obtain privileged signatures.[22]

If the privileged communication was a charge preferred for official action of a judicial nature, before any municipal, parochial, professional or other public body,[23] having authority to act upon the application,[24] plaintiff must show want of probable cause as well as malice.[25]

[16] Laughton *v.* Bishop of Sodor and Man, L. R. 4 P. C. 495, s. c., 4 Moak's Eng. 162, 174, and cases cited.

Malice in fact must be proved where the matter complained of is privileged. Lucas E. Moore Stave Co. *v.* Wells, 111 Miss. 796, 72 So. Rep. 228.

A scintilla of evidence is not sufficient. Bearce *v.* Bass, 88 Me. 521, 34 Atl. Rep. 411, 51 Am. St. Rep. 446.

[17] Fowles *v.* Bowen, 30 N. Y. 20.

[18] Gassett *v.* Gilbert, 6 Gray (Mass.), 94, 98; Andrews *v.* Gardiner, 168 N. Y. App. Div. 629, 154 N. Y. Supp. 486.

[19] Lewis *v.* Chapman, 16 N. Y. 369, rev'g 19 Barb. 252.

[20] Fowles *v.* Bowen, 30 N. Y. 20.

[21] Klinck *v.* Colby, 46 N. Y. 427. Nor from the act of sending a report to a newspaper of a privileged communication elsewhere delivered, as a public reply made in good faith to a public attack. Laughton *v.* Bishop, &c., L. R. 4 C. P. 495, 510, s. c., 4 Moak's Eng. 162, 175, and cases cited. If there were other evidence of malice, it would be proper to submit to the jury the question whether sending the report to the papers was in good faith or malicious. Id. Nor from defendant's advocate objecting at the trial to plaintiff proving facts material to him, nor from endeavoring to prove plaintiff's misconduct. Id.

Express malice may be inferred from the nature and tone of the publication. Andrews *v.* Gardiner, 168 N. Y. App. Div. 629, 154 N. Y. Supp. 486.

[22] Vanderzee *v.* M'Gregor, 12 Wend. 545; Streety *v.* Wood, 15 Barb. 105.

[23] Barrows *v.* Bell, 7 Gray, 301, 313; Remington *v.* Congdon, 2 Pick. 310, s. c., 13 Am. Dec. 431, and note.

[24] Hosmer *v.* Loveland, 19 Barb. 111.

[25] Howard *v.* Thompson, 21 Wend. 319; Viele *v.* Gray, 10 Abb.

16. Slander of Title.

To sustain an action for slander of title, whether of real [26] or personal [27] property, express malice must be shown. This is not proved by the falsity of injurious statements; [28] but there need not be direct proof of intention to injure. The intention may be inferred by the jury from false statements, exceeding the limits of fair and reasonable criticism, and recklessly uttered in disregard of the rights of those who might be affected by them.[29] If the words were used in the course of asserting defendant's claim of title, it is competent for him to show advice of counsel, as in case of an action for malicious prosecution.[30]

Special damage must be proved,[31] and must be alleged to be admissible.[32]

17. Damages.

A witness cannot be asked whether plaintiff has not sustained a general loss of reputation and suffered material injury in credit, in consequence of the words complained of.[33]

Pr. 1, 11, s. c., 18 How. Pr. 550; Streety *v.* Wood, 15 Barb. 105.

Evidence that the defendant was advised by counsel that the publication was proper negatives malice. Morah *v.* Steele, 157 N. Y. App. Div. 109, 141 N. Y. Supp. 868.

[26] Kendall *v.* Stone, 5 N. Y. 14; Fearon *v.* Fodera, 169 Cal. 370, 148 Pac. Rep. 200, Ann. Cas. 1916, D. 312.

[27] Like *v.* McKinstry 3 Abb. Ct. App. Dec. 62, s. c., 4 Keyes, 397, affi'g 41 Barb. 186.

[28] Like *v.* Mckinstry, (above).

[29] Gott *v.* Pulsifer, 122 Mass. 235, s. c., 23 Am. Rep. 322, 325; Hines *v.* Lumpkin, 19 Tex. Civ. App. 556, 47 S. W. Rep. 818; Andrew *v.* Deshler, 45 N. J. L. 167.

[30] See Like *v.* McKinstry (above); Bailey *v.* Dean, 5 Barb. 297.

[31] Kendall *v.* Stone, 5 N. Y. 14, rev'g 2 Sandf. 269; Bailey *v.* Dean, 5 Barb. 297; Le Messena *v.* Storm, 62 N. Y. App. Div. 150, 70 N. Y. Supp. 882.

[32] Gott *v.* Pulsifer, 122 Mass. 235, s. c., 23 Am. Rep. 322; Burkett *v.* Griffith, 90 Cal. 532, 27 Pac. Rep. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707; Le Messena *v.* Storm, 62 N. Y. App. Div. 150, 70 N. Y. Supp. 882; Wittemann *v.* Wittemann, 88 Misc. 266, 151 N. Y. Supp. 813.

[33] Herrick *v.* Lapham, 10 Johns. 281. And see chapter XLI, paragraph 9 of this vol.; Linehan *v.* Nelson, 197 N. Y. 482, 90 N. E. Rep. 1114, 35 L. R. A. N. S. 1119, 18 Ann. Cas. 831; Schomberg *v.* Walker, 132 Cal. 224, 64 Pac. Rep. 290. Similarly the plaintiff can-

Injury to feelings is a proper subject of consideration if other damages have been shown.[34] Alone it will not sustain an action.[35]

Actual damage need not be shown to sustain a verdict for exemplary damages.[36]

In *aggravation* of actual damages, plaintiff may give in evidence his own rank and condition in life, if in issue;[37] and for actual or exemplary damages, defendant's wealth

not testify as to the amount in which he has been damaged by the publication. Harriman *v.* Nonpareil Co., 132 Iowa, 616, 110 N. W. Rep. 33.

[34] Hamilton *v.* Eno, 16 Hun, 599, 601; Adams *v.* Cameron, 27 Cal. App. 625, 150 Pac. Rep. 1005, 151 Pac. Rep. 286; Compton *v.* Wilkins, 164 Ky. 634, 176 S. W. Rep. 36.

Evidence of th fact that the plaintiff is married and has children, their number and ages is admissible on the question of damages, to show enhanced mental suffering. Morey *v.* Morning Journal Assoc., 123 N. Y. 207, 25 N. E. Rep. 161, 20 Am. St. Rep. 730, 9 L. R. A. 621; Enos *v.* Enos, 135 N. Y. 609, 32 N. E. Rep. 123; Smith *v.* Hubbell, 142 Mich. 637, 106 N. W. Rep. 547; Enquirer Co. *v.* Johnston, 72 Fed. Rep. 443, 18 C. C. A. 628; Dennison *v.* Daily News Pub. Co., 82 Nebr. 675, 118 N. W. Rep. 568, 23 L. R. A. N. S. 362.

It has been held that the plaintiff in an action for slander may be asked how he was affected by the words. Bavington *v.* Robinson, 127 Md. 46, 95 Atl. Rep. 1067.

[35] Samuels *v.* Evening Mail Assoc., 6 Hun, 5.

[36] Fry *v.* Bennett, 9 Abb. Pr. 45, affi'd in 28 N. Y. 324; Washington Post Co. *v.* O'Donnell, 43 App. Cas. (D. C.) 215.

[37] Larned *v.* Buffinton, 3 Mass. 546, s. c., 3 Am. Dec. 185. And see Eastland *v.* Caldwell, 2 Bibb (Ky.), 21, s. c., 4 Am. Dec. 668. In an action for slander based upon words charging a married woman with unchastity, it is competent for plaintiff, as bearing upon the question of damages, to prove that she has a family of young children. Enos *v.* Enos, 135 N. Y. 609, 32 N. E. Rep. 123. Proof of the nature of the plaintiff's business, and that he is a married man, is competent to show the circumstances surrounding the plaintiff, and as bearing upon the hurtful tendency of the libel, and the general damage to which he was exposed. Morey *v.* Morning Journal Assoc., 123 N. Y. 207, 210, 25 N. E. Rep. 161.

The plaintiff may give evidence of his standing and prominence in the community. Saunders *v.* Post-Standard Co., 107 N. Y. App. Div. 84, 94 N. Y. Supp. 993.

and standing.[38] An unsuccessful plea of justification is not competent in aggravation, unless shown to have been made in bad faith;[39] nor is an unsuccessful effort to procure testimony in justification, unless shown to have been done in a manner aggravating the wrong.[40]

Special damage should be alleged in order to be proved;[41] and must be proved in case the words are not actionable *per se*.[42] The effect of the defamation on the conduct of a third person, may be proved by his own testimony,[43] but not by evidence of his declarations of his reason for an act, though made at the time.[44] The report causing special damage must be

[38] Hayner *v.* Cowden, 27 Ohio St. 292, s. c., 22 Am. Rep. 303; Bennett *v.* Hyde, 6 Conn. 24, 27; Lewis *v.* Chapman, 19 Barb. 252, rev'd, on other grounds, in 16 N. Y. 369; O'Malley *v.* Illinois Pub., etc., Co., 194 Ill. App. 544. Whether the evidence of wealth, etc., is to be directed to the time of the wrong or the time of the trial may, perhaps, depend on whether the true ground of allowing such evidence is punitory, or because of the influence supposed to attach to the utterance. See Bennett *v.* Hyde, 6 Conn. 24, 28.

[39] Distin *v.* Rose, 69 N. Y. 122, affi'g 7 Hun, 83. Compare Fero *v.* Ruscoe, 4 N. Y. 162.

[40] Ormsby *v.* Douglass, 37 N. Y. 477.

[41] Backus *v.* Richardson, 5 Johns. 476; Tobias *v.* Harland, 4 Wend. 537; Rosc. N. P. 832; McNamara *v.* Goldan, 194 N. Y. 315, 87 N. E. Rep. 440; O'Connell *v.* Press Pub. Co., 214 N. Y. 352, 108 N. E. Rep. 556; Dick *v.* Northern Pac. R. Co., 86 Wash. 211, 150 Pac. Rep. 8, Ann. Cas. 1971, A. 638.

[42] Brooker *v.* Coffin, 5 Johns. 188; Miller *v.* David, L. R. 9 C. P. 118, s. c., 43 L. J. C. P. 84; Shipman *v.* Burrows, 1 Hall, 399; Hallock *v.* Miller, 2 Barb. 630. And in that case must be shown to have occurred before suit brought. Keenholts *v.* Becker, 3 Den. 346. But special damages need not be alleged nor proved where the slanderous words are actionable *per se*. Trimble *v.* Tantlinger, 104 Iowa, 665, 74 N. W. Rep. 25, 69 N. W. Rep. 1045.

[43] Law *v.* Scott, 5 Harr. & J. (Md) 438.

[44] Ashley *v.* Harrison, 1 Esp. 48; Tilk *v.* Parsons, 2 C. & P. 201 (Best, C. J.). Whether loss of custom may be proved by general evidence of a falling off, without proof of loss of particular customers, compare Backus *v.* Richardson, 5 Johns. 476; Hartley *v.* Herring, 8 T. R. 130; Hallock *v.* Miller, 2 Barb. 630; Riding *v.* Smith, L. R. 1 Exch. Div. 91, 95, s. c., 16 Moak's Eng. 547.

connected with defendant by other evidence than its mere identity in substance with that which he published.[45]

18. Defense: Explaining the Words.

Defendant is entitled to have the whole of the alleged conversation or article put in evidence, and any document referred to in it.[46] If the article is in a newspaper, he is entitled to have read (as part of plaintiff's case) another part of the same newspaper, referred to in the article.[47] So defendant may show that, after uttering the words, he retracted or explained them in the same conversation, so as not to amount to slander, or that he adopted explanations made by another person, having the same effect.[48] If an apparent slander expressly refers to circumstances which show that no charge of crime was intended, defendant may prove those facts as giving the true import of the words as they were or ought to have been understood by the hearers; [49] but if the words were unequivocal, and intended and received as a charge of crime, evidence of facts which deprive the charge of that character, but which do not appear to have been known to the hearers, is not competent.[50] A

[45] Sewall *v.* Catlin, 3 Wend. 291; 1 Sedgw. on D. 7th ed. 148. See Miller *v.* David, L. R. 9 C. P. 118, s. c., 43 L. J. C. P. 84.

[46] Folk. Stark. 720 [548], § 725; Morehead *v.* Jones, 2 B. Monr. 210; Lodge *v.* Hampton, 116 Ill. App. 414; Ritschy *v.* Garrels (Mo. A.), 187 S. W. Rep. 1120; McLean *v.* Caverne, 175 Ill. App. 273.

[47] McLean *v.* Caverne, 175 Ill. App. 273; Folk. Stark. 720 [548], § 725. It is a rule of law essential to the liberty of the press that in all actions for libel every part of the paper must be read in order to collect its meaning. Best, C. J., Yrisarri *v.* Clement, 3 Bing. 432, 440.

[48] Trabue *v.* Mays, 3 Dana, 138.

[49] Williams *v.* Miner, 18 Conn. 464, 473; Smith *v.* Miles 15 Vt. 245, Redfield, J. Compare Dorland *v.* Patterson, 23 Wend. 422. But he must show that the facts *could* not have amounted to a crime. It is not enough to show a doubt. Laine *v.* Wells, 7 Wend. 175; Case *v.* Buckley, 15 Id. 327.

[50] Williams *v.* Miner (above); Dempsey *v.* Paige, 4 E. D. Smith, 218; Van Akin *v.* Caler, 48 Barb. 58; Stone *v.* Clark, 21 Pick. 51, 54.

Where the language is unequivocal, the defendant cannot testify as to his secret intention in using it. Shepard *v.* Brewer, 248 Mo.

previous article of plaintiff's, to which the matter complained of was an answer, may be put in evidence as explanatory of the subject, occasion, and intent of defendant's publication, although it be not legally a provocation or justification.[51]

19. Privileged Communication.

The relations between the parties to the communication may be shown by testimony or by their written contract, as most appropriate, without calling them as witnesses.[52] The manner as well as the occasion of the publication is admissible.[53] Where the privilege depends on the fairness of a report,[54] or relevancy of the communication to the proceeding,[55] the burden to show these facts is on defendant. If belief is relevant, defendant may testify to what was his belief at the time,[56] and to the communication previously made to him,[57] or to the conduct of plaintiff known to him,[58] which induced belief.

20. Justification.

Truth is a complete bar,[59] but to be admissible as a bar,

133, 154 S. W. Rep. 116; Beeson *v.* H. W. Gossard Co., 167 Ill. App. 561.

[51] Hotchkiss *v.* Lathrop, 1 Johns. 286.

[52] See Ormsby *v.* Douglass, 37 N. Y. 477.

Where the defendant claims the publication was privileged, the burden of proof is on him to show that the occasion was privileged. Brice *v.* Curtis, 38 App. Cas. D. C. 304, 38 L. R. A. N. S. 69, Ann. Cas. 1913, C. 1070.

[53] Folk. Stark. 684 [522], § 685.

[54] 1 Whart. Ev. 330, § 369.

[55] Marsh *v.* Ellsworth, 36 How. Pr. 532, s. c., 1 Sweeny, 52. And see Marsh *v.* Ellsworth, 50 N. Y. 309, affi'g 2 Sweeny, 589; Spooner *v.* Keeler, 51 N. Y. 527.

[56] See cases to paragraph 12 of chapter XXXIV of this vol.

[57] Lawler *v.* Earle, 5 Allen, 22.

[58] Bradley *v.* Heath, 12 Pick. (Mass.) 163.

[59] George *v.* Jennings, 4 Hun, 66; Cox *v.* Strickland, 101 Ga. 482, 28 S. E. Rep. 655. Otherwise, at common law, except in case of public officer or candidate. Commonwealth *v.* Morris, 1 Va. Cas. 175, s. c., 5 Am. Dec. 515; Commercial Pub. Co. *v.* Smith, 149 Fed. Rep. 704, 79 C. C. A. 410; Ferdon *v.* Dickens, 161 Ala. 181, 49 So. Rep. 888; Donaghue *v.* Gaffy, 53 Conn. 43, 2 Atl. Rep. 397;

it must be pleaded in some form,[60] so that plaintiff may have notice of what he has to meet; if not pleaded, truth is admissible, if at all, only in mitigation, as repelling the inference of malice.[61]

If plaintiff has proved only a part of the words alleged, defendant may, if he choose,[62] confine his justification to such part,[63] but he may read the part abandoned by plaintiff to show the meaning of the part relied on.[64]

The justification must establish the substance of the

Walford *v.* Herald Printing, etc., Co., 133 Ind. 372, 32 N. E. Rep. 929; Rutherford *v.* Paddock, 180 Mass. 289, 62 N. E. Rep. 381, 91 Am. St. Rep. 282; Holmes *v.* Jones, 121 N. Y. 461, 24 N. E. Rep. 701; Xavier *v.* Oliver, 80 App. Div. 292, 80 N. Y. Supp. 225.

But it is held in Pennsylvania (Burkhart *v.* North American Co., 214 Pa. 39, 63 Atl. Rep. 410), and in New Hampshire (Hutchins *v.* Page, 75 N. H. 215, 72 Atl. Rep. 689, 31 L. R. A. N. S. 132), that truth is not always a defense in actions for defamation, and that an action may lie for the malicious publication even of the truth.

[60] Feadon *v.* Dickens, 161 Ala. 181, 49 So. Rep. 888; Tingley *v.* Times Mirror Co., 151 Cal. 1, 89 Pac. Rep. 1097; Hanger *v.* Benua, 153 Ind. 642, 53 N. E. Rep. 942; Lanpher *v.* Clark, 149 N. Y. 472, 44 N. E. Rep. 182; Jacoby *v.* James, 136 N. Y. App. Div. 431, 120 N. Y. Supp. 981; Bergstrom *v.* Ridgway Co., 138 N. Y. App. Div. 178, 123 N. Y. Supp. 29; Lapezina *v.* Santangelo, 124 N. Y. App. Div. 519, 108 N. Y. Supp. 975; Huson *v.* Dale, 19 Mich. 17, s. c., 2 Am. Rep. 66; N. Y. Code Civ. Proc., § 536; Baker *v.* Wilkins, 3 Barb. 220. Unless the truth of the defamatory charge is pleaded in justification, the defendant cannot prove its truth, either in bar or in mitigation of damages. But this rule does not prevent the reception of proper evidence of good faith and honest belief in the truth of the charge, although such evidence may also tend to prove the truth of the publication. Atwater *v.* Morning News Co., 67 Conn. 504, 34 Atl. Rep. 865.

[61] Huson *v.* Dale (above). For the conflicting views on this question, see Treat *v.* Browning, 4 Conn. 408, s. c., 10 Am. Dec. 156, and cases cited; Alderman *v.* French, 1 Pick. 1, s. c., 11 Am. Dec. 114, 127, and n.

[62] According to Palmer *v.* Haight, 2 Barb. 210, he must. If plaintiff has proved other words not alleged, defendant may justify those. Warne *v.* Chadwell, 2 Stark. 457.

[63] Stow *v.* Converse, 4 Conn. 17, 28.

[64] Gould *v.* Weed, 12 Wend. 12. See paragraphs 9 and 10; Lodge *v.* Hampton, 116 Ill. App. 414.

charge justified,[65] though it need not be identical in letter and form.[66] The justification must be as broad as the charge,

[65] Sacchette *v.* Fehr, 217 Pa. 475, 66 Atl. Rep. 742. The defendant is not required to justify every word of the defamatory matter, but it is sufficient if the substance, gist, or sting thereof be justified, and immaterial variances and defects of proof upon minor matters will be disregarded. Hearne *v.* De Young, 119 Cal. 670, 52 Pac. Rep. 150, 499. Whether proof beyond a reasonable doubt is required to justify a charge of crime is disputed. See cases cited in notes to paragraph 31 of chapter XXVI of this vol. Also in the affirmative, Woodbeck *v.* Keller, 6 Cow. 118; Chalmers *v.* Shackell, 6 Carr. & P. 475; Dwinells *v.* Akin, 2 Ty. (Vt.) 75; Mix *v.* Woodward, 12 Conn. 262, 288; Lanter *v.* M'Ewen, 8 Blackf. (Ind.) 495; Tucker *v.* Call, 45 Ind. 31. The just rule in cases of justification of ordinary charges of crime is that stated in notes above referred to in chapter XXVI. Greater cogency of proof is requisite to justify punishment than to justify accusation, unless the accusation was made with actual malice, or was accompanied with a declaration of having proof. But, in those courts where proof beyond reasonable doubt is required, evidence falling short of that will avail in mitigation. In an action for libel for charging the commission of a crime, justification is established by a preponderance of evidence that the charge made is true; proof beyond a reasonable doubt is not necessary. Owen *v.* Dewey, 107 Mich. 67, 65 N. W. Rep. 8; Finley *v.* Widner, 112 Mich. 230, 70 N. W. Rep. 433.

[66] Andrews *v.* Vanduzer, 11 Johns. 38; Stow *v.* Converse, 4 Conn. 17, 33. Thus, under a charge of stealing a thing specified, evidence of stealing an entirely different article is not admissible. Eastland *v.* Caldwell, 2 Bibb, 21. But a charge of stealing "hogs" is justified by proof of stealing a hog, for here would be no surprise. Barr *v.* Gaines, 3 Dana, 258. Adultery with A. cannot be proved under justification alleging adultery with B. (Mathews *v.* Davis, 4 Bibb, 173); and illicit intercourse with a lover before marriage cannot be proved under justification of charge of being a "whore." Sheehey *v.* Cokley, 43 Iowa, 183, s. c., 22 Am. Rep. 236. So evidence of an attempt to commit a crime is not competent in proof of justification alleging the committing of the crime. Chapman *v.* Ordway, 5 Allen, 593; Fero *v.* Ruscoe, 4 N. Y. 162.

The libelous words cannot be justified by proof of misconduct other than that charged in the libel. Bergstrom *v.* Ridgway Co., 138 App. Div. 178, 123 N. Y. Supp. 29; Oakes *v.* Star Co., 119 N. Y. App. Div. 358, 104 N. Y. Supp. 244; Klaw *v.* New York Press Co., 144 N. Y. App. Div. 501, 129 N. Y. Supp. 224; Christianson *v.*

and if a statement of facts of aggravation,[67] as distinguished from matter of opinion, is part of the charge,[68] the justification must include them. If a slander charged that an act was done in another jurisdiction, which is not a crime at common law, defendant should be prepared with evidence of the laws of the place where it was done.[69]

The record of plaintiff's conviction for the crime charged, if not appearing to be based at all on defendant's testimony, is presumptive evidence in support of a justification,[70] but not conclusive.[71] Evidence of plaintiff's declarations tending to show his disposition to an offense of a particular kind is not competent to show that a specific offense of that kind was committed.[72]

In justifying a charge of perjury, the proceedings, if matter of record, must be proved by producing the record.[73] A variance in the date is not material.[74] The fact that the witness testified is *prima facie* evidence that he was sworn.[75]

O'Neil, 39 Misc. 11, 78 N. Y. Supp. 757.

[67] Helsham *v.* Blackwood, 11 C. B. 111.

The justification must be as broad as the charge. Grand Union Tea Co. *v.* Lord, 231 Fed. Rep. 390, 145 C. C. A. 384; Patten *v.* Harper's Weekly Corp., 93 Misc. 368, 158 N. Y. Supp. 70.

[68] See Baker *v.* Wilkins, 3 Barb. 220.

Where the libel consists of several charges, the defendant may justify as to any distinct charge. Farbenfabriken *v.* Beringer, 158 Fed. Rep. 802, 86 C. C. A. 62; Miller *v.* McDonald, 139 Ind. 465, 39 N. E. Rep. 159; Lanpher *v.* Clark, 149 N. Y. 472, 44 N. E. Rep. 182; Stock *v.* Keele, 86 N. Y. App. Div. 136, 83 N. Y. Supp. 133; Baldwin *v.* Genung, 70 N. Y. App. Div. 271, 74 N. Y. Supp. 835.

[69] Bundy *v.* Hart, 46 Mo. 460, s. c., 2 Am. Rep. 525. Compare Langdon *v.* Young, 33 Vt. 136; Van Anken *v.* Westfall, 14 Johns. 233.

[70] Maybee *v.* Avery, 18 Johns. 352; Cobb *v.* Oklahoma Pub. Co., 42 Okl. 314, 140 Pac. Rep. 1079.

[71] Id.

[72] Gillis *v.* Peck, 20 Conn. 228; and see Barthelemy *v.* People, 2 Hill, 248.

[73] Dwinells *v.* Aiken, 2 Tyler (Vt.), 75. As to the mode of proof, see Chapter XXIX. If before arbitrators, the submission is the best evidence of the jurisdiction of the arbitrators. Bullock *v.* Koon, 9 Cow. 30.

[74] Brooks *v.* Bemiss, 8 Johns. 455.

[75] Cass *v.* Anderson, 33 Vt. 182.

Materiality of the testimony may be presumed where the charge implied it and was so understood.[76] The allegation of knowledge of falsity is material.[77]

To justify a charge merely of bad repute, it is not necessary to prove the existence of grounds for such repute.[78]

The plea of justification puts the character of the plaintiff in issue, and evidence concerning his general character is admissible.[79] Where the pleadings in an action for the recovery of damages for a slander imputing unchastity to an unmarried female, raise an issue as to the character of the plaintiff, she may prove, as a part of her case, that, by the speech of people, her reputation is good.[80] The defendant has the right to show that the plaintiff's general character is bad, but cannot in so doing, go into proof of special acts, or resort to general rumors by hearsay. Where the plaintiff's character is in issue, he has a right to sustain it by proof of his general good character.[81]

21. Former Adjudication.

A judgment in malicious prosecution is admissible as a bar to an action for defamation in the same making of the charge,[82] but not to an action for repeating it after the termination of the prosecution.[83]

[76] Butterfield *v.* Buffum, 9 N. H. 156, 163.

[77] Spooner *v.* Keeler, 51 N. Y. 527. As to proof of the corrupt intent, see M'Kinly *v.* Rob, 20 Johns. 351; Hopkins *v.* Smith, 3 Barb. 599.

It is essential to show that the plaintiff knew that the testimony was false. Johnson *v.* Featherstone, 141 Ky. 793, 133 S. W. Rep. 753.

[78] Cooper *v.* Greeley, 1 Den. 347. Compare Stone *v.* Cooper, 2 Id. 293. As to showing a house to be a disorderly house, see Lanpher *v.* Clark, 149 N. Y. 472, 44 N. E. Rep. 182.

[79] Ratcliffe *v.* Louisville Courier Journal Co., 99 Ky. 416, 36 S. W. Rep. 177.

[80] White *v.* Newcomb, 25 App. Div. 397.

[81] Cox *v.* Strickland, 101 Ga. 482, 28 S. E. Rep. 655.

[82] Sheldon *v.* Carpenter, 4 N. Y. 579; Tidwell *v.* Witherspoon, 21 Fla. 359, 58 Am. Rep. 665.

[83] Rockwell *v.* Brown, 36 N. Y. 207. See also chapter XLI, of this vol.

22. Mitigation.

Under the new procedure, defendant may prove, in mitigation, facts which tend to disprove malice,[84] although they do tend to prove the truth of the charge, and although he has not alleged the truth of the charge in his answer.[85] Circumstances in mitigation must be pleaded in order to be admissible.[86] Facts and circumstances which induced defendant to suppose the charge true when he made it, he may prove for the purpose of showing the absence of actual malice, provided they were actually known to him when he made the charge;[87] otherwise not.[88] The terms

[84] Defendant may not show in mitigation circumstances not known to him when he spoke or published the words complained of. Barkly *v.* Copeland, 74 Cal. 1, 5 Am. St. Rep. 413, 15 Pac. Rep. 307; Morey *v.* Morning Journal Assoc., 123 N. Y. 207, 25 N. E. Rep. 161.

The defendant may testify to absence of malice, or bad motive. Arnott *v.* Standard Assoc., 57 Conn. 86, 17 Atl. Rep. 361, 3 L. R. A. 69; Henn *v.* Horn, 56 Ohio St. 442, 47 N. E. Rep. 248.

The defendant may show that the libel was published by mistake. Jones *v.* Polk, 190 Ala. 243, 67 So. Rep. 577.

The intoxication of the defendant at the time of the utterance of the slanderous words may be shown. Alderson *v.* Kahle, 73 W. Va. 690, 80 S. E. Rep. 1109, 51 L. R. A. N. S. 1198, Ann. Cas. 1916, E. 561.

[85] Bush *v.* Prosser, 11 N. Y. 347, rev'g 13 Barb. 221; Bisbey *v.* Shaw, 12 N. Y. 67. This is the New York rule. N. Y. Code Civ. Proc., § 535. In some other jurisdictions the rule formerly contended for by part of the authorities is still followed, viz., that where a defendant does not justify he may mitigate damages in two ways only: First, by showing the general bad character of the plaintiff; and, second, by showing any circumstances which tend to disprove malice, but do not tend to prove the truth of the charge. Sheahan *v.* Collins, 20 Ill. 325, 328.

[86] Willover *v.* Hill, 72 N. Y. 36, 38. Compare Hotchkiss *v.* Porter, 30 Conn. 414, 420.

[87] Even though not legal evidence of its truth. Gilman *v.* Lowell, 8 Wend. 573.

The defendant may prove the source from which its representa-

[88] Palmer *v.* Matthews, 162 N. Y. 100, 56 N. E. Rep. 501; King *v.* Root, 4 Wend. 113, affi'g 7 Cow. 613. Notoriety can raise a presumption that he knew them. *Per* Learned, P. J. Hatfield *v.* Lasher, 17 Hun, 23, 27.

and conditions on which defendant directed the libelous matter to be published, are admissible in evidence on his behalf, as part of the *res gestæ*, showing his motives.[89] But evidence of confidential publication, though thus admissible, in mitigation, does not repel the legal presumption of malice.[90]

If the defamation only purported to be a publication of rumors, defendant may show in mitigation that such rumors really existed.[91] It is competent to show in mitigation, that the article complained of was copied, and published as copied, from another paper,[92] or that defendant, before

tive secured the information upon which the libelous matter was founded. Kohn *v.* P. & D. Pub. Co., 169 N. Y. App. Div. 580, 155 N. Y. Supp. 455.

He may show that he made a careful investigation of the charges and believed in their truth. McDonald *v.* Press Pub. Co., 174 N. Y. App. Div. 463, 161 N. Y. Supp. 356.

[89] Taylor *v.* Church, 8 N. Y. (4 Seld.) 452. So of his declarations to bystanders accompanying an act of defamation. Mezzara's Case, 2 City H. Rec. 113.

[90] Mason *v.* Mason, 4 N. H. 110.

[91] Skinner ads. Powers, 1 Wend. 451; Richards *v.* Richards, 2 M. & Rob. 557. But this does not repel the legal presumption of malice. Mason *v.* Mason, 4 N. H. 110. For a convenient clue to the conflicting authorities on the admissibility of evidence of the previous existence of common report to the same effect as oral slander, see, in the *negative*, Mapes *v.* Weeks, 4 Wend. 659; Graham *v.* Stone, 6 How. Pr. 15; Brown *v.* Orvis, Id. 376; Anthony *v.* Stephens, 1 Mo. 254, s. c., 13 Am. Dec. 497, and note; Pease *v.* Shippen, 80 Penn. St. 513, s. c., 21 Am. Rep. 116, and cases cited; *affirmative*, Case *v.* Marks, 20 Conn. 248, 251; Cook *v.* Barkley, 1 Pennington (N. J.), 169, s. c., 2 Am. Dec. 343; Calloway *v.* Middleton, 2 A. K. Marsh. (Ky.) 372. The admissibility of such evidence under these rulings will often depend on whether it is offered to repel the legal implication of malice, or to rebut plaintiff's evidence of actual malice; whether it is offered in connection with other evidence tending to show that defendant in good faith published that which, upon reasonable grounds, he believed to be true; or whether it is offered on the issue of character; and whether the fact was specially pleaded, or the evidence offered under the general issue. In any case the evidence should show that this circulation was before defendant commenced the wrong. See Bailey *v.* Hyde, 3 Conn. 463, 466; Thompson *v.* Nye, 16 Q. B. 175.

[92] Ingalls *v.* Morrissey, 154 Wis.

publication, had seen substantially the same matter in other newspapers, he believing it to be true;[93] but not another publication which did not influence his,[94] nor that plaintiff had recovered against another.[95] The defendant is not entitled to prove, in mitigation of damages, that the plaintiff has commenced actions against various other newspapers,[96] has recovered a judgment against another newspaper for the publication of the same libel.[97]

Plaintiff's general character in the respect in which it was impugned by the charge, may be shown in mitigation of damages.[98] But if the words are actionable *per se*, and there is no attempt to prove special damage, it is not competent to show that plaintiff's reputation was not injured.[99]

When good faith is material, defendant may testify in his

632, 143 N. W. Rep. 681, Ann. Cas. 1915, D. 899; McDonald *v.* Woodruff, 2 Dill. C. Ct. 244. And the other paper will be admissible. Mullett *v.* Hulton, 4 Esp. 248.

[93] Hewett *v.* Pioneer-Press Company, 23 Minn. 178, s. c., 23 Am. Rep. 680. Compare Coleman *v.* Southwick, 9 Johns. 45, s. c., 6 Am. Dec. 253.

But not the existence of a general rumor. Hearne *v.* De Young, 132 Cal. 357, 64 Pac. Rep. 576.

[94] De Severinus *v.* New York Evening Journal Pub. Co., 150 N. Y. App. Div. 342, 134 N. Y. Supp. 664; Sanders *v.* Mills, 6 Bing. 213. Compare Talbutt *v.* Clark, 2 M. & Rob. 312.

[95] Creevy *v.* Carr, 7 Carr. & P. 64.

[96] Palmer *v.* New York News Pub. Co., 31 App. Div. (N. Y.) 210; Fay *v.* Brockway Co., 176 N. Y. App. Div. 255, 162 N. Y. Supp. 1030.

[97] Bennett *v.* Salisbury, 45 U. S. App. 636, 78 Fed. Rep. 769.

[98] Anthony *v.* Stephens, 1 Mo. 254, s. c., 13 Am. Dec. 497, and note; Pattangall *v.* Mooers, 113 Me. 412, 94 Atl. 561; Wood *v.* Custer, 86 Kan. 387, 121 Pac. Rep. 355, 38 L. R. A. N. S. 1176; Sun Printing, etc., Assoc. *v.* Schenck, 98 Fed. Rep. 925, 40 C. C. A. 163; Dennis *v.* Johnson, 47 Minn. 56, 49 N. W. Rep. 383; Nellis *v.* Cramer, 86 Wis. 337, 56 N. W. Rep. 911; Georgia *v.* Bond, 114 Mich. 196, 72 N. W. Rep. 232.

[99] Titus *v.* Sumner, 44 N. Y. 266.

But it has been held that the defendant may show the general bad character of the plaintiff. Osterheld *v.* Star Co., 146 N. Y. App. Div. 388, 131 N. Y. Supp. 247; Dinkelspiel *v.* New York Evening Journal Pub. Co., 91 N. Y. App. Div. 96, 86 N. Y. Supp. 375.

own behalf, to his knowledge or belief at the time,[1] and his intent in making the communication.[2]

The fact that slanderous words were spoken in the heat of passion, which was provoked by plaintiff, may be shown in mitigation,[3] but not in bar.[4] Neither the fact of defendant's enmity to plaintiff,[5] nor words and acts between one party and the father or guardian of the other, are alone competent evidence of provocation.[6]

A retraction, as distinguished from an attempt merely to construe in a different sense from that fairly imputable, is admissible in mitigation.[7]

23. Plaintiff's Character.

Defendant (although he may have pleaded[8] and given

[1] Goodman *v.* Stroheim, 36 Super. Ct. (4 J. & S.) 216, s. p., 30 N. Y. 625. *Contra*, Lawyer *v.* Loomis, 3 Supm. Ct. (T. & C.) 393; (see 3 Id. 412).

[2] Compare chapter XXXIV, paragraphs 8 and 12, and chapter XLI, paragraph 12 of this vol.

[3] Alderson *v.* Vahle, 73 W. Va. 690, 80 S. E. Rep. 1109, 51 L. R. A. N. S. 1198, Ann. Cas. 1916, E. 561; Jauch *v.* Jauch, 50 Ind. 135, s. c., 19 Am. Rep. 699; Sheffill *v.* Van Deusen, 15 Gray, 485. For which see chapter XL, paragraph 13 of this vol. For provocation of libel, see Child *v.* Homer, 13 Pick. 503; Laughton *v.* Bishop of Sodor, &c., L. R. 4 P. C. 495, s. c., 4 Moak's Eng. 162; Finnerty *v.* Tipper, 2 Camp. 72; Maynard *v.* Beardsley, 7 Wend. 560, affi'g 4 Id. 336.

[4] Mousler *v.* Harding, 33 Ind. 176, s. c., 5 Am. Rep. 195. The limits of evidence of provocation are the same as in case of assault.

[5] Craig *v.* Catlet, 5 Dana, 323.

[6] Underhill *v.* Taylor, 2 Barb. 348.

[7] Hotchkiss *v.* Oliphant, 2 Hill, 510. "We are not prepared to say that a retraction published in good faith after the commencement of an action for libel can under no circumstances be proved in mitigation of damages. Where the suit was commenced as this was, without any request for the retraction of the libelous charge, if the defendant promptly after the suit was commenced published a fair and full retraction, we see no reason to doubt that such publication could be proved and submitted to the jury to be considered by them upon the question of exemplary damages." Turton *v.* New York Recorder Co., 144 N. Y. 144, 150, 38 N. E. Rep. 1099.

[8] N. Y. Code Civ. Proc., § 535; Georgia *v.* Bond, 114 Mich. 196, 72 N. W. Rep. 232.

evidence in [9] justification) may show in mitigation,[10] that at and before the time of the defamation,[11] plaintiff's character was generally bad,[12] or was bad in respect to the general nature and subject-matter of the offense charged.[13]

[9] Id.; Hamer *v.* McFarlin, 4 Den. 509.

[10] Parkhurst *v.* Ketchum, 6 Allen, 406. Evidence of the plaintiff's bad character with reference to any of the defamatory charges is admissible under a general denial in mitigation of actual damages. Candrian *v.* Miller, 98 Wis. 164, 73 N. W. Rep. 1004. "While there has been some contrariety of opinion, or at least of expression upon this question, it must now be regarded as settled both upon principle and the great weight of authority that, in this class of cases, the defendant may introduce evidence in mitigation of damages, that the plaintiff's general reputation as a man of moral worth, is bad, and may also show that his general reputation is bad with respect to that feature of character covered by the defamation in question, and as to the admission of such evidence, it is immaterial whether the defendant has simply pleaded the general issue, or has pleaded a justification as well as the general issue. Sickra *v.* Small, 87 Me. 493, 494; 33 Atl. Rep. 9. But see 1 Whart. Ev. 67, § 53; Willover *v.* Hill, 72 N. Y. 36, 38. The value, with the jury, of evidence of plaintiff's bad character generally lies in its tending (with evidence indicating defendant's good faith), to show the absence of malice, rather than in tending to show that plaintiff has not been injured.

[11] Hamer *v.* McFarlin (above).

[12] Wood *v.* Custer, 86 Kan. 387, 121 Pac. Rep. 355, 38 L. R. A. N. S. 1176; Cunningham *v.* Underwood, 116 Fed. Rep. 803, 53 C. C. A. 99; Davis *v.* Hearst, 160 Cal. 143, 116 Pac. Rep. 530; Holmes *v.* Jones, 147 N. Y. 59, 41 N. E. Rep. 409, 49 Am. St. Rep. 646; Lowe *v.* Herald Co., 6 Utah, 175, 21 Pac. Rep. 991; Early *v.* Winn, 129 Wis. 291, 109 N. W. Rep. 633; Wuensch *v.* Morning Journal Assoc., 4 N. Y. App. Div. 110, 38 N. Y. Supp. 605; Osterheld *v.* Star Co., 146 N. Y. App. Div. 388, 131 N. Y. Supp. 247; Dinkelspiel *v.* New York Evening Journal Pub. Co., 91 N. Y. App. Div. 96, 86 N. Y. Supp. 375; Hamer *v.* McFarlin, 4 Den. 509; Paddock *v.* Salisbury, 2 Cow. 811; Eastland *v.* Caldwell, 2 Bibb (Ky.), 21. But evidence of general report that the plaintiff is guilty of the imputed offense is inadmissible for the purpose of reducing damages. Powers *v.* Cary, 64 Me. 9; Mapes *v.* Weeks, 4 Wend. 659; Stone *v.* Varney, 7 Met. 86. And evidence of the defendant's suspicions, however excited, cannot be received for such purpose. Watson *v.* Moore, 2 Cush. 134; Sickra *v.* Small, 87 Me. 493, 497, 33 Atl. Rep. 9.

[13] Wood *v.* Custer, 86 Kan.

24. Mode of Proving Character.

The legal meaning of "character," as used in the law of defamation, is reputation. It is proved by a witness, who testifies (1) to a residence in the community or neighborhood of plaintiff, such as to satisfy the court that he has reasonable means of knowing plaintiff's character; (2) that he knows the general character of the plaintiff,[14] or that he knows his character in respect to the subject-matter involved; and (3) that such character is bad.

For this purpose neither particular reports,[15] nor the particulars giving rise to bad reputation,—such as a specific offense,[16] or consorting with criminals,[17]—are admissible except as brought out by cross-examination as showing foundation of bad character.[18] Bad character, subsequent to the defamation, is inadmissible.[19]

387, 121 Pac. Rep. 355, 38 L. R. A. N. S. 1176; Sun Printing, etc., Assoc. *v.* Schenck, 98 Fed. Rep. 925, 40 C. C. A. 163; Dennis *v.* Johnson, 47 Minn. 56, 49 N. W. Rep. 383; Nellis *v.* Cramer, 86 Wis. 337, 56 N. W. Supp. 911; Georgia *v.* Bond, 114 Mich. 196, 72 N. W. Rep. 232; Treat *v.* Browning, 4 Conn. 408, s. c., 10 Am. Dec. 156, and cases cited; Clark *v.* Brown, 116 Mass. 504; REDFIELD, J., in 1 Am. L. Reg. N. S. 171, note. *Contra*, Hatfield *v.* Lasher, 81 N. Y. 246. It is not necessary to show reputation of having committed the precise legal offense. Bridgman *v.* Hopkins, 34 Vt. 532, s. c., 1 Am. L. Reg. N. S. 168.

[14] See People *v.* Mather, 4 Wend. 229. The omission of this preliminary question is not fatal if objection is not made. Senter *v.* Carr, 15 N. H. 351. It is character in the neighborhood where the person resides. Conkey *v.* People, 1 Abb. Ct. App. Dec. 418.

[15] Wolcott *v.* Hall, 6 Mass. 514, s. c., 4 Am. Dec. 173.

[16] Pattangall *v.* Mooers, 113 Me. 412, 94 Atl. Rep. 561; Tribune Assoc. *v.* Follwell, 107 Fed. Rep. 646, 46 C. C. A. 526; Bergstrom *v.* Ridgway Co., 138 N. Y. App. Div. 178, 123 N. Y. Supp. 29; Thibault *v.* Sessions, 101 Mich. 279, 59 N. W. Rep. 624; Davis *v.* Hamilton, 88 Minn. 64, 92 N. W.

[17] Lamos *v.* Snell, 6 N. H. 413.

[18] Sawyer *v.* Eifert, 2 Nott & McCord (S. C.), 511, s. c., 10 Am. Dec. 633.

[19] Hoag *v.* Cooley, 33 Kan. 387, 6 Pac. Rep. 585. Even though it could not have been caused by a belief of the charge made by defendant. Douglass *v.* Tousey, 2 Wend. 352.

Character many years[20] before the time in question is not irrelevant, for shown once to exist it is presumed to continue; [21] but where the period is very remote, it is in the discretion of the court to require some connection to be shown between the present and former character.[22] The mode of proving business credit has already been stated.[23]

25. Rebuttal.

If defendant has given evidence of plaintiff's bad character,[24] plaintiff may rebut with contrary evidence.[25] Evidence of bad character in rebuttal of evidence of good character is equally confined to reputation.[26] An attack by proof of specific acts, does not let in evidence of general good character.[27]

Rep. 512; Pier *v.* Speer, 73 N. J. L. 633, 64 Atl. Rep. 161; Pfister *v.* Milwaukee Free Press, 139 Wis. 627, 121 N. W. Rep. 938; Cudlip *v.* New York Evening Journal Pub. Co., 180 N. Y. 85, 72 N. E. Rep. 925. A party must defend his reputation in general, but not in detail; he cannot be expected to try particular facts not in issue. Peterson *v.* Morgan, 116 Mass. 350.

[20] So held of the lapse of ten years. Parkhurst *v.* Ketchum, 6 Allen, 406. So held of twelve years. Tompkins *v.* Wadley, 3 Supm. Ct. (T. & C.) 424, 428.

[21] See Graham *v.* Chrystal, 2 Abb. Ct. App. Dec. 263.

[22] Tompkins *v.* Wadley (above); Lake *v.* Peple, 1 Park. Cr. 495.

[23] Chapter XXXIV, paragraph 6 of this vol.

[24] Inman *v.* Foster, 8 Wend. 602.

[25] Bavington *v.* Robinson, 127 Md. 46, 95 Atl. Rep. 1067. According to some authorities he may do this when defendant, without giving evidence as to character, has given evidence of the truth of a charge of a criminal offense whether in mitigation, or in justification (Charlton *v.* Walton, 6 Carr. & P. 385; Harding *v.* Brooks, 5 Pick. 244; Redfield, J., in 1 Am. L. Reg. N. S. 171); at least if the evidence of truth has been only presumptive (Sheehey *v.* Cokley, 43 Iowa, 183, s. c., 22 Am. Rep. 236). *Contra*, Houghtaling *v.* Kilderhouse, 1 N. Y. 530; Shipman *v.* Burrows, 1 Hall, 399; Matthews *v.* Huntley, 9 N. H. 146. Compare Sprague *v.* Craig, 51 Ill. 288, 294; Lecky *v.* Bloser, 24 Penn. 401, 407.

[26] Reg. *v.* Rowton, 11 Jur. N. S. 325.

[27] Ziter *v.* Merkel, 24 Penn. St. 408; Bamfield *v.* Massey, 1 Campb. 460; Pratt *v.* Andrews, 4 N. Y. 493.

CHAPTER XLIV

ACTIONS FOR BREACH OF PROMISE OF MARRIAGE

1. Mutual promises.
2. Letters.
3. Affection.
4. Breach.
5. Damages.
6. *Defense.*
7. — justification of breach.
8. — mitigation.

1. Mutual Promises.

Plaintiff must show mutual promises,[28] but no particular form of words nor even any express promise is necessary.[29] A common intent, mutually accepted is enough; and this may be inferred from declarations and accepted attentions such as usually characterize an engagement of marriage.[30] Neither

[28] McKee *v.* Mouser, 131 Ia. 203, 108 N. W. Rep. 228; Cates *v.* McKinney, 48 Ind. 562, 17 Am. Rep. 768; Kelly *v.* Riley, 106 Mass. 339, s. c., 8 Am. Rep. 336.

A complaint alleging a contract to the effect that "in consideration that the plaintiff, who was then a sole and unmarried woman, at the request of the defendant agreed and would marry him on such request, the defendant promised the plaintiff to so marry her on his request," is unenforcible as lacking in mutuality; the promise of the defendant being a mere option to marry the plaintiff, without any corresponding obligation on his part. Smythe *v.* Greacen, 100 N. Y. App. Div. 275, 91 N. Y. Supp. 450.

In Hughes *v.* Water, 63 Misc. 199, 116 N. Y. Supp. 1, the complaint alleging that defendant agreed to marry the plaintiff at her request and further alleging such request and demand and defendant's refusal, was held sufficient.

[29] Homan *v.* Earle, 53 N. Y. 267, affi'g 13 Abb. Pr. N. S. 402, and cases cited; Wightman *v.* Coates, 15 Mass. 1; McKee *v.* Mouser, 131 Iowa, 203, 108 N. W. Rep. 228; Rime *v.* Rater, 108 Iowa, 61, 78 N. W. Rep. 835; Edge *v.* Griffen, 63 S. W. Rep. (Tex. Civ. A.) 148.

"It is sufficient to establish the contract if the conduct and language of the parties were such as clearly to indicate a mutual engagement and understanding to marry." Adams *v.* Byerly, 123 Ind. 369, 24 N. E. Rep. 130.

[30] Id.; Rosc. N. P. 468; Yale *v.* Curtis, 151 N. Y. 598, 45 N. E. Rep. 1125; Connolly *v.* Bollinger, 67 W. Va. 30, 67 S. E. Rep.

evidence of courtship[31] nor evidence of mutual attachment[32] is alone enough to prove mutual promise; but these facts are relevant, and, in connection with other evidence, may be enough.[33] The promise on the part of the woman may be inferred from slighter circumstances than would suffice to

71; Judy *v.* Sterrett, 52 Ill. App. 265, affirmed 153 Ill. 94, 38 N. E. Rep. 633.

The acts and conduct of the parties both at the time of and subsequent to the alleged promise are pertinent in support of the inference. McKee *v.* Mouser, 131 Iowa, 203, 108 N. W. Rep. 228.

Direct evidence of the promise is not required. The promise is often made out by evidence of the attention paid by one party to the other, exchange of presents, purchase of clothing, and preparation for the marriage relation. Rime *v.* Rater, 108 Iowa, 61, 78 N. W. Rep. 835.

Upon a denial by the defendant of the alleged promise to marry it is competent for the plaintiffs to prove the circumstances under which she and the defendant had been thrown into intimate, daily association with each other for some time prior to the alleged engagement, and any facts which tend to show the state of his feelings toward her at the time of the alleged promise. Anderson *v.* Kirby, 125 Ga. 62, 54 S. E. Rep. 197, 114 Am. St. Rep. 185, 5 Ann. Cas. 103.

[31] Walmsley *v.* Robinson, 63 Ill. 41, s. c., 14 Am. Rep. 111; and see Cates *v.* McKinney, 48 Ind. 562, 567.

Mere courtship or even an intention to marry is insufficient to constitute the contract. Yale *v.* Curtiss, 151 N. Y. 598, 45 N. E. Rep. 1125.

[32] Lecky *v.* Bloser, 24 Penn. St. 401.

A promise cannot be inferred from evidence of defendant's apparent intimacy and expression of affection, where the plaintiff lived with him as his mistress. Bleiler *v.* Koons, 132 Pa. St. Rep. 401, 19 Atl. Rep. 140.

[33] Button *v.* Hibbard, 82 Hun (N. Y.), 289, 31 N. Y. Supp. 483; Southard *v.* Rexford, 6 Cow. 254; Hubbard *v.* Bonesteel, 16 Barb. 360; Hotchkiss *v.* Hodge, 38 Barb. 117, and cases cited.

Evidence as to courtship, the oft repeated promise to marry and the seduction of the plaintiff is admissible to prove the contract. Sramek *v.* Sklenar, 73 Kan. 450, 85 Pac. Rep. 566.

A promise of marriage made in consideration of sexual intercourse is void. Judy *v.* Sterrett, 153 Ill. 94, 38 N. E. Rep. 633, affirming 52 Ill. App. 265; Connolly *v.* Bollinger, 67 W. Va. 31, 67 S. E. Rep. 71, 20 Ann. Cas. 1350. But a promise of marriage may be found independently. Button *v.* Hibbard (above).

show that on the part of the man.[34] It is not necessary to allege or prove that she is a woman, that she was of marriageable age, that she was unmarried, or that she was otherwise competent to enter into a contract of marriage; but her capacity to enter into such contract will be presumed in the absence of averment and proof to the contrary.[35]

The parties' conversations on the subject of marriage, though some time prior to the alleged promise, are admissible as tending to show their relation at the time of the promise.[36] So, defendant's declarations to plaintiff that he would make a good home for her, are admissible.[37]

[34] Such, for instance, as her making no objections at the time of the offer, and from her receiving defendant's visits as a suitor. Wells. *v.* Padgett, 8 Barb. 323, and cases cited; Rosc. N. P. 468.

But equivocal acts and declarations on the part of the plaintiff should not be allowed to go to the jury as proof of her promise. Cates *v.* McKinney, 48 Ind. 562, 17 Am. Rep. 738.

[35] Tucker *v.* Hyatt, 144 Ind. 635, 639, 41 N. E. Rep. 1047, 43 N. E. Rep. 872.

The burden rests with the defendant to plead and prove the plaintiff's incapacity. Chapman *v.* Brown, 192 Mo. App. 78, 179 S. W. Rep. 774.

A married man can unquestionably enter into a promise of marriage and thereby become responsible in damages to the other contracting party, provided such other party was ignorant of the fact of his marriage; otherwise there is no consideration to support the contract. Davis *v.* Pryor, 3 Ind. Terr. 396, 58 S. W. Rep. 660. See also Cammerer *v.* Muller, 60 Hun, 578, 14 N. Y. Supp. 511.

Under the rule which permits the introduction of testimony as to all the relations between the parties in corroboration of direct evidence of an express contract, testimony as to a previous engagement to marry is not rendered incompetent by some legal impediment to the enforcement of the promise if it were made the basis of an action. Parrish *v.* Parrish, 67 Kan. 323, 72 Pac. Rep. 844.

[36] Connolly *v.* Bollinger, 67 W.

[37] Button *v.* McCauley, 1 Abb. Ct. App. Dec. 282, s. c., 5 Abb. Pr. N. S. 29, rev'g 38 Barb. 413.

"Any representations which the defendant may have made to the plaintiff concerning his wealth, whether true or false, would be admissible for the purpose of explaining the situation, surroundings, acts, conduct, and the relation of the parties towards each other at the time the marriage contract, if any, was made." Humphrey *v.* Brown, 89 Fed. Rep. 640.

Plaintiff's declarations to a third person, in the absence of defendant, that defendant had made a promise of marriage, are not competent in her favor [38] to prove defendant's promise, but they may be competent as tending to prove plaintiff's.[39] Plaintiff's acts of preparation for the wedding,[40] and her declarations made as part of the *res gestæ*,

Va. 30, 67 S. E. Rep. 71, 20 Ann. Cas. 1350; Button *v.* Hibbard, 82 Hun, 289, 31 N. Y. Supp. 483; Hook *v.* George, 108 Mass. 324, 331. While a promise of marriage made to a woman known to be married is void, yet evidence of the relations of the parties prior to the time the woman obtained a divorce, is relevant upon the question whether a promise of marriage was subsequently made to her. Smith *v.* Hall, 69 Conn. 651, 38 Atl. Rep. 386.

Proof of facts referred to by the defendant while paying attention to the plaintiff as having caused or increased his love for her and of his declarations as to the influence which such facts have had upon him, are competent as tending to corroborate evidence of a specific promise. Anderson *v.* Kirby, 125 Ga. 62, 54 S. E. Rep. 197, 114 Am. St. Rep. 185, 5 Ann. Cas. 103.

So evidence of the defendant's expressed intention to marry the plaintiff is admissible to support testimony that he carried that intention into effect by making the contract. Lohner *v.* Coldwell, 15 Tex. Civ. App. 444, 39 S. W. Rep. 591.

[38] Walmsley *v.* Robinson, 63 Ill. 41, s. c., 14 Am. Rep. 111. "The plaintiff, as courts and juries must ever be constituted, has certainly advantage enough of the defendant without giving her the opportunity of fabricating, by her acts and declarations, without his consent or knowledge, evidence to make a case against him. It would place almost any man at the mercy of an evil-disposed and designing woman." McPherson *v.* Ryan, 59 Mich. 39, 26 N. W. Rep. 321. See also Osmun *v.* Winters, 25 Or. 260, 35 Pac. Rep. 251; Liebrandt *v.* Sorg, 133 Cal. 571, 65 Pac. Rep. 319. Nor is that of her parent. Lawrence *v.* Cooke, 56 Me. 187, 195.

[39] See Cates *v.* McKinney, 48 Ind. 562, 566, s. c., 17 Am. Rep. 768.

Evidence of a declaration by the plaintiff after the breach, tending to show her feelings toward the defendant before the breach, is admissible against her. Robinson *v.* Craver, 88 Iowa, 383, 55 N. W. Rep. 492.

But declarations are inadmissible when they relate merely to the state of feelings after the breach. Edwards *v.* Edwards, 93 Iowa, 127, 61 N. W. Rep. 413.

[40] Wilcox *v.* Green, 23 Barb. 639. A resolution of a society to which both the plaintiff and defendant

of such acts, and showing the matrimonial intent, are competent in her favor.[41] Such declarations are competent evidence of a promise in her favor, although made in defendant's absence.[42]

The time of the promise is not material;[43] but the time fixed by the promise, if any, for its performance, is mate-

in an action for breach of promise of marriage were members, congratulating them upon their supposed marriage, and directing a copy thereof to be forwarded to them, is admissible in proof of the promise of marriage, since it tends, though remotely, to show a relationship consistent with the plaintiff's claim of an engagement. Osmun *v.* Winters, 30 Ore. 177, 46 Pac. Rep. 780.

Preparation for the marriage relation taken in connection with other circumstances is often enough to justify an inference of a promise of marriage. Rime *v.* Rater, 108 Iowa, 61, 78 N. W. Rep. 835.

But evidence of such preparations is not admissible to establish a promise by the defendant when made without his knowledge or assent. Dunlap *v.* Clark, 25 Ill. App. 573.

[41] Id. Unless made after rupture. Wetmore *v.* Mell, 1 Ohio St. 26.

[42] Lecky *v.* Bloser, 24 Penn. St. 401, 406.

[43] Fowler *v.* Martin, 1 Supm. Ct. (T. & C.) 377. A promise to marry generally is, in law, a promise to marry within a reasonable time; and although an admission of a special promise to marry at a particular time should be proved in evidence, it may be left to a jury to infer from the circumstances, a more general promise. Potter *v.* Deboos, 1 Stark. 82; Phillips *v.* Crutchley, 1 Moore & P. 239, Rosc. N. P. 468; Adams *v.* Byerly, 123 Ind. 369, 24 N. E. Rep. 130; Bowes *v.* Sly, 96 Kan. 388, 152 Pac. Rep. 17.

The exact date when the plaintiff and defendant first met or when the contract was finally consummated, does not constitute the essence of the contract, and hence on appeal it is unnecessary to reconcile conflicting evidence in relation thereto. Walters *v.* Stockberger, 20 Ind. App. 277, 50 N. E. Rep. 763.

Where, between the date of the agreement and that appointed for the ceremony, the man without intervening fault on his part, develops a disease which renders it improper or unsafe for him to marry, he is entitled to have the ceremony postponed until the result of the disease is determined. Trammell *v.* Vaughan, 158 Mo. 214, 59 S. W. Rep. 79, 81 Am. St. Rep. 302, 57 L. R. A. 854.

When no time of performance is alleged, the plaintiff must aver readiness and willingness to carry out her part of the contract. Garmong *v.* Henderson, 112 Me. 383, 92 Atl. Rep. 322.

rial.[44] A condition or contingency expressed is material;[45] unless it be such as is implied by law.[46]

2. Letters.

The fact of correspondence is competent without producing the letters.[47] To prove the contents the originals must

[44] Martin *v.* Patton, 1 Litt. (Ky.) 233.

When the time and place are fixed and the defendant fails to appear, he is guilty of a breach. Grubbs *v.* Pence, 73 S. W. Rep. 785, 24 Ky. L. 2183.

[45] Conrad *v.* Williams, 6 Hill, 444, Rosc. N. P. 469.

It has been held that a promise by the defendant to marry the plaintiff as soon as his mother recovered from an illness, is an unconditional promise to marry to be performed at an uncertain time in the future, and a refusal by the defendant to marry the plaintiff while his mother was still sick constitutes a breach, and the plaintiff is not required to wait until the time for performance arrives before bringing suit, but can treat the contract as broken and bring suit at once. Anderson *v.* Kirby, 125 Ga. 62, 54 S. E. Rep. 197, 114 Am St. Rep. 185, 5 Ann. Cas. 103; Lauer *v.* Schmidt, 25 Ind. App. 54, 56 N. E. Rep. 108.

The doctrine of anticipatory breach laid down in Hochester *v.* De la Tour, 2 E. & B. 678, 75 E. C. L. 678, 20 Eng. L. & Eq. 157, 118 Reprint, 922, 6 E. R. C. 576, 22 L. J. (Q. B.) 455, applies to contracts to marry. Anderson *v.* Kirkby, 125 Ga. 62, 54 S. E. Rep. 197, 114 Am. St. Rep. 185, 5 Ann. Cas. 103; Zatlin *v.* Davenport, 71 Ill. App. 292; Lewis *v.* Tapman, 90 Md. 294, 45 Atl. Rep. 459.

[46] Waters *v.* Bristol, 26 Conn. 398, 403.

[47] Conaway *v.* Shelton, 3 Ind. 334.

Where oral evidence is admitted as to the contents of letters which are not produced, the construction of such correspondence is properly a matter for the jury. Barber *v.* Geer, 31 Tex. Civ. App. 176, 71 S. W. Rep. 792.

Letters couched in affectionate language sent by the defendant to the plaintiff stating business deals had by him, are admissible as bearing upon the defendant's reason for writing the plaintiff telling her about his business affairs. Geiger *v.* Payne, 102 Iowa, 581, 69 N. W. Rep. 554, 71 N. W. Rep. 571.

Letters written by the plaintiff to a man other than the defendant, which may be characterized as silly but which are not improperly indelicate and in no way compromise the character of the writer, which could be the only purpose of their introduction in evidence, are properly excluded. Burke *v.* Shaver, 92 Va. 345, 23 S. E. Rep. 749.

be produced, or be accounted for to let in secondary evidence. Destruction may be explained.[48] Plaintiff's putting in evidence one or more of defendant's letters does not require her to put in others;[49] and putting in evidence his letters does not require her to put in hers, nor raise a presumption that they contain evidence against her.[50] The other side may read the connected parts of the correspondence. But one who has put in evidence, properly, a letter of the other, which shows that it was written in answer to a previous letter, may also put in the previous one as tending to explain the answer.[51] A letter written by plaintiff's parent with her knowledge and without dissent, is competent against her, though she would not be answerable for particular expressions in it.[52]

The rules for proving handwriting have already been stated.[53]

[48] Fowler *v.* Martin, 1 Supm. Ct. (T. & C.) 377; and see chapter XXI, paragraph 2 of this vol.

So the plaintiff was allowed to testify to the contents of a letter which she claimed the defendant had written her, where the reason she assigned for destroying it was her fear that other servants where she was employed might discover it. Shroeder *v.* Michel, 98 Mo. 43, 11 S. W. Rep. 314.

As the presumption is that a letter properly deposited in the United States mail reaches its destination and is received by the addressee in due course, it is competent for the plaintiff to prove the contents of a letter so posted showing an offer on her part to comply with the contract and a demand that the defendant should perform his promise. Shields *v.* Lewis, 49 S. W. Rep. 803, 20 Ky. L. 1601.

[49] GRAY, J., Stone *v.* Sanborn, 104 Mass. 319, s. c., 6 Am. Rep. 238.

[50] Law *v.* Woodruff, 48 Ill. 399.

[51] Trischet *v.* Hamilton Ins. Co., 14 Gray, 456; Strong *v.* Strong, 1 Abb. Pr. N. S. 233.

The failure of the defendant to answer the plaintiff's letters in which she affirmed that he had promised to marry her is not sufficient corroboration of the plaintiff's testimony of the existence of a mutual promise. Weidemann *v.* Walpole, [1891] 2 Q. B. 534.

[52] Rosc. N. P. 470.

The plaintiff's letters to the defendant referring to her pregnancy by him and not even intimating the existence of any promise of marriage are insufficient proof of a promise. Roe *v.* Doe, 11 N. Y. Supp. 236.

[53] Chapter XXI, paragraphs 5, etc., of this vol.; Hoitt *v.* Moulton, 21 N. H. (1 Fost.) 586.

3. Affection.

Witnesses who are shown to have had sufficient opportunities of observation,[54] may testify whether or not in their opinion, one party was sincerely attached to the other.[55] The engagement having been proved, plaintiff's declarations of present emotion of affection and happiness, as distinguished from narratives of the past; and, its breach having been proved, her similar declarations of pain and distress; are competent in her favor upon principles already stated.[56]

4. Breach.

Breach may be proved, either by evidence of another marriage by defendant, making performance impossible; [57]

If letters are admittedly in the possession of the defendant's attorney, no notice to produce them is necessary. Hill *v.* Houser (Tex. Civ. A.), 115 S. W. Rep. 112.

[54] This is essential. Tompkins *v.* Wadley, 3 Supm. Ct. (T. & C.) 424.

The conclusions of witnesses drawn from their observation of the conduct of the parties are insufficient to prove a promise of marriage. It is necessary to show the facts observed. Vanderpool *v.* Richardson, 52 Mich. 335, 17 N. W. Rep. 936.

Testimony by members of the plaintiff's family of their understanding of the relationship of the parties, will not be considered as evidence of a promise to marry. Nolan *v.* Glynn, 142 N. W. Rep. (Iowa), 1029.

[55] M'Kee *v.* Nelson, 4 Cow. 355; Sprague *v.* Craig, 51 Ill. 288; Rime *v.* Rater, 108 Iowa, 61, 78 N. W. Rep. 363.

[56] Chapter XXXI, paragraph 44 of this vol.; SWAYNE, J., in 9 Wall. 405.

[57] Sheahan *v.* Barry, 27 Mich. 217, 223, Rosc. N. P. 469; Frost *v.* Knight, L. R. 7 Ex. 111, rev'g L. R., 5 Ex. 322; Bracken *v.* Dinning, 141 Ky. 265, 132 S. W. Rep. 425.

Where the agreement was that the defendant would marry the plaintiff upon the death of his divorced wife, and the defendant married another woman, it was held that in legal contemplation he had unqualifiedly renunciated his contract with the plaintiff, the argument that his divorced wife had not yet died, that his new wife might die before the divorced wife and that it was entirely possible therefore to perform his contract with the plaintiff, being without merit. Brown *v.* Odill, 104 Tenn. 250, 56 S. W. Rep. 840, 78 Am. St. Rep. 914, 52 L. R. A. 660.

The entering into a contract

or by an express breaking off of the engagement; [58] or by circumstantial evidence.[59] Evidence of defendant's declarations, that he never intended to marry the plaintiff, is admissible.[60] Plaintiff need not prove a tender of marriage

by one who knows that he has a loathsome venereal disease entitles the other party to sue for a breach immediately after learning of this condition. Trammell *v.* Vaughan, 158 Mo. 214, 59 S. W. Rep. 79, 81 Am. St. Rep. 302, 51 L. R. A. 854.

But no action may be maintained by one who is aware of a disability on the part of the other. Gulick *v.* Gulick, 41 N. J. L. 13; Cammerer *v.* Muller, 60 Hun, 578, 14 N. Y. Supp. 511; Davis *v.* Pryor, 112 Fed. Rep. 275, 50 C. C. A. 579.

"A contract to marry is coupled with the implied condition that both the parties shall remain in the enjoyment of life and health, and, if the condition of the parties has so changed that the marriage state would endanger the life or health of either, a breach of the contract is excusable." Sanders *v.* Coleman, 97 Va. 690, 34 S. E. Rep. (Va.) 621, 47 L. R. A. 581.

In Smith *v.* Compton, 67 N. J. L. 548, 52 Atl. Rep. 386, 58 L. R. A. 480, it was stated that nothing will excuse the defendant for a breach but such a disease as renders the consummation of the marriage contract impossible.

[58] Cherry *v.* Thompson, L. R., 7 Q. B. 573.

Where one tells his affianced he will never marry, she may treat this as a breach and sue thereon at once. Johnson *v.* Blondahl, 90 Wash. 625, 156 Pac. Rep. 561.

If the promise is once broken, an offer to renew it is no defense. Wanecek *v.* Kratky, 69 Neb. 770, 96 N. W. Rep. 651, 66 L. R. A. 798.

[59] Hubbard *v.* Bonesteel, 16 Barb. 360.

A breach may be established by showing delay without adequate excuse, and actions which completely ignore the existence of a contract to marry. Campbell *v.* Arbuckle, 4 N. Y. Supp. 29, 123 N. Y. 662, 26 N. E. Rep. 750.

A refusal to marry may be inferred from a breaking off of the intimate relationship without explanation. Bowes *v.* Sly, 96 Kan. 388, 152 Pac. Rep. 17.

A mere request for a postponement of the ceremony for an expressed and reasonable cause is not as a matter of law a breach of the contract. Walters *v.* Stockberger, 20 Ind. App. 277, 50 N. E. Rep. 763.

A repudiation of the contract must be shown by the words, acts, conduct or deed of the party who repudiates it. Walters *v.* Stockberger, 20 Ind. App. 277, 50 N. E. Rep. 763.

[60] Green *v.* Spencer, 3 Mo. 225, 227.

on her part.[61] Slight evidence of a request is sufficient,[62] when any is necessary.[63]

5. Damages.

In enhancement of damages, the pecuniary circumstances of the defendant,[64] the announcement of engagement, and

[61] Johnson *v.* Caulkins, 1 Johns. Cas. 116; Willard *v.* Stone, 7 Cow. 22; Boyhill *v.* Norton, 175 Mo. 190, 74 S. W. Rep. 1024.

Where the time and place are fixed for the performance of the contract, it is sufficient if the plaintiff avers that she was there, ready and willing to perform. Grubbs *v.* Pence, 73 S. W. Rep. 785, 24 Ky. L. 2183.

[62] Kniffen *v.* McConnell, 30 N. Y. 285; Green *v.* Spencer, 3 Mo. 225, 228.

Where the testimony tends to show that a certain time in the future was fixed for the marriage and the subsequent conduct of the man indicates that it is not to be carried out by him, this may be considered tantamount to a refusal, and will authorize an action for the breach without proof of an actual request by plaintiff and refusal by defendant. Birum *v.* Johnson, 87 Minn. 362, 92 N. W. Rep. 1.

[63] Martin *v.* Patton, 1 Litt. (Ky.) 233.

[64] Casey *v.* Gill, 154 Mo. 181, 55 S. W. Rep. 219; McKenzie *v.* Gray, 143 Iowa, 112, 120 N. W. Rep. 71; Lawrence *v.* Cooke, 56 Me. 187, 193. As distinguished from those of his family. Miller *v.* Rosier, 31 Mich. 475, 478. Evidence of the defendant's general reputation, as to wealth, is competent upon the question of damages. Chellis *v.* Chapman, 125 N. Y. 214, 26 N. E. Rep. 308.

Such evidence is admitted to show the position in life which the plaintiff would have assumed had the promise been fulfilled, and not for the purpose of showing the defendant's ability to pay damages. Stratton *v.* Dole, 45 Nebr. 472, 63 N. W. Rep. 875.

Evidence of the defendant's reputed wealth and circumstances is competent, but proof of ownership of specific property is not. Smith *v.* Compton, 67 N. J. L. 548, 52 Atl. Rep. 386, 58 L. R. A. 480. See Birum *v.* Johnson, 87 Minn. 362, 92 N. W. Rep. 1 (holding that proof as to the value of his actual possessions is competent, as well as proof of his reputed wealth). See also to the same effect, McKee *v.* Mouser, 131 Iowa, 203, 108 N. W. Rep. 228; Vierling *v.* Binder, 113 Iowa, 337, 85 N. W. Rep. 621. But see Johansen *v.* Modahl, 4 Nebr. (Unof.) 411, 94 N. W. Rep. 532 (where it is said that evidence of reputed wealth is too remote).

The defendant's interest in the estate of his father is a proper subject of inquiry. Rime *v.* Rater, 108 Iowa, 61, 78 N. W. Rep. 835.

the advanced preparations for wedding at the time of breach, are competent;[65] and an unsuccessful attempt by defendant, either in pleading[66] or in evidence,[67] to rest his defense in whole or in part on charges of bad character or improper conduct on the part of plaintiff, is competent in aggravation.[68]

[65] Reed *v.* Clark, 47 Cal. 194, 199.

Where it is established that the defendant told the plaintiff that he would build a house for them on lots he owned, and that they had planned the house which he said he intended to build, it was held that it was not error to advise the jury that in estimating the damages they might consider "the money value or worldly advantage the marriage would have given the plaintiff." Jacoby *v.* Stark, 205 Ill. 34, 68 N. E. Rep. 557.

The fact that the plaintiff is unable to provide an independent home for herself has been said to be a proper consideration for the jury as being a circumstance which may be deemed to have been in the minds of the parties when the contract was made. Birum *v.* Johnson, 87 Minn. 362, 92 N. W. Rep. 1.

Damages may include full compensation for the pain, mortification and wounded feelings occasioned by the breach. Graves *v.* Rivers, 123 Ga. 224; Liese *v.* Meyer, 143 Mo. 547, 45 S. W. Rep. 282; Rime *v.* Rater, 108 Iowa, 61, 78 N. W. Rep. 835.

Mental anguish as a result of the breach is apparent and need not be proved. Finkelstein *v.* Barnett, 17 Misc. 564, 40 N. Y. Supp. 694.

[66] Thorn *v.* Knapp, 42 N. Y. 474.

Punitive damages may be awarded where the defendant pleads this maliciously. Hively *v.* Golnick, 123 Minn. 498, 144 N. W. Rep. 213, 49 L. R. A. N. S. 757, Ann. Cas. 1915, A. 295.

[67] Kniffen *v.* McConnell, 30 N. Y. 285; Liese *v.* Meyer, 143 Mo. 547, 45 S. W. Rep. 282.

Irrespective of the defendant's good or bad faith in interposing the plea. Kaufman *v.* Fye, 99 Tenn. 145, 42 S. W. Rep. 25.

[68] Fleeford *v.* Barnett, 11 Colo. App. 77, 52 Pac. Rep. 293; Broyhill *v.* Norton, 175 Mo. 190, 74 S. W. Rep. 1024. To the contrary, unless bad faith is shown, are Powers *v.* Wheatley, 45 Cal. 113; Reed *v.* Clark, 47 Cal. 194, 203. And this is the rule now recognized in libel. Chapter XLII, paragraph 14 of this vol. "If the conduct of the defendant in violating his promise is characterized by a disregard of the plaintiff's feelings, or reputation; if he has placed her, or induced her to place herself in a false position, or to forego temporal advantages; if the breach of his promise is unjustifiable; if he spreads upon the record matters in defense of the action which are scandalous and tend to reflect discredit upon the plaintiff, or stain her reputation,

Seduction, under the promise, if pleaded,[69] is competent in aggravation of damages.[70] Loss of health is special damage, not admissible unless alleged.[71]

then these are all circumstances, which may be considered by the jury and may be availed of by them to enhance the damages." Chellis *v.* Chapman, 125 N. Y. 214, 222, 26 N. E. Rep. 308. Insulting letters addressed by defendant to plaintiff after the commencement of the action are admissible. Osmun *v.* Winters, 30 Ore. 177, 186, 46 Pac. Rep. 780. But see Leavitt *v.* Cutler, 37 Wis. 46; Greenleaf *v.* McColley, 14 N. H. 303. Where seduction is alleged there is no presumption of guilt or innocence. The issue is a question of fact, which is to be determined by the preponderance of evidence. Liese *v.* Meyer, 143 Mo. 547, 45 S. W. Rep. 282. Evidence that plaintiff had been, for several years, a member of the church, is admissible on her standing and reputation. Ferguson *v.* Moore, 98 Tenn. 342, 39 S. W. Rep. 341.

The fact that the defendant knew that he was suffering from a contagious venereal disease may be offered in aggravation. Trammell *v.* Vaughan, 158 Mo. 214, 59 S. W. Rep. 79, 81 Am. St. Rep. 302, 51 L. R. A. 854.

But evidence offered for the same purpose is incompetent where it was shown that a venereal disease was contracted from the defendant during the engagement. Churan *v.* Sebesta, 131 Ill. App. 330.

[69] Graves *v.* Rivers, 123 Ga. 224, 51 S. E. Rep. 318. Otherwise not admissible if the statute gives an action for seduction alone. Cates *v.* McKinney, 48 Ind. 562, s. c., 17 Am. Rep. 768.

Seduction must be specially pleaded. Herriman *v.* Layman, 118 Iowa, 590, 92 N. W. Rep. 710; Osmun *v.* Winters, 25 Or. 260, 35 Pac. Rep. 250.

Contra, Poehlmann *v.* Kertz, 204 Ill. 418, 68 N. E. Rep. 467, affirming 105 Ill. App. 249; Jennette *v.* Sullivan, 63 Hun, 361, 18 N. Y. Supp. 266.

If the defendant promised to marry the plaintiff in consideration of her consent to an illicit relationship, no action could be maintained for the breach of such contract, because of the illegality of the consideration. It is a question for the jury whether such is the fact or whether the seduction took place after the contract to marry was made. Sramek *v.* Sklenar, 73 Kan. 450, 85 Pac. Rep. 566.

But it has been held that evidence of seduction is inadmissible to prove the contract or its breach. Wrynn *v.* Downey, 27 R. I. 454, 63 Atl. Rep. 401, 114 Am. St. Rep. 63, 4 L. R. A. N. S. 615, 8 Ann. Cas. 912.

[70] Sramek *v.* Sklenar, 73 Kan. 450, 85 Pac. Rep. 566; Anderson

[71] Houser *v.* Carmody, 173 Mich. 121, 139 N. W. Rep. 9; Schmidt *v.* Durnham, 46 Minn. 227, 49 N. W. Rep. 126. But see Hively *v.*

6. Defense.[72]

To invoke the statute of frauds,[73] it must appear that the terms of the promise were to the effect that the marriage

v. Kirby, 125 Ga. 62, 54 S. E. Rep. 197, 114 Am. St. Rep. 185, 5 Ann. Cas. 103; Liese *v.* Meyer, 143 Mo. 547, 45 S. W. Rep. 282; Mainz *v.* Lederer, 21 R. I. 370, 43 Atl. 876; Geiger *v.* Payne, 102 Iowa, 581, 69 N. W. Rep. 554, 71 N. W. Rep. 571; Kniffen *v.* McConnell, 30 N. Y. 285; Kelley *v.* Riley, 106 Mass. 339; Sheahan *v.* Barry, 27 Mich. 217; Green *v.* Spencer, 3 Mo. 225; Sauer *v.* Schulenberg, 33 Md. 288, s. c., 3 Am. Rep. 174, disapproving decisions in Pennsylvania and Kentucky. See Johnson *v.* Smith, 3 Pitts. 184.

It is competent to prove in aggravation of damages that the defendant's motives were bad when he entered into the contract to marry. It is also competent for him to prove in mitigation that his motives were good. Kaufman *v.* Fye, 99 Tenn. 145, 42 S. W. Rep. 25. See also Jacoby *v.* Stark 205 Ill. 34, 68 N. E. Rep. 557.

Golnick, 123 Minn. 498, 144 N. W. Rep. 213, 49 L. R. A. N. S. 757, Ann. Cas. 1915, A. 295; Bedell *v.* Powell, 13 Barb. 183. Damages cannot be recovered for abortion and attendant indignities, unless such damages are claimed in the pleadings. Ferguson *v.* Moore, 98 Tenn. 342, 39 S. W. Rep. 341.

[72] Infancy of defendant a defense. Fiebel *v.* Obersky, 13 Abb. Pr. N. S. 402, note; Hardy, 21 Tex. Civ. App. 454, 51 S. W. Rep. 503. Precontract of plaintiff no defense. Roscoe N. P. 470; Roper *v.* Clay, 18 Mo. 383; Doubet *v.* Kirkman, 15 Ill. App. 622. Nor is it a matter in mitigation where the defendant continues his engagement to plaintiff after learning of such previous engagement. Albertz *v.* Albertz, 78 Wis. 72, 47 N. W. Rep. 95, 10 L. R. A. 584. As to previous marriage of either party, see Paddock *v.* Robinson, 63 Ill. 99, s. c., 14 Am. Rep. 112; Cover *v.* Davenport, 1 Heisk. 368, s. c., 2 Am. Rep. 706; Kelley *v.* Riley, 106 Mass. 339, 342; Carter *v.* Rinker, 174 Fed. Rep. 882; Smith *v.* Hall, 69 Conn. 651, 38 Atl. Rep. 386; Kerns *v.* Hagenbuchle, 60 N. Y. Supp. 222, 17 N. Y. Supp. 367.

Disease a good defense. Trammell *v.* Vaughan, 158 Mo. 214, 59 S. W. Rep. 79, 81 Am. St. Rep. 302, 51 L. R. A. 854; Vierling *v.* Binder, 113 Iowa, 337, 85 N. W. Rep. 621; Grover *v.* Zook, 44 Wash. 489, 87 Pac. Rep. 638, 120 Am. St. Rep. 1012, 7 L. R. A. N. S. 582, 12 Ann. Cas. 192; Shackleford *v.* Hamilton, 93 Ky. 80, 19 S. W. 5, 40 Am. St. Rep. 166, 15 L. R. A. 531.

[73] 2 N. Y. Personal Property Law, § 31; Nichols *v.* Weaver, 7 Kans. 373, 377; Vaughan *v.* Smith, 177 Ind. 111, 96 N. E. Rep. 594, Ann. Cas. 1914, C. 1092; Barge *v.* Haslam, 63 Nebr. 296, 88 N. W.

was not to be performed within one year.[74] A release or exoneration of defendant from his promise may be implied from the conduct and demeanor of the parties.[75]

7. Justification of Breach.

The presumption is that before engagement the parties satisfied themselves as to each other's character, and that all objection to previous loose conduct was waived.[76] Sub-

Rep. 516, affirmed, 65 Nebr. 659, 91 N. W. Rep. 528.

[74] Lawrence *v.* Cooke, 56 Me. 187, 193.

A contract to marry to be performed more than one year from the time it was made was held in Brick *v.* Gannar, 36 Hun, 52, not to be within the statute of frauds in New York. This case was later approved in Nearing *v.* Van Fleet, 151 N. Y. Rep. 643, 45 N. E. Rep. 1133. See also Lewis *v.* Tapman, 90 Md. 294, 45 Atl. Rep. 459, 47 L. R. A. 385; and Corduan *v.* McCloud, 87 N. J. L. 143, 93 Atl. Rep. (N. J.) 724, L. R. A. 1916, D. 1190.

Although a "mere rehearsal of the terms of a previous contract will not constitute a new promise, and a conversation which does nothing more than go over the substance of a previous understanding for the purpose of seeing if it is still satisfactory will not create a new engagement," yet in view of the situation of the parties and all the circumstances surrounding them, including the attitude of the defendant toward another woman whom he subsequently married, it was held that the jury were warranted in finding that the statement of the defendant "we will go on the farm and live right," constituted a distinct, express, independent and present promise, without relation to any previous contract." Parrish *v.* Parrish, 67 Kan. 323, 72 Pac. Rep. 844.

[75] Rosc. N. P. 470.

Where the plaintiff had written the defendant a letter wherein she said "we will never get married" and made other statements therein to the effect that she hoped he might marry some day, it was held not to amount to a condonation by the plaintiff when considered in connection with the entire letter, which in fact conveyed a distinct protest against his refusal to observe his promise to marry her. Mickens *v.* Phillips (Va.), 51 S. E. Rep. 354.

[76] Sprague *v.* Craig, 51 Ill. 288, 295; Bowman *v.* Bowman, 153 Ind. 498, 55 N. E. Rep. 422.

But if the defendant entered into the contract of marriage knowing of an impediment to his consummation of it, this fact may properly be considered in aggravation of the plaintiff's damages. Trammell *v.* Vaughan, 158 Mo. 214, 59 S. W. Rep. 79, 81 Am. St. Rep. 302, 51 L. R. A. 854.

sequent unchastity on plaintiff's part,[77] or previous unchastity affirmatively shown to have been unknown to defendant at the time of the engagement,[78] is competent. Otherwise

It is no justification for a breach to show that performance would be inconvenient or that it might be dangerous. Smith *v.* Compton, 67 N. J. L. 548, 52 Atl. Rep. 386, 58 L. R. A. 480.

"The fact, if it was a fact, that the plaintiff had some negro blood in her veins, or that her motives were mercenary, or that there was a want of affection on her part, or that there was an incompatibility resulting from disparity of age, difference in character and disposition, and other causes, which, apart from fraud, were the things relied on by the defendant, would not justify him as matter of law in breaking the contract." Van Houten *v.* Morse, 162 Mass. 414, 38 N. E. Rep. 705, 44 Am. St. Rep. 373, 26 L. R. A. 430.

[77] Id.; Houser *v.* Carmody, 173 Mich. 121, 139 N. W. Rep. 9. Unless seduction by defendant has been shown, and breach without assigning just grounds, in which case other incontinence discovered after breach goes only in mitigation and not in bar. Sheahan *v.* Barry, 27 Mich. 217, 222. Bad character of a relative is no bar. Sherman *v.* Rawson, 102 Mass. 395, 400.

[78] Irving *v.* Greenwood, 1 Carr. & Payne, 350; Foster *v.* Hauchett, 68 Vt. 319, 35 Atl. Rep. 316, 54 Am. St. Rep. 886.

Evidence may be admitted showing that the plaintiff had testified at another trial that she had had illicit intercourse with other men before her engagement, where this was unknown to defendant at the time. Clark *v.* Reese, 26 Tex. Civ. App. 619, 64 S. W. Rep. 783.

If seduction is alleged in aggravation of damages, a plea of previous unchastity must aver that such unchastity was unknown to the defendant when the promise to marry was given. Bowman *v.* Bowman, 153 Ind. 498, 55 N. E. Rep. 422.

When the man first learns of the woman's unchastity, he may withdraw from his engagement. La Porte *v.* Wallace, 89 Ill. App. 517. See also Williams *v.* Fahn, 119 Iowa, 746, 94 N. W. Rep. 252. Where it is said that the rule is not weighed down by requirements that proof of specific acts of unchastity must be made, but that it is sufficient if the woman is shown to have been of bad character at the time the contract was made and that the fact was unknown to the defendant.

"Mere silence on the part of the plaintiff, without inquiry by the defendant, though resulting in the concealment of matters which would have prevented the engagement if known, would not constitute fraud on her part. . . . But a partial and fragmentary disclosure, accompanied by the wilful concealment of material and qualifying facts, would be as much of a fraud

of mere rumors or repute of unchastity.[79] The character of the plaintiff for chastity when attacked, can always be sustained by evidence of reputation.[80]

8. Mitigation.[81]

Any misconduct of plaintiff after breach, showing that she would be an unfit companion in married life, is competent in mitigation.[82] The burden is on plaintiff to show

as actual misrepresentation, and in effect would be misrepresentation." Van Houten *v.* Morse, 162 Mass. 414, 38 N. E. Rep. 705, 44 Am. St. Rep. 373, 26 L. R. A. 430.

Evidence of the plaintiff's bad character five years previous was held incompetent, where the defendant had not pleaded this as a defense. Bracken *v.* Dinning, 141 Ky. 265, 132 S. W. Rep. 425.

[79] Boies *v.* McAllister, 12 Me. (3 Fairf.) 308.

[80] Smith *v.* Hall, 69 Conn. 651, 38 Atl. Rep. 386; Jones *v.* Layman, 123 Ind. 569, 24 N. E. Rep. 363.

An instruction that "if defendant has failed to prove by a preponderance of the evidence that plaintiff is not a chaste and virtuous woman, then under the law you should find in her favor" is erroneous in that the defendant is not excused unless he proves at the very time of the trial that plaintiff is not a chaste and virtuous woman, entirely negativing the possibility of plaintiff's being reformed and having become chaste and virtuous. La Porte *v.* Wallace, 89 Ill. App. 517.

[81] According to Button *v.* McCauley, 1 Abb. Ct. App. Dec. 282, s. c., 5 Abb. Pr. N. S. 29, rev'g 38 Barb. 413, and Tompkins *v.* Wadley, 3 Supm. Ct. (T. & C.) 424, 430, mitigating circumstances may be proved without being pleaded. But compare the rule in slander and libel, chapter XLII, paragraph 22 of this vol.

Any condition of mind or body which renders one of the parties less fitted for the marriage relation may be given in mitigation. Walker *v.* Johnson, 6 Ind. App. 600, 33 N. E. Rep. 267, 34 N. E. Rep. 100.

Matters in mitigation cannot be considered as a set-off or counterclaim, and the jury in response to an interrogatory as to the amount allowed by them in mitigation of damages are only required to state what was considered by them in mitigation in determining the amount of their verdict. Maybin *v.* Webster, 8 Ind. App. 547, 35 N. E. Rep. 194, 36 N. E. Rep. 373.

[82] Button *v.* McCauley, 1 Abb. Ct. App. Dec. 282, s. c., 2 Abb. Pr. N. S. 29, rev'g 38 Barb. 413; Palmer *v.* Andrews, 7 Wend. 142.

Want of chastity either before or after the alleged promise is a circumstance tending to mitigate damages and should be pleaded.

defendant's connivance in such misconduct, if it be relied on.[83] To show defendant's good faith, he may prove the objection of parents as a ground of breach.[84] If plaintiff has given evidence of defendant's wealth, defendant may show that property imputed to him he had lost before the breach, or had lost by involuntary transfer after breach, upon contracts made before the breach.[85] Evidence of poverty at the time of trial is irrelevant.[86] If plaintiff has proved a reason assigned by defendant for breach, defendant may prove its truth if it tends to mitigate damages.[87]

Declarations of plaintiff disavowing affection and all other than mercenary motives, are admissible, if made before the commencement of the action, though after breach,[88] but not if made after commencement of action.[89]

Herriman *v.* Layman, 118 Iowa, 590, 92 N. E. Rep. 710.

Proof offered in mitigation of damages, that the plaintiff shot the defendant after the breach, was properly excluded. Schmidt *v.* Durnham, 46 Minn. 227, 49 N. W. Rep. 126.

[83] Id.; Kniffen *v.* McConnell, 30 N. Y. 285.

The charge that "plaintiff's immorality or unchaste conduct with third persons after the promise is no defense if done with defendant's connivance or consent" was held to be proper. Bowman *v.* Bowman, 153 Ind. 498, 55 N. E. Rep. 422.

[84] Irving *v.* Greenwood, 1 Carr. & Payne, 350; Johnson *v.* Jenkins, 24 N. Y. 252.

The defendant's good faith is relevant on the question of damages. Kaufman *v.* Fye, 99 Tenn. 145, 42 S. W. Rep. 25.

[85] Sprague *v.* Craig, 51 Ill. 288, 291.

Where it was established that the reputed wealth of the defendant was between fifty and seventy-five thousand dollars, it was held that a judgment for sixteen thousand dollars was not excessive in view of the defendant's wealth and the great wrong inflicted on the plaintiff in her seduction and betrayal. Geiger *v.* Payne, 102 Iowa, 581, 69 N. W. Rep. 554, 71 N. W. Rep. 571.

The defendant may rebut evidence of general reputation as to his pecuniary circumstances by showing that the general reputation is otherwise or by proof of what property he really possesses. Smith *v.* Compton, 67 N. J. L. 548, 52 Atl. Rep. 386, 58 L. R. A. 480.

[86] Id.

[87] Johnson *v.* Jenkins (above).

[88] Miller *v.* Rosier, 31 Mich. 475, 477.

[89] Miller *v.* Hayes, 34 Iowa, 496, s. c., 11 Am. Rep. 154.

Plaintiff's general character (that is, reputation) as to virtue and sobriety, is relevant on the question of damages;[90] but evidence of bad character relied on in bar must show charges well founded,[91] and unknown to plaintiff when he made the engagement.

The mode of proving character has been already stated.[92]

Where chastity and not mere reputation is in issue, specific acts of unchastity may be proved.[93]

It has been held that it was erroneous for the court to give the jury an instruction which might be construed as authority for them to find an agreement to marry from the plaintiff's self-serving declarations. Lauer *v.* Banning, 140 Iowa, 319, 118 N. W. Rep. 446.

[90] Markham *v.* Herrick, 82 Mo. App. 327; Johnson *v.* Caulkins, 1 Johns. Cas. 116; Willard *v.* Stone, 7 Cow. 22; Palmer *v.* Andrews, 7 Wend. 142. These cases allow evidence of bad repute after the breach, but it is certainly otherwise in case of seduction. Boynton *v.* Kellogg, 3 Mass. 189, 192. Compare the rule in slander and libel, chapter XLII, paragraph 24 of this vol.

See Barber *v.* Gier, 31 Tex. Civ. App. 176, 71 S. W. Rep. 792, for an instance where evidence of the plaintiff's reputation for truth and veracity was held not admissible for the purpose of mitigating the damages claimed to have resulted from the injured reputation.

[91] Roscoe N. P. 470; La Porte *v.* Wallace, 89 Ill. App. 517.

Evidence is not admissible in mitigation of damages where it is merely that of specific immodest and indecent acts before the engagement, which were not known to the defendant until subsequent thereto. Colburn *v.* Marble, 196 Mass. 376, 82 N. E. Rep. 28, 124 Am. St. Rep. 561.

[92] See chapter XLII, paragraph 24 of this vol.

[93] Ford *v.* Jones, 62 Barb. 484.

Evidence of the plaintiff's general reputation for good character is inadmissible to refute evidence of specific acts of fornication with persons other than the defendant, pleaded as a defense, since it does not prove or tend to prove that she was not guilty of the illicit acts testified to by the defendant's witnesses. McKane *v.* Howard, 202 N. Y. 181, 95 N. E. Rep. 642, Ann. Cas. 1912, D. 960, reversing 138 N. Y. App. Div. 680, 123 N. Y. Supp. 632.

CHAPTER XLV

ACTIONS FOR SEDUCTION OR ENTICING AWAY

1. Husband's action for enticing.
2. Master's action.
3. Parent's action.
4. Seduction.
5. Loss of service.
6. Good faith.
7. Character.
8. *Defense.*

1. Husband's Action.

In a husband's action for enticing away, as distinguished from an action for criminal conversation,[94] direct proof of formal marriage is not necessary. Evidence of cohabitation and repute, and of defendant's admissions that plaintiff and his alleged wife were married, is sufficient.[95] If it appear that defendant aided her to leave, at her request, upon her complaint of ill-usage, the burden of proof is upon plaintiff

[94] See next chapter. The marriage of the plaintiff and his wife must be established as a fact, but absolute proof is not required; cohabitation, reputation and general surroundings indicating the reasonable probability of the conclusion that the parties were married are recognized as being sufficient evidence to establish that fact. Durning *v.* Hastings, 183 Pa. St. 210, 38 Atl. Rep. 627.

The fact that a wife obtains a divorce does not bar a subsequent suit by her for alienation of her husband's affections. See Beach *v.* Brown, 20 Wash. 266, 55 Pac. Rep. 46, 43 L. R. A. 114, 72 Am. St. Rep. 98.

[95] Scherpf *v.* Szadeczky, 1 Abb. Pr. 366, s. c., 4 E. D. Smith, 110; see page 242 of this vol.

Where the marriage has been established by other evidence, proof that the parties lived together as husband and wife is admissible to show their harmonious relations prior to the alleged alienation and seduction. Mead *v.* Randall, 111 Mich. 268, 69 N. W. Rep. 506.

But the plaintiff in an action for the alienation of his wife's affections cannot introduce evidence as to the wife's property, since a wife owes no duty to support her husband. See Zimmerman *v.* Whiteley, 134 Mich. 39, 95 N. W. Rep. 989.

to prove an unlawful motive or design on defendant's part.[96] If defendant is the father of the wife, the presumption is that he acted from paternal affection rather than from improper motives.[97]

2. Master's Action.

To recover for enticing from service, it must appear that the servant was at the time in plaintiff's actual service, and that defendant's inducement was the moving cause of desertion.[98] There must be some evidence of defendant's knowledge of the relation.[99]

[96] Barnes *v.* Allen, 1 Abb. Ct. App. Dec. 111, s. c., 1 Keyes, 390, rev'g 30 Barb. 663; see also Bennett *v.* Smith, 21 Barb. 439; Schuneman *v.* Palmer, 4 Barb. 225.

In an action for harboring the plaintiff's wife after notice not to do so, the burden is on the plaintiff to show that the wife had no justification for leaving him. See Powell *v.* Benthall, 136 N. C. 145, 48 S. E. Rep. 598.

[97] Hutcheson *v.* Peck, 5 Johns. 196; Cripe *v.* Cripe, 170 Cal. 91, 148 Pac. Rep. (Cal.) 520.

"A parent may advise his daughter in good faith, and for her good, to leave her husband if he, on reasonable grounds, believes that the further continuance of the marriage relation tends to injure her health, or destroy her peace of mind, so that she would be justified in leaving him." Oakman *v.* Belden, 94 Me. 280, 47 Atl. Rep. 553, 80 Am. St. Rep. 396.

But the parents are liable where they brought about the separation of the wife from her husband because of malicious motives. Hotz *v.* Dick, 42 Ohio St. 23, 51 Am. Rep. 791.

[98] Caughey *v.* Smith, 47 N. Y. 244; and see Bixby *v.* Dunlap, 56 N. H. 456, s. c., 22 Am. Rep. 475, and note.

In Lawyer *v.* Fritcher, 130 N. Y. 239, 29 N. E. Rep. 267, 27 Am. St. Rep. 521, 14 L. R. A. 700, where the plaintiff brought suit for the seduction of his daughter after he had given his consent to her marriage with the defendant who fraudulently represented that he was divorced, the court stated that "the loss of service constitutes the cause of action and it can make no difference as to the right of action whether that has been accomplished by an unlawful persuasion of the servant to leave the master's employment or through fraud upon the master or force upon the servant, or by both such fraud and force."

The plaintiff must show a loss of services to which he was entitled. Cook *v.* Bartlett, 179 Mass. 576, 61 N. E. Rep. 266.

[99] Id.; and see Stuart *v.* Simpson,

3. Parent's Action.[1]

The rules as to proving parentage are elsewhere stated.[2] Proof of the slightest degree of service is sufficient,[3] pro-

1 Wend. 377; Clark *v.* Clark, 63 N. J. L. 1, 42 Atl. Rep. 770.

[1] An action may be brought by persons *in loco parentis* wherever the natural parent might sue. Graham *v.* Wallace, 50 N. Y. App. Div. 101, 63 N. Y. Supp. 372; Anderson *v.* Aupperle (Ore.), 95 Pac. Rep. 330.

The common law recognized no right of action in favor of a woman against her seducer. The right is purely statutory. Welsund *v.* Schneller, 98 Minn. 475, 108 N. W. Rep. 483, 8 Ann. Cas. 1115; Greenman *v.* O'Riley, 144 Mich. 534, 108 N. W. Rep. 421, 115 Am. St. Rep. 466; Oberlin *v.* Upson, 84 Ohio St. 111, 95 N. E. Rep. 511, Ann. Cas. 1912, B. 1061.

Where a daughter is seduced while her father is living, his subsequent death does not give the mother a right of action for the seduction. Vossil *v.* Cole, 10 Mo. 634, 47 Am. Dec. 136.

Section 764 of N. Y. Code Civ. Proc., provides that "an action commenced by a father to recover damages for the seduction of his minor daughter does not abate by his death, but survives to the mother of such daughter; who may recover both actual and exemplary damages therein to the same extent as though the original party plaintiff had lived."

Where the plaintiff's daughter had recovered in a breach of promise action exemplary damages for the same wrongful act, this cannot be considered in bar or mitigation of damages if the father sues for the seduction. Luther *v.* Shaw, 157 Wis. 234, 147 N. W. Rep. (Wis.) 18, 52 L. R. A. N. S. 85.

A girl may sue though she was under the age of consent at the time of her seduction. Huempfner *v.* Bailly, 156 N. W. Rep. 78.

So a female ward may maintain an action against her guardian on attaining her majority. Graham *v.* Wallace, 50 N. Y. App. Div. 101, 63 N. Y. Supp. 372.

[2] Chapter V, paragraph 28 *et seq.*, and chapter XVII, paragraph 39 of this vol.

[3] Moran *v.* Dawes, 4 Cow. 412; Badgley *v.* Decker, 44 Barb. 577, and cases cited. Compare Blanchard *v.* Ilsley, 120 Mass. 487, s. c., 21 Am. Rep. 535; Kennedy *v.* Shea, 110 Mass. 147, s. c., 14 Am. Rep. 584.

"The common law gave the father an action for the seduction of his daughter upon the ground alone, that he was entitled to, and by the seduction had lost her labor and services, and the measure of his damages was only such as resulted from the disabling physical injury to a servant. While we yet preserve the old doctrine that the father must prove that the relation of master and servant existed yet it is little more than a legal fiction, and proof of the nominal relation of master and servant is all that is

vided it included the time of the wrong,[4] or some part of it.[5] Where there is no evidence of actual service, evidence that the parent's marriage was void is competent, to rebut a presumption of actual service by showing that the plaintiff was not legally entitled to her services; and in mitigation of damages.[6]

4. Seduction.[7]

The circumstances under which the female was seduced, and the means used for effecting it, and corrupting her mind, may be shown.[8] But promise of marriage cannot be proven,[9]

required to give the father a standing in the courts." Garretson *v.* Becker, 52 Ill. App. 255.

[4] Hedges *v.* Tagg, L. R. 7 Ex. 283, s. c., 2 Moak's Eng. 679.

In an action by a parent for the seduction of his daughter it must appear that they stood in the relation of master and servant at the time that the defendant committed the injury. Anderson *v.* Rigg, 64 N. J. L. 407, 45 Atl. Rep. 782.

[5] See Evans *v.* Walton, L. R. 2 C. P. 615.

[6] Howland *v.* Howland, 114 Mass. 517, s. c., 19 Am. Rep. 381.

Where a girl is over 21, the parent has no cause of action for seduction unless the parent by a contract express or implied, has a right to the daughter's services. See Vossel *v.* Cole, 10 Mo. 634, 47 Am. Dec. 136.

[7] The act of seduction contemplates fraud, deceit, and bad faith. Verwers *v.* Carpenter, 166 Iowa, 273, 147 N. W. Rep. 742; Stowers *v.* Singer, 114 Ky. 584, 68 S. W. Rep. 637, 24 Ky. L. 395. Seduction is the act of a man inducing a woman to commit unlawful sexual intercourse with him, and it is not essential in order to maintain the action that there should be a promise of marriage. Milliken *v.* Long, 188 Pa. St. 411, 41 Atl. Rep. 540; Gemmill *v.* Brown, 25 Ind. App. 6, 56 N. E. Rep. 691; Young *v.* Corrigan, 208 Fed. 431.

Nor is it necessary to allege ability and willingness to marry where a promise of marriage was one of the means used by defendant to effect his design. Swett *v.* Gray, 141 Cal. 83, 74 Pac. Rep. (Cal.) 551.

[8] Bracy *v.* Kibbe, 31 Barb. 273; Kennedy *v.* Shea, 110 Mass. 147, s. c., 14 Am. Rep. 584; Walters *v.* Cox. 67 Mo. App. 299.

No action can be maintained where the woman was induced to

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[9] Clark *v.* Fitch, 2 Wend. 459; Gillet *v.* Mead, 7 Id. 193; Brownell *v.* McEwen, 5 Den. 367. *Contra*, White *v.* Campbell, 13 Gratt. 573; Mudd *v.* Clements, 3 Cranch C. Ct. 3; and see Rosc. N. P. 576;

unless, perhaps, when offered for a special purpose,—as, for instance, to rebut evidence of a father's negligent exposure of his daughter.[10] The fact that the daughter was not living with her father at the time the offense was committed, does not affect the father's right of recovery.[11] The father may recover although the daughter may have led a life of prostitution, if it appears that at the time of defendant's connection with her she was leading a virtuous life.[12] Where

have illicit intercourse by the promise of a pecuniary reward. Saxon *v.* Wood, 4 Ind. App. 242, 30 N. E. Rep. 797.

In Young *v.* Corrigan, 208 Fed. Rep. 431 it was held that an instruction was proper which charged that the plaintiff was not seduced if she voluntarily accompanied the defendant on a long trip, it being quite evident to her that sexual intercourse would result and was the end sought by the defendant.

It is sufficient if it is shown that the plaintiff's unwillingness was overcome and she was induced to yield her virtue by any act, solicitation or statement of the defendant. Bradshaw *v.* Jones, 103 Tenn. 331, 52 S. W. Rep. 1072, 76 Am. St. Rep. 655.

Evidence that the defendant admitted he was the father of the plaintiff's child is competent where he denies having had intercourse with her. Rabeke *v.* Baer, 115 Mich. 328, 73 N. W. Rep. 242, 69 Am. St. Rep. 567.

Verwers *v.* Carpenter, 166 Iowa, 273, 147 N. W. Rep. 742; Falkner *v.* Schultz, 160 Wis. 594, 150 N. W. Rep. 424.

The promise of marriage need not be proved in express terms or by direct evidence. Fisher *v.* Bolton, 148 Iowa, 651, 127 N. W. Rep. 979.

[10] Whitney *v.* Elmer, 60 Barb. 250. The fact of the seduction of another daughter of the plaintiff three years previously by a man other than the defendant, and the attendant circumstances, are not admissible in evidence in mitigation of damages as tending to show that the plaintiff was chargeable with careless indifference in affording opportunities for criminal intercourse between the defendant and the daughter for whose seduction the action was brought. Tourgee *v.* Rose, 19 R. I. 432, 37 Atl. Rep. 9.

[11] Milliken *v.* Long, 188 Pa. St. 411, 41 Atl. Rep. 540.

A mother may recover where her minor child at the time of the seduction was temporarily living in a boarding house. Elder *v.* Warner, 129 N. Y. Supp. 816.

[12] Milliken *v.* Long, 188 Pa. St. 411, 41 Atl. Rep. 540.

A father is entitled to redress if he has in no way encouraged or aided in what has led to his daughter's dishonor. Stondt *v.* Shepherd,

intercourse is admitted but seduction denied, plaintiff may show in aggravation of damages that defendant, after discovering that she was in a family way, had agreed to marry her.[13]

5. Loss of Service.

The parent may recover not only for the loss of the daughter's services, but also for mental anguish caused by the loss of her virtue, the loss of comfort and consolation that he has a right to feel in the purity and virtue of his daughter and for the disgrace and dishonor brought upon himself.[14] There must be some evidence from which loss of service may be inferred.[15] In the case of seduction, either pregnancy,[16] or impairment of health,[17] is enough. Procuring an abortion is competent in aggravation.[18]

73 Mich. 588, 41 N. W. Rep. 696.

[13] Milliken *v.* Long, 188 Pa. St. 411, 41 Atl. Rep. 540.

[14] Milliken *v.* Long, 188 Pa. St. 411, 41 Atl. Rep. 540.

The real measure of damage is the disgrace of the family. Middleton *v.* Nichols, 62 N. J. L. 636, 43 Atl. Rep. 575; Elder *v.* Warner, 129 N. Y. Supp. 816. See also Mighell *v.* Stone, 175 Ill. 261, 51 N. E. Rep. 906, affirming 74 Ill. App. 129.

[15] Hewit *v.* Prime, 21 Wend. 79, and cases cited. In an action of this nature, for the seduction of a minor daughter, the relation of master and servant between her and her father is presumed to exist; and no acts of service need be proved, unless he has divested himself of the right to control her person or to require her services. Beaudette *v.* Gagne, 87 Me. 534, 33 Atl. Rep. 23; Fitzgerald *v.* Connors, 88 Vt. 365, 92 Atl. Rep. 456. But when the daughter is of age, it

[16] Id.; Ingerson *v.* Miller, 47 Barb. 47.

But the fact that the defendant's seduction of the plaintiff's daughter was not followed by her pregnancy or sexual disease is no defense. Abrahams *v.* Kidney, 104 Mass. 222, 6 Am. Rep. 220.

One who brings an action for her daughter's seduction is not obliged to wait until the daughter's pregnancy is so far advanced as to render her incapable of performing household services. Elder *v.* Warner, 129 N. Y. Supp. 816.

[17] Abrahams *v.* Kidney, 104 Mass. 222, s. c., 6 Am. Rep. 220; White *v.* Nellis, 31 N. Y. 405; Moherlsky *v.* Hartmeister, 68 Mo. App. 318.

[18] White *v.* Murtland, 71 Ill. 250, 22 Am. Rep. 1000.

But the abortion and the inci-

6. Good Faith.

Defendant, to show good faith, want of knowledge, etc., may prove declarations made by the wife or servant at the time the defendant received him or her,[19] or at the time of alleged ill treatment,[20] stating apparent good cause for leaving plaintiff. The fact that he did not inquire of plaintiff as to the truth of the reports of cruelty on which he acted is only a circumstance for the jury.[21]

7. Character.

The character of the parent,[22] and that of the house in which the child, being a minor, resided with her parent,[23] are irrelevant.

must appear that she resided in her father's family and performed some acts of service, however slight. It is not necessary, however, that the services of an adult daughter should be such as the father can command. It is sufficient if, by mutual assent, the relation of master and servant did in fact exist. (Id.) But in Anthony *v.* Norton, 60 Kan. 341, it was held that there was no reason for distinguishing between cases of minority and full age of the daughter, and that the parent could recover in either case if humiliation and disgrace is shown. See also Hartman *v.* McCrary, 59 Mo. App. 571.

"It is only necessary to show that the parent has the legal right at the time to command the service of the child." Middleton *v.* Nichols, 62 N. J. L. 636, 43 Atl. Rep. 575.

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dental suffering of indignity must be pleaded. Ferguson *v.* Moore, 39 S. W. Rep. 341, 98 Tenn. 342.

Ignorance of the fact that an act of illicit intercourse in fact constituted seduction is no defense to a physician who procured an abortion for the purpose of concealing knowledge of the intercourse. Gunder *v.* Tibbetts, 153 Ind. 591, 55 N. E. Rep. 762.

[19] Caughey *v.* Smith, 47 N. Y. 244.

[20] Barnes *v.* Allen, 1 Abb. Ct. App. Dec. 111, s. c., 1 Keyes, 390, rev'g 30 Barb. 663.

[21] Smith *v.* Lyke, 13 Hun, 204.

A stranger who carries a woman beyond the reach of her husband with her consent must prove that the circumstances demanded his intervention and that what he did was meant in good faith, for the wife's protection. Higham *v.* Vanosdol, 101 Ind. 160. See also Johnson *v.* Allen, 100 N. C. 131, 5 S. E. Rep. 666.

[22] Dain *v.* Wyckoff, 18 N. Y. 45.

[23] Kenyon *v.* People, 26 N. Y. 203, affi'g People *v.* Kenyon, 5 Park. Cr. 254.

Evidence of the girl's previous good character for chastity is not competent in the first instance as part of plaintiff's case,[24] except as it may legitimately bear on the value of services.[25]

Defendant, in mitigation of damages, may show the girl's previous bad character for chastity,[26] and specific instances of previous lascivious conduct on her part; [27] but neither, subsequent to his seduction of her. Want of chastity may be shown not only by general reputation and specific acts of unchastity but by evidence tending to show impure con-

[24] Bracy *v.* Kibbe, 31 Barb. 273; 1 Whart. Ev. 65, § 50; Gemmill *v.* Brown, 25 Ind. App. 6, 56 N. E. 691; Robinson *v.* Powers, 129 Ind. 480, 28 N. E. Rep. 1112.

Although plaintiff was not bound to place her previous character in issue, in failing to do so she was not entitled to recover for loss of character. Wilson *v.* Mangold, 154 Iowa, 352, 134 N. W. Rep. 1072.

On principle the defendant may offer evidence to show his general reputation for chastity. Hein *v.* Holdridge, 78 Minn. 468, 81 N. W. Rep. 522.

Testimony by the parents of the girl seduced that her tastes, habits and desires had changed after her association with the defendant and tendered to moral deterioration is admissible. Eller *v.* Lord, 36 S. D. 377, 154 N. W. Rep. 816.

[25] 1 Whart. Ev. 65, § 51.

[26] 1 Whart. Ev. 65, § 51; Greenman *v.* O'Riley, 144 Mich. 534, 108 N. W. Rep. 421, 115 Am. St. Rep. 466.

Such evidence may only be considered in mitigation of damages or as tending to show that she was not seduced as alleged. Gemmill *v.* Brown, 25 Ind. App. 6, 56 N. E. Rep. 691.

Evidence of the wife's intimate association with lewd women is admissible upon the question of chastity. Smith *v.* Hockenberry, 146 Mich. 7, 109 N. W. Rep. 23, 117 Am. St. Rep. 615, 10 Ann. Cas. 60.

[27] Bracy *v.* Kibbe, 31 Barb. 273; Dodd *v.* Norris, 3 Campb. 519; Clemons *v.* Seba, 130 Mo. A. 378, 11 S. W. Rep. 522; Smith *v.* Hockenberry, 146 Mich. 7, 109 N. W. Rep. 23, 117 Am. St. Rep. 615, 10 Ann. Cas. 60.

Evidence may not be received to show that the woman had illicit connections with a person other than the defendant after the alleged seduction but before she became pregnant, unless the time was within the period of gestation. Ayer *v.* Colgrove, 81 Hun, 322, 30 N. Y. Supp. 788.

The jury may disregard evidence of the playful actions of the girl seduced when she was 14 years old, offered by the defendant as evidence showing previous unchaste character. Trzebietowski *v.* Jereski, 159 Wis. 190, 149 N. W. Rep. 743.

versation and improper and familiar association with men.[28] Defendant is not bound by her answers as to such matters on cross-examination.[29] If defendant gives general evidence of bad character for chastity, before the alleged wrong, plaintiff may rebut it by general evidence of good character.[30]

8. Defense.

Plaintiff's consent or connivance is not admissible as a bar, unless pleaded.[31] An offer of marriage is not admissible in mitigation.[32]

[28] Stewart *v.* Smith, 92 Wis. 76, 65 N. W. Rep. 736.

But evidence of mere immodest remarks not connected with any immoral act is not admissible. Fry *v.* Leslie, 87 Va. 269, 12 S. E. Rep. 671.

Evidence of swearing by the plaintiff may be offered in mitigation of damages but is inadmissible to show lascivious or lewd character. Anderson *v.* Aupperle, 51 Ore. 556, 95 Pac. Rep. 330.

Evidence is admissible also of plaintiff's association with women of loose moral character. Stewart *v.* Smith, 92 Wis. 76, 65 N. W. Rep. 736.

[29] Hogan *v.* Cregan, 6 Robt. 138.

[30] Pratt *v.* Andrews, 4 N. Y. 493, 495, and cases cited. Evidence is admissible of the previous good character of the daughter in the neighborhood where the intercourse took place, in rebuttal of defendant's evidence that her reputation was bad before she came to that place. Milliken *v.* Long, 188 Penn. St. 411, 41 Atl. Rep. 540. The fact that a person's reputation is not talked of is evidence that it is good. Id.

[31] Travis *v.* Barger, 24 Barb. 614; but see Chapter on Crim. Con.

[32] Ingersoll *v.* Jones, 5 Barb. 661. Especially if made after suit brought. White *v.* Murtland, 71 Ill. 250, s. c., 22 Am. Rep. 100.

CHAPTER XLVI

ACTIONS FOR CRIMINAL CONVERSATION

1. Competency of witnesses.
2. Marriage.
3. Affection and domestic happiness.
4. Criminal intercourse.
5. Loss of consortship; Damages.
6. *Defenses.*
7. Character.

1. Competency of Witnesses.

Plaintiff is a competent witness for either party,[33] subject to the restrictions as to disclosing confidential communica-

[33] He was incompetent at common law, on grounds of public policy independent of his incompetency as a party. Rex *v.* Luffe, 8 East, 193; Dennison *v.* Page, 29 Penn. St. 420, 423; Ratcliff *v.* Wales, 1 Hill, 63. And in those states where the statute only removes the incompetency of parties, it is the better view that the husband is still incompetent in his own favor in this class of actions. Manchester *v.* Manchester, 24 Vt. 649; Dwelly *v.* Dwelly, 46 Me. 377; Hasbrouck *v.* Vandervoort, 9 N. Y. 153. On the injustice of admitting the one when the other cannot be admitted, see Baylis *v.* Baylis, L. R. 1 Pr. & D. 395; Conradi *v.* Conradi, Id. 514; Harding *v.* Harding, 4 Sw. & Tr. 145, 149; Blackborne *v.* Blackborne, L. R., 1 Pr. & D. 563; Mordaunt *v.* Mordaunt, L. R., 2 Pr. & D. 109, 124. A husband, though divorced from his wife, is not a competent witness to testify to her alleged adultery occurring during the marriage. Hanselman *v.* Dovel, 102 Mich. 505, 47 Am. St. Rep. 557, 60 N. W. Rep. 978.

The trial court properly admitted the testimony of the plaintiff offered in his own behalf, with respect to a conversation with the defendant in the presence of the plaintiff's wife, wherein the defendant made admissions tending to establish his guilt, and the plaintiff was also allowed to detail the remarks of the wife directed to the defendant while the three were together. Mainard *v.* Reider, 2 Ind. App. 115, 28 N. E. Rep. 115.

The plaintiff was competent to testify to any statements which his wife made to him and which would throw light on the question of her state of feelings towards him and their domestic happiness.

tions already stated.[34] His wife is not a competent witness for him,[35] but is now competent for defendant, with somewhat similar restrictions.[36]

Defendant is a competent witness for plaintiff, subject

Billings *v.* Albright, 66 N. Y. App. Div. 239, 73 N. Y. Supp. 22.

It was held, however, that the plaintiff could not testify, under a count for criminal conversation, to any act of misconduct on the part of his wife nor to set out his wife's confession to him of such misconduct, since under the statute all testimony relating to an adulterous act was excluded. Rust *v.* Oltmer, 74 N. J. Law 802, 67 Atl. Rep. 337.

[34] Chapter VI, paragraph 3, of this vol.

[35] Page 473 of this vol.; Hicks *v.* Bradner, 2 Abb. Ct. App. Dec. 362; Rea *v.* Tucker, 51 Ill. 110. Unless after divorce. Ratcliff *v.* Wales, 1 Hill, 63; Dickerman *v.* Graves, 60 Mass. (6 Cush.) 308.

Contra, in Nebraska, Smith *v.* Meyers, 52 Nebr. 70, 71 N. W. Rep. 1006.

In Lee *v.* Hammond, 114 Wis. 550, 90 N. W. Rep. 1073, the court said: "In some cases it is held that after a divorce the wife is a competent witness for the husband to prove the charge of adultery. Ratcliff *v.* Wales, 1 Hill 63; Wottrich *v.* Freeman, 71 N. Y. 601; Dickerman *v.* Graves, 6 Cush. 308, 53 Am. Dec. 41. This is in harmony with the ruling of this court. Bigelow *v.* Sickles, 75 Wis. 427, 44 N. W. Rep. 761; Brown *v.* Johnson, 101 Wis. 661, 77 N. W. Rep. 900. But where there is no divorce she is incompetent as a witness to prove the criminal intercourse. Carpenter *v.* White, 46 Barb. 291."

It has been held that the plaintiff's wife was a competent witness to show the time when the plaintiff became appraised of her acts of misconduct. Long *v.* Booe, 106 Ala. 570, 17 So. Rep. 716.

It seems that in Nebraska the plaintiff's wife can competently testify in his behalf. Smith *v.* Meyers, 52 Nebr. 70, 71 N. W. Rep. 1006.

[36] Chapter VI, paragraphs 3 *et seq* of this vol.

Even though divorced, the wife is not a competent witness for the defense in matters which by their very nature must have been learned by her during the existence of the marital relation. But it is proper to permit her to testify to matters affecting her and the party calling her, when those matters relate to a time subsequent to the divorce. Crose *v.* Rutledge, 81 Ill. 266.

A plaintiff's wife, by consenting to testify as to her innocence of any wrongdoing in the first of the three years in which she was alleged to have committed acts of adultery with the defendant, did not thereby waive her privilege to refuse to testify, as to the other acts alleged to have occurred in the other two years. Evans *v.* O'Connor, 174 Mass. 287, 54 N. E. Rep. 557, 75 Am. St. Rep. 316.

to his privilege from criminating himself [37] in those jurisdictions where adultery is a crime. He is competent as a witness on his own behalf; but, if called, it is usually with the effect of waiving his privilege on cross-examination.[38]

2. Marriage.

Marriage must be proved by direct evidence.[39] Permanent separation by a valid agreement, so that the husband

[37] For the general rule as to the privilege, see chapter XXXIV, paragraph 12 of this vol.

Where the question was one of identity at a particular time and place, evidence as to previous conduct and conversations of the defendant tending to show his guilt were held admissible. Dorman *v.* Sebree, 52 S. W. Rep. 809, 21 Ky. L. 634.

[38] See Boardman *v.* Boardman, L. R. 1 Pr. & D. 233; Tappan *v.* Butler, 7 Bosw. 480.

Proof of the plaintiff's marriage, the criminal intercourse between his wife and the defendant, and that it was without his consent, is sufficient to authorize the recovery of nominal damages. Billings *v.* Albright, 66 N. Y. App. Div. 239, 73 N. Y. Supp. 22.

[39] The mode of proof is that stated at pp. 242 and 25 of this vol. Hutchins *v.* Kimmell, 31 Mich. 126, s. c., 18 Am. Rep. 164; Birt *v.* Barlow, 1 Dougl. 171; Hemmings *v.* Smith, 4 Id. 33; Nixon *v.* Brown, 4 Blackf. 157. *Contra*, as to husband's competency, Dann *v.* Kingdom, 1 Supm. Ct. (T. & C.) 492; but see N. Y. Code Civ. Proc., § 831, removing incompetency. Where ceremonies of marriage in a foreign country, with cohabitation following it, are shown by official certificates duly authenticated, it is presumptively a valid marriage, and it is not necessary to prove the foreign law of marriage. Hutchins *v.* Kimmell (above). See also Morning *v.* Long, 109 Iowa, 288, 80 N. W. Rep. 390.

As to the presumption of marriage, see Hardy *v.* Bach, 173 Ill. App. 123.

"In cases of this kind an actual marriage must be proven (Hutchins *v.* Kimmell, 31 Mich. 126, 18 Am. Rep. 164)"; Browning *v.* Jones, 52 Ill. App. 597.

Where the action is simply for enticing away a man's wife direct proof of a formal marriage is not requisite. Evidence of cohabitation and repute and of the defendant's admissions that the plaintiff and his alleged wife were married is allowed to satisfy the jury. See Perry *v.* Lovejoy, 49 Mich. 529, 14 N. W. Rep. 485.

Although marriage must be proved by direct evidence, the certificate of marriage, properly authenticated, is not essential to establish the marital relation. It may be shown by the testimony of

had no right to the society and assistance of his wife at the time of the alleged intercourse, is a bar.[40] Unless the separation is legal and permanent, it goes in mitigation only.[41]

3. Affection and Domestic Happiness.

To show the affection and domestic happiness of the husband and wife, it is competent to prove expressions of affection and regard used by either in the presence of the other,[42] and the wife's manner of speaking and writing of her husband even when absent from him;[43] their letters to each other.[44] The opinions of witnesses, who are shown to have had sufficient means of observation, as to the affection of the

eye witnesses. Jacobsen *v.* Siddal, 12 Or. 280, 7 Pac. Rep. 108, 52 Am. Rep. 360.

A copy of the parish register in London, England, was sufficient to prove marriage where the objection offered was general and thus did not go to the question of the authentication thereof or to the secondary character of the evidence offered. Groom *v.* Parables, 28 Ill. App. 152.

[40] Weedon *v.* Timbrell, 5 T. R. 357, as explained in Chambers *v.* Caulfield, 6 East, 244; Graham *v.* Wigley, 2 Bright's H. &. W. 352; and reiterated in Harvey *v.* Watson, 7 Mann. & G. 644; and see Fry *v.* Derstler, 2 Yeates (Penn.), 278.

It seems that the action may be maintained by the husband after a divorce obtained by the wife, if the cause of action accrued prior to the divorce. Wood *v.* Mathews, 47 Iowa, 409.

[41] Buller N. P. 27; 1 Selw. N. P. 10.

Mere separation from the wife without a renunciation of the marital rights can be shown, not as a bar, but in mitigation of damages only. Prettyman *v.* Williamson, 17 Del. (1 Penn.) 224, 39 Atl. Rep. 731.

[42] Edwards *v.* Crock, 4 Esp. 39; Preston *v.* Bowers, 13 Ohio St. 1.

Conversations, declarations, and statements of the plaintiff's wife made in his presence which tend to show her state of feeling toward him are competent. Billings *v.* Albright, 66 N. Y. App. Div. 239, 73 N. Y. Supp. 22.

[43] Jones *v.* Thompson, 6 Carr. & P. 415; Willis *v.* Bernard, 8 Bing. 376, s. c., 5 Carr. & P. 342.

For contrary view see Billings *v.* Albright, 66 N. Y. App. Div. (N. Y.) 239, 73 N. Y. Supp. 22.

[44] Trelawney *v.* Coleman, 1 Barnew. & Ald. 90; Edwards *v.* Crock (above).

It was proper to admit in evidence letters passing between the husband and wife prior to her infidelity, which contained mutual expressions of love and affection

wife for her husband,[45] the happiness of the marriage,[46] &c., are competent within the same limits that evidence of declarations would be.[47] Evidence of the declarations, letters, &c., or manner of the *husband*, should be confined to the period before his first suspicions of his wife. Evidence of those of the *wife* should be confined to the period before her intimacy with the defendant.[48] The date of a letter is not, for this purpose, sufficient *prima facie* evidence of the time when it was written.[49]

in order to show on what terms the couple lived before the seduction. Long *v.* Booe, 106 Ala. 570, 17 So. Rep. 716.

[45] Trelawney *v.* Coleman, 2 Stark. 191.

[46] Bell *v.* Bell, 1 Sw. & Tr. 565. Proof that the parties lived together as husband and wife is admissible for the purpose of showing their harmonious relations prior to the alleged alienation, where the fact of the marriage has been established by other evidence. Mead *v.* Randall, 111 Mich. 268, 69 N. W. Rep. 506.

[47] Bowie *v.* Maddox, 29 Geo. 285. That part of a conversation between a plaintiff and his wife which tended to show his feelings and conduct at the time he learned of her adultery was admissible on the question of damage. Dalton *v.* Dredge, 99 Mich. 250, 58 N. W. Rep. 57.

[48] Cases in notes above; Wilton *v.* Webster, 7 Carr. & P. 198. "In actions for criminal conversation it is relevant to inquire into the terms on which the husband and wife lived together before her connection with the defendant, and it is usual to give evidence of what they have said or written to or of each other, in order to show their mutual demeanor and conduct, and whether they were living on good or bad terms. It is, however, always required that proof should be given that the declarations or letters of the wife, when the husband is the plaintiff, purporting to express her feelings, were made or written prior to the existence of any facts calculated to excite suspicion of misconduct on her part, and when there existed no ground to suspect collusion." Fratini *v.* Caslini, 66 Vt. 273, 44 Am. St. Rep. 843, 29 Atl. Rep. 252. That the wife wrote her husband a letter protesting wifely love and fidelity about the same time that she wrote said letter to her paramour, is not such evidence of collusion as to exclude the letter to the paramour. Puth *v.* Zimbleman, 99 Iowa, 641, 68 N. W. Rep. 895. See Horner *v.* Yance, 93 Wis. 352, 67 N. W. Rep. 720.

[49] Houliston *v.* Smyth, 2 Carr. & P. 22; Trelawney *v.* Coleman, 1 Barnew. & Ald. 90; Edwards *v.* Crock (above), s. c., p. 56 of this vol.

4. Criminal Intercourse.

Though the gist of the action is the loss of consortship,[50] criminal intercourse, being alleged, must be proved.[51] Under an allegation general as to time, illicit intercourse at any time within the period is admissible, but in case of surprise an adjournment may be allowed.[52]

Rules as to the mode of proving adulterous intercourse, and the admissibility of the evidence under the issue, and the limits of time, are the same as in actions for divorce, subject to the qualifications stated in this chapter. Neither a judgment of divorce against the wife, nor the confessions of the wife are competent against plaintiff, except in the cases stated at page 477 of this vol.

[50] Weedon *v.* Timbrell, 5 T. R. 357; Billings *v.* Albright, 66 N. Y. App. Div. 239, 73 N. Y. Supp. 22. See also Prettyman *v.* Williamson, 17 Del. (1 Penn.) 224, 39 Atl. Rep. (Del.) 731.

For further authorities on the question see Cross *v.* Grant, 62 N. H. 675, 683, 13 Am. St. Rep. 607.

Alienation of affection is a matter in aggravation only. Evans *v.* O'Connor, 174 Mass. 287, 54 N. E. Rep. 557, 75 Am. St. Rep. 316.

"In actions of this character where the act of adultery is not shown by direct proof, the plaintiff must show—First, a disposition to illicit intercourse on the part of the wife; second, a disposition to illicit intercourse with the wife on the part of the defendant, and, third, opportunity to gratify such mutual disposition." Ramsay *v.* Ryerson, 40 Fed. Rep. 739.

[51] Winsmore *v.* Greenbank, Willes, 577, 581; Wood. *v.* Matthews, 47 Iowa, 409, s. c., 8 Reporter, 143. The debauching by the defendant of the wife of plaintiff may be shown by admissions contained in letters written by the defendant to the wife. Mead *v.* Randall, 111 Mich. 268, 69 N. W. Rep. 506.

[52] Coddington *v.* Coddington, 4 Sw. & Tr. 63. The time of the alleged wrongful act may be laid with a continuando, and the evidence may be directed to any time within that period. Smith *v.* Meyers, 52 Nebr. 70, 71 N. W. Rep. 1006.

The plaintiff has the burden of proving the acts of alleged misconduct on the part of the defendant. Burnett *v.* Luttrell, 52 Ill. App. 19.

Adultery may be proved by circumstantial evidence and an objection that the witnesses by whose testimony the plaintiff sought to establish the misconduct were not disinterested will not be sustained. Smith *v.* Meyers, 52 Neb. 70, 71 N. W. Rep. 1006.

It is not essential to allege the

5. Loss of Consortship;[53] Damages.

Evidence of defendant's wealth is not competent.[54] The pecuniary circumstances of plaintiff are not relevant.[55]

The means used by defendant to obtain an intimacy[56] and corrupt the mind[57] of the wife, are competent, and the situation of plaintiff's children who were dependent on the wife's care.[58]

place or places where the intercourse occurred or to prove that the acts complained of took place precisely at the time alleged. Smith *v.* Meyers, 52 Nebr. 70, 71 N. W. Rep. 1006.

[53] As to causes of separation, see Chapter VI, paragraph 25 of this vol.

See also Bigaouette *v.* Paulet, 134 Mass. 123, 145 Am. D. 307; Long *v.* Booe, 106 Ala. 570, 17 So. Rep. 716.

[54] James *v.* Biddington, 6 Carr. & P. 589, followed in Kniffen *v.* McConnell, 30 N. Y. 285, 289; Bell *v.* Bell, 1 Sw. & Tr. 569; Wilson *v.* Leonard, 5 Ir. Jur. O. S. 101. Except in those jurisdictions where punitory damages are allowed to be enhanced according to the means of the wrongdoer. Peters *v.* Lake, 66 Ill. 206, s. c., 16 Am. R. 593.

When the jury found that there had been no damages, there was no error in refusing to admit testimony of the defendant's wealth. Burnett *v.* Luttrell, 52 Ill. App. 19.

[55] Norton *v.* Warner, 9 Conn. 172. *Contra*, Thompson *v.* Glendenning, 1 Head (Tenn.) 297; Massey *v.* Headford, Phila. P. Byrne, 1804; Rea *v.* Tucker, 51 Ill. 110.

In fact it is unnecessary to show pecuniary loss. Prettyman *v.* Williamson, 17 Del. (1 Penn.) 224, 39 Atl. Rep. 731.

[56] Massey *v.* Headford (above).

A letter which the defendant wrote to one not a party to the suit in which he requested this person to allow the plaintiff's wife to bring his sick wife to town was held to be admissible to show that the defendant had used indirect means of procuring the attendance of the plaintiff's wife, though such an interpretation of the defendant's acts was a matter for the jury. Cross *v.* Grant, 62 N. H. 675, 13 Am. St. Rep. 607.

[57] Campbell *v.* Hook, Major Hook's Defense, Lond. J. Murray, 1793.

Where it was alleged that the defendant had carnal intercourse with the plaintiff's wife by forcible ravishment, it was held proper to show the effect of the act on her mind and body. Jacobsen *v.* Siddal, 12 Ore. 280, 7 Pac. Rep. 108, 53 Am. Rep. 360.

[58] See Bedford *v.* McKowl, 3 Esp. 119. Opinion evidence is admissible as to whether or not she was of pleasing appearance. Childs *v.* Muckler, 105 Iowa, 279, 75 N. W. Rep. 100.

6. Defenses.

Under the general issue may be proved anything which goes to show that plaintiff never had a cause of action, by negativing any matter of fact alleged or necessary to be proved (as distinguished from avoiding conclusions of law), *e. g.*, that he was never married, that the intercourse alleged was by his license or connivance, that his delay to sue or disavowals of a cause of action throw suspicion on his case; as well as all matters merely in mitigation, such as evidence of his or his wife's bad character, of his unhappy domestic life, of the degree of suffering, &c. And, on the other hand any matter which confesses and avoids the cause of action,—*e. g.*, condonation, release, a former recovery for the same cause, &c.,—must be pleaded in order to be admissible.[59]

[59] This is the common-law rule, and in harmony with the general principles of pleading under the Code established in McKyring *v.* Bull, 16 N. Y. 297. To the same effect, in part, Travis *v.* Barger, 24 Barb. 614. Compare the rulings in *Slander and Libel* (chapter XLIII of this vol.), and in *Breach of Promise* (chapter XLIV of this vol.). See also Morning *v.* Long, 109 Iowa 288, 80 N. W. Rep. 390.

The husband's consent to the act complained of must be specially pleaded, and no proof of it is admissible under a general denial. Morning *v.* Long, 109 Iowa, 288, 80 N. W. Rep. 390.

The collusion or connivance of the plaintiff is a bar to an action for criminal conversation, but as this is a matter which the defendant should prove, the plaintiff need not negative it in his petition. Smith *v.* Meyers, 52 Nebr. 70, 71 N. W. Rep. 1006.

It was held error to strike from the answer allegations as to a wife's misconduct with other men, since under a general denial evidence of such offenses were admissible in mitigation of damages. Dorman *v.* Sebree, 21 Ky. Law Rep. 634, 52 S. W. Rep. 809.

Evidence of trouble and unhappiness between the plaintiff and his wife which had occurred eighteen years prior to the commencement of the present suit was held inadmissible as being too remote. Dorman *v.* Sebree, 21 Ky. Law Rep. 634, 52 S. W. Rep. 809.

An answer alleging as a complete defense that the plaintiff by his unmanly and abusive treatment of his wife alienated and destroyed any respect, love or affection she may have had for him is demurrable, as such facts are pertinent in mitigation of damages only and should have been expressly stated to be a partial defense only. See Cole *v.* Beyland, 67 N. Y. Supp. 1024.

Plaintiff's consent to the adultery at the time may be proved in bar. In mitigation may be proved, the husband's gross negligence or inattention to the conduct of his wife with respect to the defendant;[60] any circumstances tending to controvert the affection and domestic happiness of the husband and wife before the alleged wrong;[61] or that he had

[60] Duberley *v.* Gunning, 4 T. R. 657, approved and followed in Bunnell *v.* Greathead, 49 Barb. 106. To the same effect is the unreported case of Trevannion *v.* Danbuz, mentioned in 1 Steph. N. P. 7; Lowe *v.* Massey, 62 Ill. (Freem.), 47; Smith *v.* Masten, 15 Wend. 270.

Defenses to an action for damages for criminal conversation are of two kinds, viz.; those which completely bar and absolutely defeat the action and those which go only in mitigation of damages. The consent of the husband to his wife's act of infidelity is of the first kind. Prettyman *v.* Williamson, 17 Del. (1 Penn.) 224, 39 Atl. Rep. (Del.) 731.

Whether the plaintiff's ill treatment of his wife can be set up as an answer or goes in mitigation of damages is a point on which decisions are not unanimous, though the weight of authority leans to the view that it is a matter in mitigation only. Cross *v.* Grant, 62 N. H. 675, 13 Am. St. Rep. 607 and cases cited.

Connivance on the part of the husband is a complete bar to his action for the debauchery of his wife, but unless there is undisputed evidence of such connivance of such a nature that a rational mind could draw no other conclusion its existence presents a question for the jury to decide. Kohlhoss *v.* Mobley, 102 Md. 199, 62 Atl. Rep. 236, 5 Ann. Cas. 865.

[61] Smith *v.* Masten, 15 Wend. 270; Palmer *v.* Crook, 7 Gray, 418; Coleman *v.* White, 43 Ind. 429. And, for this purpose, may show specific acts of cruelty. Narracott *v.* Narracott, 3 Sw. & Tr. 408. The wife's declarations are competent for this purpose within limits already stated. Paragraph 3 above, and Chapter VI, paragraph 25 of this vol.

It was proper for the jury to consider, in mitigation of damages, any evidence showing that the relations of the plaintiff and his wife, prior to her act of infidelity, were unhappy; that there was a want of affection between them and only slight intercourse with each other, that the husband was cruel and unkind to his wife and that he failed to support her. Prettyman *v.* Williamson, 17 Del. (1 Penn.) 224, 39 Atl. Rep. 731.

If pleaded, the defendant may prove the adultery of the plaintiff, that his habits were bad, that he was cruel to his wife and any facts which show the kind of a man he was. Billings *v.* Albright, 66 N. Y. App. Div. 239, 73 N. Y. Supp. 22.

put away his wife and charged her with misconduct before the alleged intercourse.[62]

Condonation with the wife is a mitigation, and throws great doubt on any testimony of the husband to guilt,[63] if not a bar. [64]

7. Character.

Defendant's character is not in issue in this action;[65]

[62] Winter *v.* Henn, 4 Carr. & P. 494.

But the fact that the husband has, by his conduct, compelled a separation, does not defeat his right to an action for his wife's debauchery. Cross *v.* Grant, 62 N. H. 675, 13 Am. St. Rep. 607.

[63] State *v.* Marvin, 35 N. H. 22.

The plaintiff when told of his wife's infidelity is not bound to assert his ignorance of her acts. His silence therefore is no admission of his consent. Smith *v.* Hockenberry, 138 Mich. 129, 101 N. W. Rep. 207.

[64] On this question, see in the *affirmative*, Aiken *v.* Macree, 2 Shaw's Dig. 842, Pl. 706; Norris *v.* Norris, 30 L. J. Mat. Cas. 111; Adams *v.* Adams, L. R., 1 Pr. & D. 333; *negative*, Foley *v.* Lord Peterborough, 4 Dougl. 294; Sanborn *v.* Neilson, 4 N. H. 501.

"The law is now clearly settled to be that, if the husband consents to his wife's acts it goes in bar to the action." Prettyman *v.* Williamson, 17 Del. (1 Penn.) 224, 39 Atl. Rep. 731.

Connivance on the part of a husband when properly established bars the action. The question as to whether the plaintiff connived at the misconduct of his wife is primarily one of fact for the jury; but if the conduct as established by the undisputed evidence or admitted in his own testimony is such that a rational mind could draw no other conclusion than that he had consented, actively or passively, the question becomes one of law for the court, in which case it is its duty to take the case from the jury. Kohlhoss *v.* Mobley, 102 Md. 199, 62 Atl. Rep. 236, 5 Ann. Cas. 865.

The fact that the husband continues to live with his wife after knowledge of her wrong is evidence of condonation (Smith *v.* Hockenberry, 138 Mich. 129), but does not necessarily establish connivance (Morning *v.* Long, 109 Iowa, 288, 80 N. W. Rep. 390).

[65] Cox *v.* Pruitt, 25 Ind. 90; Trial of Swensden, 14 How. St. Tr. (1702), 589, 590.

In an action for the seduction of the plaintiff's wife, the character of the defendant was not in issue, and evidence that the latter had seduced the wives of other men and that he was in the habit of seducing married women was too remote to prove a particular charge. The court said: "The character

hence evidence of his good character is not admissible,[66] in the absence of evidence directly attacking it.[67]

Plaintiff's character and moral principles are in issue [68] for purposes of mitigation; hence his adulteries at any time after marriage and before trial,[69] and equally his gross immoralities,[70] and his avowals of profligate principles,[71] are competent in mitigation.[72]

of the wife for chastity was involved, but not that of the defendant." Crose *v.* Rutledge, 81 Ill. 266.

[66] Ziter *v.* Merkel, 24 Penn. St. 408; Maguinay *v.* Saudek, 5 Sneed (Tenn.) 146.

[67] Cox *v.* Pruitt (above). The expression "putting character in issue," does not mean that a man's reputation is imperiled by the result of the action, but that the character is of particular importance in determining the issue or the measure of damages. Ford *v.* Jones, 62 Barb. 484; Porter *v.* Seiler, 23 Penn. St. 424; see also chapter XLIII, paragraphs 23–25 of this vol.

[68] Smith *v.* Masten, 15 Wend. 270; Foot *v.* Tracy, 1 Johns. 46, 51.

[69] Id.; Shattuck *v.* Hammond, 46 Vt. 466; s. c., 14 Am. Rep. 631; Sanborn *v.* Neilson, 4 N. H. 501; Rea *v.* Tucker, 51 Ill. 110.

"In such an action it is competent for the defendant to prove the adultery of the plaintiff, the relations which he sustained to his wife, whether affectionate or otherwise; that his treatment of her was cruel; that his habits were bad, and any and all facts which tend to show the kind of man the plaintiff was before the commencement of the action, provided only that such facts are pleaded in the defendant's answer as a partial defense and in mitigation of damages, but not otherwise." Billings *v.* Albright, 66 N. Y. App. Div. (N. Y.) 239, 73 N. Y. Supp. 22.

Early cases held that where the plaintiff himself had been living in a state of open adultery, evidence of this fact was sufficient to defeat his action for debauching his wife; but now, the courts have held that such evidence goes only in mitigation of damages. Rea *v.* Tucker, 51 Ill. 110, 99 Am. Dec. 539.

[70] Bennett *v.* Smith, 21 Barb. 439. *Contra,* Norton *v.* Warner, 9 Conn. 171.

"But desertion, adulteries at any time after marriage and before trial on the part of the husband, together with other gross immoralities and avowals of profligate principles, and loss of affection on the part of the wife, are competent in mitigation of damages. Hilliard on Torts, Vol. 2, P. 687." Browning *v.* Jones, 52 Ill. App. 597.

[71] See Robinson *v.* Burton, 5 Harr. (Del.) 335. See Browning *v.* Jones, 52 Ill. App. 597.

[72] Bromley *v.* Wallace, 4 Esp.

Evidence impeaching the chastity of the woman previous to the alleged offense, is admissible in mitigation.[73] Evidence of the general good character, that is, reputation, of the wife, prior to the alleged familiarities of defendant, is not admissible if no evidence impeaching her character has been given.[74]

237; Harrison *v.* Price, 22 Ind. 165. See Browning *v.* Jones, 52 Ill. App. 597.

[73] Gregson *v.* M'Taggart, 1 Campb. 415; Elsam *v.* Faucett, 2 Esp. 562; Harter *v.* Crill, 33 Barb. 283; Smith *v.* Milburn, 17 Iowa, 30; Rea *v.* Tucker (above); Mott *v.* Goddard, 1 Root, 472; Davenport *v.* Russell, 5 Day, 145; Torre *v.* Summers, 2 N. & M. 267; Verry *v.* Watkins, 7 Carr. & P. 308; Hogan *v.* Cregan, 6 Robt. 138; Thompson *v.* Glendenning, 1 Head (Tenn.) 296; Camp *v.* State, 3 Geo. (Kelly), 417; Conway *v.* Nicol, 34 Iowa, 533.

"The proof that his (plaintiff's) wife lacked chastity before the defendant met her clearly lessened plaintiff's damages." Smith *v.* Hockenberry, 138 Mich. 129, 101 N. W. Rep. 207.

Even evidence of the wife's misconduct prior to her marriage to the plaintiff was admissible. Hardy *v.* Bach, 173 Ill. App. 123.

[74] Pratt *v.* Andrews, 4 N. Y. 493.

It was held that there was no error in allowing the appellee to show the general reputation his wife had for chastity when it had been specifically attacked by evidence of acts of adultery. Browning *v.* Jones, 52 Ill. App. 597.

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